Kapatos v New York City Health & Hosps. Corp.
2017 NY Slip Op 32753(U)
December 28, 2017
Supreme Court, New York County
Docket Number: 805003/2012
Judge: Martin Schoenfeld

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

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VANGELIS KAPATOS,

DECISION AND ORDER
Index No. 805003/2012

Plaintiff,

-against-

NEW YORK CITY HEALTH & HOSPITALS CORPORATION,

Defendant.

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Hon. Martin Schoenfeld:

In this medical malpractice action arising out of Vangelis Kapatos' (Kapatos) alleged suicide attempt, defendant New York City Health & Hospitals Corporation (HHC) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing Kapatos' complaint. Kapatos opposes the motion and cross-moves, pursuant to CPLR 3025 (b), for an order permitting him to amend his bill of particulars to allege specific departures from standards of good and accepted psychiatric practice on the part of Matthew Warren, M.D. (Warren), one of Kapatos' treating physicians for whom HHC is claimed to be vicariously liable. For the reasons set forth below, the motion for summary judgment is denied, except that certain alleged departures are dismissed consistent with the instant memorandum opinion, and the cross-motion to amend the bill of particulars is granted in part and denied in part.

Background

Kapatos and his parents emigrated from Greece to New York when he was an infant and resided in Manhattan in a ninth-floor apartment that his parents leased. He still lived in the same apartment at the time in issue. Kapatos claims that since he was a young boy, his father mistreated his mother and turned Kapatos against her until he matured and realized that his father was at fault. Kapatos also claims that his father's brother and his wife, who resided in an apartment one floor below his and with whom he cut off all contact in about 2008, meddled in his parents' marriage and mistreated his mother. Kapatos' parents separated and in about 2005 his mother returned to Greece where she is institutionalized with a mental impairment. In February 2010, when Kapatos was 25, his father returned to live with him in their apartment, as he was suffering from terminal brain cancer. Sometime in 2010, Kapatos' landlord commenced an eviction proceeding claiming that he lacked succession rights because his name was never on his parents' lease. In the fall of 2010, Kapatos' father was near death and hospitalized.

On November 27, 2010, Kapatos became convinced that his uncle and aunt had placed a camera into his bedroom window frame to spy on him. He became frightened, panicked, and sought help at the Criminal Court from court officers. He told them that he wanted the F.B.I. to place him in the Witness Protection Program so that he would be safe. [Kapatos examination before trial (EBT) at 74-75]. They contacted Emergency Medical Services (EMS) which took him to Bellevue Hospital (Bellevue), an HHC entity. EMS's report indicates that Kapatos was cooperative, appeared to be paranoid, chiefly complained that he was depressed, and advised that he had no desire to hurt himself or anyone else and was not hearing voices. EMS brought

Kapatos to Bellevue's Comprehensive Psychiatric Emergency Program (CPEP) unit. He was assessed that day by attending psychiatrist, Karen Rubenstein (Rubenstein).

Kapatos told Rubenstein that he was tired of hearing voices telling him that he was insane and not growing up. Kapatos advised Rubenstein that he wanted another chance to grow up, but that his parents, aunt, and uncle would not let him, and abused and sabotaged him. Kapatos told Rubenstein that when he was a teen he hit his mother and was arrested and released. Kapatos admitted to having smoked several marijuana joints daily for the past five years. He also advised Rubenstein that he had been depressed his entire life. Kapatos repeatedly told Rubenstein that he knew that "we knew what was going on" and he wanted "us" to "finish him off". [*Id.*]. Kapatos declined to elaborate, but stated that "we could just kill him." [*Id.*]. He denied any suicidal ideation. He, however, indicated that he wanted to hurt those who have been trying to sabotage him, but denied any plan. Kapatos told her that he had been laid off from his seasonal job and that his source of financial support was the proceeds of his father's condominium's sale.

Rubenstein noted that Kapatos' affect was flat, he avoided eye-contact, and his mood was depressed. [Rubenstein EBT at 120]. She also noted that Kapatos' judgment, insight, and impulse control were impaired, evidenced by the fact that he was so paranoid that he could not control his actions and went to the courthouse to get into the Witness Protection Program. [*Id.*]. Kapatos denied any psychiatric history, prior mental health services, and any history of self-harm. Rubenstein found that his suicide risk and mitigation factors could not be assessed, noting potentially contributing psychosocial factors, including his unemployment and his lack of family support and a social network. Rubenstein found that he had aggressive ideation based on his desire to hurt those who had attempted to sabotage him.

Rubenstein concluded that Kapatos had an unspecified psychosis with a cannabis dependence, was unsafe to be discharged because of his risk of harm to others, and that he required hospitalization for safety and stabilization. Rubenstein started him on one milligram daily of Risperdal to treat his psychosis and to stabilize his mood. She slowly increased his dose and by December 10, Kapatos' morning dose was two milligrams, and his evening dose was four milligrams, totaling the maximum recommended daily dosage of six milligrams. [Weir note, 12/10/10, 21:46 hours].

On the day Kapatos arrived, Bellevue applied for his emergency admission, pursuant to Mental Hygiene Law § 9.39 (a),[1] because he was a danger to himself and others. Bellevue provided a multi-disciplinary team approach to Kapatos' care and treatment. Treatment included psychiatric care supervised by Rubenstein and involving other psychiatrists, diverse types of group therapy sessions, and nursing care. He was required to be frequently monitored for safety and he also had the services of a social worker, Leigh Wolfsthal (Wolfsthal).

On November 28, 2010, Kapatos was seen by psychiatrist Anthony Dark (Dark). At that time, Kapatos repeated that he had thoughts of harming his uncle and said that his aunt and uncle wanted to "do him in." He also claimed that "people [were] trying to harm him," because his name was changed from how it appeared on his passport. Kapatos informed Dark that a stressor

[1] This statute permits the director of a hospital with appropriate staff and facilities for the treatment of mentally ill persons to admit a person on an emergency basis for immediate, appropriate care, observation, and treatment for 15 days when that person has a mental illness that is likely to result in serious harm to himself or others. A likelihood of substantial risk of harm to the patient is that risk manifested by threats or attempts at suicide or other serious bodily harm "or by other conduct demonstrating that he is dangerous to himself." Mental Hygiene Law § 9.39 (a) (1). After that 15-day period, if the patient does not need involuntary treatment, he must be discharged, unless he agrees to remain voluntarily. Mental Hygiene Law § 9.39 (b). When the patient requires involuntary care, and refuses to voluntarily stay, he can be kept beyond that period, on an appropriate application, subject to the rights to notice, a hearing, review, and judicial approval.

in his life was his father's recent hospitalization with terminal brain cancer. Kapatos gave Dark the contact information for "Jessie," whom Kapatos had known for three years and dated for most of 2008. [Kapatos EBT at 63]. Jessie told Dark that she thought there was something very wrong with Kapatos. She described him as paranoid, noting that at times he refused to leave his apartment because he thought people were watching him. Jessie denied that he had ever attempted suicide. Dark concluded that Kapatos required hospital admission, as he was so paranoid, disorganized, and thought disordered, that he was unable to care for himself. Dark estimated Kapatos' discharge date as December 8, 2010.[2]

Kapatos testified that while in CPEP he thought that they euthanized patients, but he never told anyone at Bellevue. When asked whether he had suicidal ideation in CPEP, Kapatos testified that he "was in a state of panic that I could end my life, so I was afraid to [commit suicide], so why would I try to commit suicide." [Kapatos 50-h Hearing at 50]. He also testified that he feared for his life, mistrusted and was afraid of everyone in the hospital, as he thought that they were up to no good. [Kapatos EBT at 84, 95, 99-100, 104-05, 110]. Kapatos testified that he was no longer concerned that he was going to be euthanized once he was transferred to a floor, but was in "complete fear" of the aides. He believed the aides were perhaps abusing him, laughing at the patients while watching them shower, and calling him names because his name was an anagram meaning condom in Greek. [*Id.* at 87, 104-06; Kapatos 50-h Hearing at 50-51, 54-55]. Consequently, he thought it best to keep quiet, do as he was told, attend all the group therapy sessions, lie low, and not get in trouble. [Kapatos EBT at 95, 109]. After a required

2 The estimated discharge date was continuously updated throughout Kapatos' hospitalization. Kapatos was unaware of his estimated discharge date until shortly before his actual discharge.

activity, he would return to his room and stay in bed. [*Id.* at 95-96]. After meals, he would also go back to bed unless a patient with whom he was friendly was in the dining room. [Kapatos 50-h Hearing at 52-53]. While in Bellevue, Kapatos called a friend, Ty Miller (Miller), a few times. Miller told him to act "as normal as possible," hence why he never told anyone at Bellevue that he wanted to hurt himself or others. [*Id.* at 62-63].

On about November 30, 2010, Kapatos was admitted to a psychiatric floor. Wolfsthal performed a psychosocial assessment on November 28th and 30th. Kapatos told her that he believed his uncles, the one who lived in his building and at least one other, were trying to remove him from his apartment by terrorizing him. He explained that he needed the Witness Protection Program, because he feared they would find him. Further, Kapatos said that he may have seen something terrible, i.e., his father, uncle, aunt, and himself killed his mother. He believed that their abuse made his mother was "brain dead" in Greece. Kapatos did not want to take a chance with his life and needed the Program to help him disappear and start anew.

Wolfsthal's November 30th notes reflect that Kapatos looked depressed, afraid, and anxious, and seemed isolated. Further, he denied any auditory hallucinations and suicidal or homicidal ideation. Kapatos advised her of an upcoming court appearance in the eviction proceeding and asked that she call his counsel to explain his unavailability. Kapatos gave her phone numbers for his aunt, uncle, and Jessie, but only authorized her to contact only Jessie. Jessie told Wolfsthal that Kapatos never had psychiatric treatment or medication during the past three years, but needed it.

Wolfsthal found that when Kapatos was interviewed he was calm, cooperative, coherent, articulate, and had good eye-contact. His speech was normal in all respects. His thought process

was linear and goal directed, but his thought content demonstrated paranoid delusions. She also found that his disposition would be hard to determine until the truth of his apparent delusions could be investigated. Wolfsthal concluded that Kapatos was paranoid, psychotic, and unable to give specific discharge goals. Further, she determined that he would be admitted for stabilization and appropriate discharge planning, the latter being one of her primary functions. [Wolfsthal EBT at 33].

On November 30, 2010, Rubenstein also evaluated Kapatos both "1:1" and with Wolfsthal and the "CAT," apparently the activities therapist, Marsha Goldman (Goldman). Rubenstein noted that Kapatos' mother had mental problems and was in Greece and that his father was hospitalized with terminal brain cancer. Kapatos stated that he was concerned about his finances and his fate if he were to lose his apartment and was "very worried" about his father's illness. [Rubenstein EBT at 169]. Kapatos told Rubenstein that he was thinking of living with a friend in California to feel safe, because his uncle was trying to remove him from his apartment. Kapatos asked her to place his uncle on "visitor restriction" [Rubenstein note of 11/30/10] and she did. Rubenstien believed that Kapatos had a psychosis, secondary to marijuana usage. She also believed that schizophrenia and depression with psychotic features secondary to marijuana usage were to be ruled out.

On December 2, 2010, Rubenstein found Kapatos to be tense and preoccupied with thoughts of his allegedly abusive family, but was less concerned with the Witness Protection Program. Rubenstein concluded that Kapatos' insight and judgement were impaired as to his illness. The next day, she found that Kapatos was less tense and anxious, but that his impulsive

or reckless behavior posed a risk of harm to himself or to others. She determined that he could not safely maintain himself, absent a structured setting.

The nursing notes concerning Kapatos from the inception through December 6, 2010, generally reflect the following: he ate and slept well; he was cooperative; he was compliant with his medications; he was disorganized, isolative, and guarded; he had poor insight, a depressed flat affect, and poor hygiene and grooming; and he needed prompting with routines. The notes also show that he rarely left his room, except for his meals, medications, and groups therapy sessions. Further, he stayed in bed and napped a lot. Kapatos was minimally engaged with the staff, but polite. He lacked peer interaction, although he played chess with one patient. He also denied self-harm and suicidal and homicidal ideation.

Meanwhile, Kapatos' aunt, Katherin Capatos[3] (Aunt Katherin), learned from an acquaintance that Kapatos was at Bellevue. Once visiting restrictions were lifted, she visited him daily and her husband visited approximately weekly. Kapatos was "okay" with family visits because he disliked the hospital's food and Aunt Katherin brought him meals. [Kapatos 50-h Hearing at 60]. Evidently to conceal his thoughts about his uncle and Aunt Katherin, Kapatos informed her that he was admitted to Bellevue because he had "freaked out," the landlord and the rental office's manager were after him, and he was afraid for his life and of being evicted. [Capatos EBT at 73, 78, 102].

Wolfsthal's December 7th notes reveal that she met with Kapatos to discuss discharge plans. Wolfsthal noted that he had a normal affect and was slightly less paranoid, but was still considering the Witness Protection Program. Kapatos asked how he could get a bed in the

[3] Kapatos' aunt and uncle spell their last name with a "C".

shelter system. Wolfsthal wrote that she would ask him whether he would permit her to talk to his relatives regarding his discharge plans, and evidently, around mid-December, he consented.

Marian Georgiev, M.D. (Georgiev) evaluated Kapatos and noted that he was compliant with his medication and reported mild sedation, as also reported by Rubenstein on December 13th. Georgiev determined that Kapatos had severely impaired reality testing, and that, absent a structured setting, he could not safely maintain himself. The nursing notes of December 8th through December 12, 2010 indicate, with limited exceptions, that Kapatos: remained isolative, guarded, preoccupied, and withdrawn, with no or minimal peer interaction; still napped and mostly stayed in bed, except as required; was calm and cooperative, disorganized and thought disordered, poorly motivated, and prompt dependent as to the unit's routines, activities of daily living (ADLs), and group activities, but was receptive to staff direction; exhibited poor insight, including as to his illness; had, although less so, a depressed affect, as well as poor hygiene and grooming, had less overtly paranoid ideation, and denied suicidal and homicidal ideation.

On December 14th, Rubenstein applied to continue Kapatos' involuntary acute inpatient treatment, noting that he remained paranoid with impaired insight. Rubenstein also certified that further acute inpatient treatment was required for his safety and stabilization, because he was a danger to himself. That day, Wolfsthal saw Kapatos and noted that in general he was less paranoid than when he arrived, but he was isolative and withdrawn with constricted affect. Wolfsthal wrote that Kapatos' Aunt Katherin and uncle had come to the hospital the week before, prompting Wolfsthal to ask whether Kapatos wanted to see them or wanted them on the restricted visitor list. He replied that it did not matter and that he had to do what they said because they were all that he had. Kapatos also told her he did not want to return to his

apartment. He refused to explore either issue. Wolfsthal noted that she would continue to meet with him to decide what he wanted and whether he was safe in returning to his apartment.

On December 15th, Rubenstein wrote that Kapatos no longer wished to move to California, but rather wanted to return to his apartment, and consented to meet with the team and his uncle. Kapatos agreed to have Wolfsthal obtain a supportive case manager (SCM) on discharge to contact him several times monthly to ensure that he was going to his appointments, help him "navigate in the community," and to see if he needed help, such as in applying for benefits. [Rubenstein EBT at 170].

Kapatos claims that around December 16, 2010, he found a paper clip, which he held onto for about two days. He intended to slice his throat in case something happened to him, so that he "would die and that would be the end of it." [Kapatos EBT at 108]. He never told anyone at the hospital about this. [*Id.* at 109]. When asked whether he wanted to commit suicide in December 2010, Kapatos responded that he did not know what that was. [*Id.* at 108]. However, Kapatos previously testified that he had thoughts of suicide in the middle of his hospital stay, i.e., around December 16th, but kept them to himself. [Kapatos 50-h Hearing at 56]. He further testified that other than that there were no other times during his hospitalization when he wanted to end his life, and instead, was "in fear of [his] life mostly." [Kapatos EBT at 110]. He also claimed that he had no thoughts of hurting himself. [Kapatos 50-h Hearing at 57].

On December 17, 2010, a psychologist who was leading a group therapy session, wrote that Kapatos seemed to focus on the discussion, but rarely participated. On December 21st, Rubenstein changed Kapatos' diagnosis to schizophrenia with marijuana abuse. [Rubenstein EBT at 92-93]. Rubenstein noted that she, Wolfsthal, Kapatos, Aunt Katherin, and his uncle had

met to discuss discharge and treatment options. Part of Rubenstein's December 21st notes repeat verbatim in a cut-and-paste fashion, parts of several earlier days' notes that, although Kapatos was still offering paranoid ideation, he was less tense, anxious, and concerned with obtaining the Witness Protection Program's help. Nevertheless, the notes indicate that his judgment and insight were still impaired as to his illness and marijuana use and their relationship to his need for hospitalization and his ability to participate in discharge planning. Rubenstein testified that she ascertained at the meeting that after discharge, Kapatos' aunt and uncle would help him "especially financially." Additionally, they would make sure he took his medication and attended his out-patient program. [Rubenstein EBT at 179, 180, 184]. Rubenstein also testified that she discussed Kapatos' fear of his uncle at the meeting and found that it was not validated. [*Id.* at 184]. Rubenstein set December 30, 2010 as his estimated discharge date.

Wolfsthal's December 21st weekly notes, including those of that day's meeting, show that Kapatos had a flat affect. Further, his actions and speech were to some extent robotic. Kapatos was animated when attending groups, but he "almost appears afraid" when speaking to him one-on-one. Wolfsthal wrote that he denied any concerns about family issues, his apartment, and the Witness Protection Program. The disposition was to include outpatient treatment, to which everyone at the meeting agreed, and Kapatos' return to his apartment with his aunt and uncle's financial aid. Wolfsthal testified that she had spoken to Aunt Katherin to ascertain whether his assertions were delusional or accurate. Aunt Katherin denied that Kapatos had been abused, that his uncle was out to kill him, and "so on and so forth." [Wolfsthal EBT at 43; *but see* Capatos EBT at 95, 96, 99 (Aunt Katherin was unaware of Kapatos' claims against them until her

deposition)]. Wolfsthal, thus, believed that on discharge Kapatos would have social support and a place to go. [Wolfsthal EBT at 43].

Neither Wolfsthal's nor Rubenstein's alleged conversations, confirming the delusional nature of Kapatos' beliefs that his aunt and uncle had abused and/or were out to kill him, were reflected in HHC's records.

On December 23rd, Goldman noted that Kapatos had reported feeling less anxious, tense, and preoccupied, but that he had continued paranoid ideation. Further, although he had been attending all groups with "active participation," he requested a departure from them because he was feeling more sedated and tired. Goldman wrote that she would encourage him to attend. The nursing notes of December 20th through December 27th,[4] reflect that Kapatos was calm, cooperative, and compliant with unit routines and medication. Additionally, he showered, denied suicidal and homicidal ideation, but was largely guarded, isolative, minimally interactive with his peers, had a blunted affect, and continued to feel depressed and/or look sad.

On December 28th, at approximately 5:15 p.m. Rubenstein noted that Kapatos' new estimated discharge date was December 31, 2010. However, about two hours later, Wolfsthal wrote that Kapatos was scheduled for a December 29th discharge, had confirmed this with his aunt and uncle, and denied any concern about his family, apartment issues, or the need for the Witness Protection Program. Wolfsthal found that Kapatos was alert, oriented, and "continued to attend groups and becomes animated," but that he had a flat affect, spent a great deal of time in bed, and still was not dressing daily.

[4] Not every shift wrote a full, substantive, and particularly informative note.

On Wednesday, December 29th, registered nurse (RN) Dennis River (River), who worked the night shift, from 11:00 p.m. until 7:15 a.m. [River EBT at 15], and had worked various shifts covering Kapatos several times before, wrote his note on Kapatos shortly before 5:30 a.m. River testified that he woke his patients at 5:00 a.m. and encouraged them to shower. River would encourage them to change into fresh pajamas or clothes by 6:15 a.m. [*Id.* at 21-22]. River's note recites, in part, that Kapatos was isolative, poorly related, and in need of prompting with the ADLs, and that his insight and judgment were severely impaired.

Late afternoon on December 29th, Wolfsthal issued her discharge note, which indicated that Kapatos was "somewhat isolative," had complied with the prescribed treatment, and taken all his medications. She also noted that he denied suicidal and homicidal ideation and "maintained good behavioral control." Kapatos told her that he no longer feared his uncles and felt safe to return to his apartment with his aunt and uncle's help. Wolfsthal added that Kapatos was being discharged, as he no longer met the criteria for hospitalization. Furthermore, the "team" believed the discharge date was appropriate.

Wolfsthal later testified that she found part of River's December 29th note to be untrue. Specifically, the part that indicated that Kapatos was isolative and in need of prompting with the ADLs. [Wolfsthal EBT at 62]. Wolfsthal's testimony contradicts her discharge notes, which indicated that Kapatos was "somewhat isolative," had spent a great deal of time in bed the day before, and still was not dressing "each day." Wolfsthal also wrote that Kapatos was given a medication supply and an evaluation appointment for 9:00 the next morning with Warren of Bellevue's chemical dependency clinic, where Kapatos was to attend an intensive, five-day-a-week program, which ran from about 9:00 a.m. through 2:00 p.m. The clinic was designed for

the treatment of patients with psychiatric and substance abuse problems and monitored each patient's medication. [Rubenstein EBT at 181]. Wolfsthal noted that Kapatos understood the plan and felt safe with it.

On December 29th at about 5:15 p.m., Rubenstein discharged Kapatos. Rubenstein noted in her discharge summary that his mood was euthymic[5] and he had a full affect and intact impulse control. Although his thought content included persecutory delusions and paranoid ideation, "grossly impaired" judgment and insight were both absent. This meant that Kapatos agreed to live at home and was able to verbalize his need to take his medication and attend his program. [Rubenstein EBT at 189, 200]. She noted that Kapatos had participated appropriately in group therapy sessions, was able to "independently" carry out the ADLs, was goal directed, lacked aggressive, homicidal, and suicidal ideation, was alert, but had reduced orientation. [*But see* Rubenstein EBT at 189 (discharge note was incorrect because Kapatos was fully oriented)]. Rubenstein further noted that Kapatos was neither depressed, violent, suicidal, nor acutely psychotic. That note adds that Kapatos agreed with the disposition and that no family was involved in it. Rubenstein's rationale for the discharge was that Kapatos was a chronic risk, which was not currently increased, and that he lacked involuntary criteria.

Almost three years later, Rubenstein testified that her discharge findings as to Kapatos were different from River's findings of earlier that day and that she disagreed with them. [Rubenstein EBT at 199-200]. As contrasted with her discharge note that Kapatos' insight and judgment were not "grossly impaired," Rubenstein testified that on discharge his insight and

[5] Euthymic is defined as being in a state of "mental peace and tranquility," or of "moderation of mood," not being "manic or depressed". MediLexicon International, on-line, 2004-2016.

judgment were "not impaired." [*Id.* at 198-99]. Although her discharge summary was silent on whether Kapatos was guarded and as to his isolative behavior, Rubenstein testified that Kapatos was "at times" guarded, but was "much less" so at discharge. She also testified that he was, "at times," isolative, adding that "sometimes" he had a sad affect, but that his mood was "much brighter." [*Id.* at 198].

Kapatos claims he was neither suicidal nor did he wish to hurt himself before his hospital discharge [Kapatos 50-h Hearing at 61-62, 66], and thought "okay, I'm going home, I tried to put it all behind me." [Kapatos EBT at 116]. He also testified, however, that prior to discharge he did not want to return to his apartment, had been asking some patients whether they could take him home, raise him properly, and give him a family. Additionally, he had spoken to his California friend, who allegedly agreed to let him move in. [*Id.* at 116-17, 131-32; Kapatos 50-h Hearing at 69-70]. Upon discharge, Kapatos boarded a bus accompanied by his aunt and uncle. Aunt Katherin testified that Kapatos could not tolerate being on it because it was too confined. [*See also* Kapatos 50-h Hearing at 66 (Kapatos testified that upon discharge, "reality . . . just hit [him] in the face," and getting onto the bus was too much for him)]. They all got off the bus and walked home. That night Kapatos dined at his aunt's apartment, but was quiet, looked at the table the entire time he was there, and left about an hour to an hour and a half later, stating that he was tired. Kapatos' demeanor at dinner there the next three nights was essentially the same.

In the meantime, on the morning of Thursday, December 30th, Kapatos went to Warren's office with his aunt and uncle. When Warren entered the waiting room to get Kapatos, his aunt informed Warren that Kapatos was sleeping all the time from the medication. Warren allegedly replied that he would adjust it. [Capatos EBT at 111]. Kapatos, alone, went with Warren into

his office, bringing a copy of Rubenstein's discharge summary. Warren testified that Bellevue had emailed him a copy of that discharge summary and that he also had electronic access to Kapatos' hospital chart before his visit. Warren's notes refer to portions of the discharge summary, and recite that Kapatos' presentation at Bellevue likely reflected "his first break with paranoid delusions that were persecutory in nature, stating that his family was against him . . . also with secondary depression," that Kapatos had taken Risperdal, which was increased with good results, and that Kapatos was better organized and no longer delusional on discharge. Warren wrote that Kapatos' affect was flat and that he denied being depressed or having delusions and suicidal ideation.

Warren found that Kapatos did not appear to need acute services nor did he seem to be an immediate danger to himself or others. Warren testified that Kapatos answered his questions, perhaps not elaborating, but in a direct and organized manner. Kapatos denied any significant medical history to Warren, whose notes reflect that Kapatos had no psychiatric hospitalizations before his Bellevue admission. Additionally, it noted that he lacked any prior history of having been a danger to himself. He advised Warren of his past marijuana usage and denied using it during and after his hospitalization. Warren noted that Kapatos had no stressors and testified that Kapatos' mood was "okay." [Warren EBT at 38].

During Kapatos' December 30th visit, Warren discontinued the two-milligram morning Risperdal dose, as Kapatos' complained of sedation. Warren noted that he would reevaluate the situation on Monday, January 3, 2011, when Kapatos was to start his day-program. Aunt Katherin testified that after the evaluation when Kapatos and Warren came out to the reception area, Warren informed her that he had reduced the Risperdal dosage. Kapatos testified, however,

that, although Warren informed him that the dose could be lowered, he did not lower it that day. [Kapatos EBT at 123].[6] Kapatos also testified that he was not feeling suicidal when he saw Warren and only began feeling suicidal later that morning through the time he attempted suicide. [Kapatos 50-h Hearing at 67, 69]. Furthermore, after his discharge he felt suicidal when the "cameras were still there" [*id.* at 67] and he believed he would never have privacy. [Kapatos EBT at 111]. After his hospital discharge, Kapatos phoned his landlord-tenant counsel and asked whether he could live with him, find him another place to live or adopt him. [Kapatos EBT at 132].

Kapatos testified that, on December 31, 2010, he took a knife and was running around with it because he "thought there were people coming out of nowhere, like trap doors . . . I was trying to make sure my house was completely locked," and feared the fire escape door, since it did not lock." [Kapatos EBT at 125, 127-28]. After his discharge, Kapatos only took a shower once in four days because he was afraid that someone would be coming at him "through the door." [*Id.* at 105]. Kapatos explained that he was "trying to slash his throat, — not trying to slash [his] throat [with that knife], but gently go on the skin to see how it feels like to do it." [*Id.* at 125]. When questioned about whether he wanted to hurt himself after his discharge, Kapatos responded that he did perhaps a little bit with the knife. [*Id.* at 132]. He asserted that, after his discharge, he felt helpless and hopeless and did not know whether that constituted depression. [*Id.* at 133]. He thought his life was going to be controlled by his aunt and uncle, the landlord,

[6] Because neither party raised or discussed this testimony, the Court will not grant any relief based on it, including any effect it might have had on Kapatos' claimed departure that Warren was negligent in reducing his Risperdal dose.

and the landlord's real estate agent; that they were going to watch him; and that his life would be like that. [*Id.* at 133-34].

On Sunday, January 2, 2010, Kapatos' aunt and uncle went out for the day. Upon their return, they learned that Kapatos had been found under an open window of his apartment on a pile of trash bags and was taken to Bellevue. He was treated there for about three months for multiple fractures, paraplegia of his lower extremities, and other injuries. He was then transferred to a nursing home, where he resided as of his deposition. Kapatos testified that when his aunt and uncle told him of his attempted suicide he could not believe it [Kapatos 50-h Hearing at 70], and that his Saturday evening, January 1, 2010 nap was the last thing he remembered. [Kapatos EBT at 137; Kapatos 50-h Hearing at 71].

Kapatos' Pleadings

Kapatos commenced this action against HHC in 2012 by a complaint, which sets forth medical malpractice claims, arising out of the in-patient treatment rendered at Bellevue and the visit to Warren. The complaint and bill of particulars allege that HHC failed to conduct proper and timely psychiatric interviews, and to properly examine, diagnose, and treat Kapatos' psychological conditions, including his depression, schizophrenia, and psychosis. It posits that these failures resulted in Kapatos' attempted suicide, his injuries, and their sequalae.

The pleadings also allege that HHC departed from accepted standards of psychiatric practice by prescribing Risperdal; failing to take proper medical, familial, and social histories; not educating his family regarding his condition; failing to appropriately prescribe antidepressant and antipsychotic medication; not providing proper discharge plans and instructions; not recognizing that Kapatos' condition had largely remained unchanged during his hospitalization

and that he was still psychotic when discharged; failing to educate Kapatos and his family regarding Risperdal's side effects; not properly assessing Kapatos for psychological stressors and suicide risk factors; and not using a proper assessment tool for substance abuse, psychosis, depression, and the risk of suicide.

Kapatos' supplemental bill of particulars[7] alleges that HHC is vicariously liable for all those who treated him at Bellevue, including Rubenstein, Dark, Warren, Wolfsthal, and Dennis River,[8] as an inpatient or as an outpatient of the chemical dependency unit. It also alleges that HHC negligently failed to consider Kapatos a high suicide risk and to treat him with an antidepressant before "discharging him on December 30 [sic], 2010." In addition, it asserts that HHC negligently prescribed Risperdal and discharged a patient with a significant history of conflict and delusion related to his family and living circumstances.

Motion and Cross-Motion

HHC moves for an order granting it summary judgment dismissing Kapatos' complaint. The motion is supported by the pleadings, HHC's records of Kapatos' treatment, the depositions of Kapatos, his aunt and uncle, Warren, Rubenstein, Wolfsthal, and River's[9] depositions, and the affirmation of HHC's expert psychiatrist, Philip Muskin, M.D. (Muskin). As for the inpatient treatment, Muskin, who suggests that because Kapatos never stated that he wanted to take his life, "[h]e was clearly not suicidal." [Muskin affirmation at 6]. Rather, he contends that appropriate histories were obtained and proper treatment, including the administration of

[7] Kapatos served another supplemental bill of particulars, which related solely to injuries and special damages.
[8] The chart also refers to him as Dennis Rivere, but his last name, as stated at his deposition, is River.
[9] HHC attached to its moving papers a CD-ROM containing complete versions of its exhibits, including its records of Kapatos' treatment, the pleadings, and the deposition transcripts.

Risperdal, was provided. In addition, Muskin maintains that no antidepressant was warranted because Kapatos' complaints of feeling depressed were due to his schizophrenia, not a separate disorder and would improve with the treatment of his psychotic symptoms.

Muskin explains that discharge was appropriate because Kapatos' condition improved. He was no longer psychotic or delusional and the criteria for involuntary commitment no longer existed. Muskin further contends that HHC developed an appropriate post-discharge treatment plan. Muskin opines that on December 30, 2010 Warren thoroughly and properly assessed Kapatos. He notes that Kapatos complained of feeling tired, denied feeling depressed, delusional, or suicidal, did not appear to be a danger to himself. In light of the risk that he might stop taking his medication, Warren appropriately discontinued the morning Risperdal dose and decided that Kapatos would be reassessed when he returned to begin his day program. Furthermore, Muskin contends that evidence is lacking that the decreased Risperdal dosage caused Kapatos to become suicidal. Muskin also asserts that the evidence is insufficient that Kapatos attempted suicide, as he could not recall the incident and there were no witnesses to the events.

Kapatos opposes HHC's motion and, in an effort to assert various claims of Warren's malpractice and to further oppose the motion, cross-moves to amend his bill of particulars in the form of his annexed proposed amended bill of particulars. [*See* Opposing and cross-moving papers, Ex. M]. In opposing HHC's motion, Kapatos relies on the affidavit of his expert psychiatrist, whose name has been redacted.[10] Kapatos' expert contends that the absence of

[10] The court has reviewed the unredacted affidavit in camera and verified that the expert is board certified in psychiatry. *Marano v. Mercy Hosp.*, 241 A.D.2d 48, 49-50 (2d Dept. 1998).

expressed suicidal ideation does not eliminate the impulse to hurt oneself. The expert points to Kapatos' November 27, 2010 statements to Rubenstein: "Just kill me," and asking "them" to "finish him off," because "he knew that they knew what was going on." He argues that these statements were expressions of suicidal ideation, rather than as Muskin claims, expressions that Kapatos did not want to live like this, with people pursuing him, a sign of his psychosis.

Kapatos' expert opines that because Kapatos was suffering from delusions he was an unreliable historian. Thus, his denials of suicidal ideation could not be taken at face value and did not eliminate the possibility that he was suicidal or that he would become panicky and frightened and flee from perceived threatening circumstances. The expert observes that at the time of his admission Kapatos was found to be impulsive and lacking in understanding, and asserts that throughout his hospitalization Kapatos was impulsive, isolative and withdrawn, notwithstanding his structured environment and that he was medicated. Kapatos' expert claims that Kapatos was a suicide risk because, among other reasons, he was delusional, depressed, guarded, isolative, and impulsive throughout his hospitalization.

The expert argues that Kapatos was prematurely discharged from the hospital. Additionally, the expert maintains that the fact that Wolfsthal noted, on December 21, 2010, that Kapatos expressed a lack of concern regarding his apartment or family, was active in groups, but when speaking to him one-on-one he "almost seems afraid," demonstrates how expressed feelings can be contradicted by observed appearances evidently notwithstanding that, thereafter, Kapatos repeatedly expressed a lack of concern in that regard, advised that he was no longer afraid of his uncles, agreed with the discharge plan, and testified, that he had come to recognize that the whole point was for him to have a relationship with his aunt and uncle, and, thus, said to

himself, "Let me give them a try. Let me give them a chance. Let's see where it goes from there." [Kapatos EBT at 91-93].

Kapatos' expert also opines that HHC departed from accepted standards of practice by failing to take an adequate history from Kapatos. In addition, the expert argues that Rubenstein departed from such standards by failing to inform Kapatos that a Risperdal side-effect was the inability to have an erection. Moreover, the expert maintains that even if Kapatos improved during his hospitalization Rubenstein failed to recognize the likelihood of post-discharge psychotic decompensation due to the lack of a structured environment, especially since he was returning to the place of his delusions, an uncle who was trying to harm him and a landlord who was "spying" on him. [Kapatos' expert's aff., ¶ 23].

Kapatos' expert further observes that Muskin's claim that Kapatos, at discharge, was not suffering from delusions was false. Furthermore, Kapatos' expert points to nurse River's December 29, 2010 note, and maintains that Rubenstein could not ignore its contents and was required to further evaluate Kapatos. Kapatos' expert contends that Rubenstein should have kept Kapatos in the hospital for another week or two of observation and evaluation to determine whether he truly lacked suicidal ideation and had the capacity to care for himself. Further, Kapatos' expert asserts that the discharge plan was inadequate.

As for Warren, Kapatos' expert asserts that he departed from accepted standards of psychiatric practice in eliminating the morning Risperdal dose, evidently starting with the December 31, 2010 dose, without intensive monitoring, because Kapatos would not be seen at the clinic until the morning of January 3, 2011, three days after Kapatos allegedly stopped taking that dose. Additionally, Kapatos' expert opines that Warren departed from accepted standards of

practice in failing to ascertain the stressors affecting Kapatos [Kapatos' expert's aff., ¶¶ 3, 29, 31], and by incorrectly noting that he had none.

Kapatos' expert claims that had Warren informed himself of the environmental stressors and other risks faced by Kapatos, and followed "reasonable cautions consistent with the standard of care," he would have been required to wait until after the holiday weekend to consider the propriety of a Risperdal decrease to see how those stressors and risks affected Kapatos once he was in his home environment for a while. [*Id.*, ¶ 36]. The expert urges that had Warren informed himself of all the information available to him he could have foreseen that a Risperdal reduction would unnecessarily "risk a recurrence of serious paranoid delusions and a dangerous flight from a terrifying reality," in light of the environment to which Kapatos returned. The expert further contends that it was no coincidence that the Risperdal reduction "coincided" with Kapatos becoming panicky over the holiday weekend. [*Id.*].

Kapatos' expert claims that all the departures were a cause of Kapatos' overwhelming suicidal impulses and panic in the middle of a foreseeable post-discharge decompensation, which led to his injuries. [*Id.*, ¶ 38]. Kapatos' expert further claims that, given Kapatos' state of mind, the evidence is adequate to demonstrate that he fell or jumped from his window in a foreseeable and preventable "panicked flight from an insufferable reality". [*Id.*, ¶ 42]. Kapatos' expert disputes HHC's claim that evidence of causation is lacking.

In reply, HHC's counsel observes that, on the discharge date, Rubenstein evaluated Kapatos hours later than did River, and determined, as reflected in the discharge summary, that Kapatos was not depressed, had improved judgment and insight, and had agreed to the disposition. HHC further claims that River's 2014 testimony regarding the basis for his December 29, 2010 note was speculative, noting that he could not recall the exact basis for that

note, and stated that it could have been premised on the patient's response to questioning by him in the evening, such as to whether the hospitalization was helping him, upon the patient's lack of response to talks about hygiene, grooming, and cleanliness, or on the "entire interaction," such as the patient's failure to respond to attempts to rouse him when awoken at 5:00 a.m. [*See* River EBT at 54-55].

HHC asserts that Kapatos' expert conclusion that Kapatos should have remained hospitalized for another week or two, merely constitutes a disagreement as to treatment options, which HHC maintains is insufficient to rebut its alleged showing of entitlement to summary judgment. HHC also opposes Kapatos' cross-motion, asserting that a party cannot seek to amend its pleading to add claims in an effort to oppose a summary judgment motion. HHC further contends that, because, in attempting to amend his pleading, Kapatos is seeking relief, he cannot offer a redacted expert's affidavit and must reveal his expert's identity.

In reply to HHC's opposition to Kapatos' cross-motion, Kapatos' counsel claims that all the allegations he seeks to assert in his proposed amended bill of particulars are reiterations and amplifications of prior pleadings' allegations, HHC would not be prejudiced by the proposed amendments, pleadings can be amended even at trial, and that, because Kapatos is not seeking summary judgment, he is not required to reveal his expert's name.

The Legal Principles

A motion seeking leave to amend a pleading "is committed . . . to the court's discretion to be determined on a sui generis basis," affording the court the greatest latitude possible. *Murray v. City of New York*, 43 N.Y.2d 400, 404-05 (1977) (internal quotation marks and citation omitted). Leave to amend pleadings should be freely granted absent prejudice or surprise, provided that the proposed amendment is not clearly devoid of merit or palpably

insufficient. *See Tri-Tec Design, Inc. v. Zatek Corp.*, 123 A.D.3d 420, 420 (1st Dept. 2014). Nevertheless, the Appellate Division, First Department, has held that in opposing a summary judgment motion it is generally impermissible for a party to raise a theory of liability that it never pleaded in the complaint or in its bills of particulars. *Pinkham v. West Elm,* 142 A.D.3d 477, 478 (1st Dept. 2016)*; Atkins v. Beth Abraham Health Servs.*, 133 A.D.3d 491, 492 (1st Dept. 2015). The impropriety of relying on a new theory to oppose a summary judgment motion applies even where that party moves or cross-moves for leave to amend its pleadings. *See Farris v. Dupret*, 138 A.D.3d 565, 565-66 (1st Dept. 2016); *but see Alvarado v. Beth Israel Med. Ctr.*, 78 A.D.3d 873, 874 (2d Dept. 2010); *Walker v. Metro-North Commuter R.R.*, 11 A.D.3d 339, 340-41 (1st Dept. 2004). Where, however, the allegations sought to be added do not constitute a new liability theory, but simply expound upon allegations which were asserted in prior pleadings, an application to amend the pleadings made in response to a summary judgment motion can be granted. *Martino v. Bendo*, 93 A.D.3d 500, 501 (1st Dept. 2012).

A party opposing a summary judgment motion in a medical malpractice action can redact its expert's identity from the opposing affidavit, provided that the opposing party gives the court an unredacted copy for in camera review. *Marano*, 241 A.D.2d at 49-50. This serves to balance the movant's right to test the merits of the adversary's case, while protecting the adversary from having to prematurely disclose its expert's identity, a right set forth in CPLR 3101 (d), which permits the parties in a medical malpractice action to omit their medical experts' identities when providing expert disclosure pursuant to that statute. Nevertheless, the movant on a summary judgment motion cannot omit its expert's name because summary judgment is the procedural equivalent of a trial and if the movant were permitted to redact its expert's name, the adversary would be deprived of the chance to test that expert's credibility. *Marano*, 241 A.D.2d at 51.

An application to amend a pleading is not the procedural equivalent of a trial, nor must the movant establish the merits of a proposed claim. *Fairpoint Cos., LLC v. Vella,* 134 A.D.3d 645, 645 (1st Dept. 2015); *Delta Dallas Alpha Corp. v. South St. Seaport L.P.*, 127 A.D.3d 419, 420 (1st Dept. 2015); *Miller v. Cohen*, 93 A.D.3d 424, 425 (1st Dept. 2012). Therefore, the same interests are not involved as on a summary judgment application. Accordingly, a plaintiff in a medical malpractice action who seeks to amend its pleading is permitted to serve a redacted expert's affidavit and provide the court with an unredacted copy for in camera review. *Zuck v. Sierp*, 169 A.D.2d 717, 718 (2d Dept. 1991); *cf. Gourdet v. Hershfeld*, 277 A.D.2d 422, 422-23 (2d Dept. 2000) (on an application to vacate her default, plaintiff, to establish her claims' merit, was required to submit an unredacted copy of her expert's affidavit to the court for in camera inspection). Thus, HHC's claim that Kapatos was required to serve it with an unredacted expert's affidavit is unavailing.

A party moving for summary judgment has the initial burden of prima facie establishing its entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). The failure to do so mandates the denial of the application, irrespective of the opposing papers' sufficiency. *Id.* at 853. When the movant makes its required showing, the burden shifts to the opponent to demonstrate the existence of a material fact. *Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324 (1986). If there is any doubt as to a factual issue's existence or where such existence is even arguable, summary judgment should be denied. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 315 (2004); *O'Sullivan v. Presbyterian Hosp. in City of N.Y. at Columbia Presbyt. Med. Ctr.*, 217 A.D.2d 98, 100-01 (1st Dept. 1995) (applied to a psychiatric malpractice suicide case).

The fact that a medical provider must render care that is within standards acceptable in the medical community in which he or she practices does not impose on him an obligation to be successful in each case, nor is that provider "liable for mere errors of professional judgment". *Schrempf v. State of New York,* 66 N.Y.2d 289, 295 (1985); *Betty v. City of New York*, 65 A.D.3d 507, 509 (2d Dept. 2009). The doctrine of professional medical judgment will insulate from liability a psychiatrist who chooses a treatment course that is within the range of medically accepted options, where that doctor has appropriately examined and evaluated the patient. *O'Sullivan*, 217 A.D.2d at 100; *see also Durney v. Terk,* 42 A.D.3d 335, 336 (1st Dept. 2007); *Cohen v. State of New York*, 51 A.D.2d 494, 496 (3d Dept. 1976), *affd* 41 N.Y.2d 1086 (1977). For a provider of psychiatric care to be liable for a decision relating to the treatment rendered or to the discharge of a patient from the hospital, it must be demonstrated that such decision constituted "something less than a professional medical determination." *Ozugowski v. City of New York*, 90 A.D.3d 875, 876 (2d Dept. 2011) (internal quotation marks and citation omitted). A determination that lacks a proper medical foundation, i.e., that did not involve a careful examination, cannot be legally insulated as a professional medical judgment. *Thomas v. Reddy*, 86 A.D.3d 602, 604 (2d Dept. 2011); *Fotinas v. Westchester County Med. Ctr.*, 300 A.D.2d 437, 439 (2d Dept. 2002); *see e.g. Winters v. New York City Health & Hosps. Corp.*, 223 A.D.2d 405 (1st Dept. 1996). The distinction between medical judgment and a departure from good and accepted medical practice is often hazy in psychiatric malpractice cases. *Schrempf,* 66 N.Y.2d at 295; *Topel v. Long Is. Jewish Med. Ctr.*, 55 N.Y.2d 682, 684 (1981).

While in the past, the care of those with serious psychiatric conditions was often limited to confinement, the modern and more compassionate goal of the psychiatric profession is to render treatment to enable the patient to return to the community where "he does not pose an

immediate risk of harm to himself or others." *Schrempf,* 66 N.Y.2d at 295. This requires a thoughtful consideration and balancing of competing interests - the duty to care for each patient suffering from a psychiatric condition with the goal of returning that individual to the community in a more productive and capable state, against the concern that the patient, once released from confinement, will not harm himself or others and/or their property. *Id.*; *see also Bell v. New York City Health & Hosps. Corp.*, 90 A.D.2d 270, 279 (2d Dept. 1982). Because psychiatry is not an exact science, this process involves a measure of risk and disagreement among experts as to the proper course of action. *Schrempf,* 66 N.Y.2d at 295; *Durney,* 42 A.D.3d at 337; *Bell,* 90 A.D.2d at 280.

If liability were imposed each time a prediction as to the course of a mental disease was incorrect, few patients would be released, thereby impeding any hope of rehabilitation and recovery. *Id.; Seibert v. Fink,* 280 A.D.2d 661 (2d Dept. 2001); *Cameron v. State of New York,* 37 A.D.2d 46, 49 (4th Dept. 1971), *affd* 30 N.Y.2d 596 (1972). Thus, provided that the decision to release the patient from the hospital constituted a professional medical judgment, and even if other psychiatrists might not make the same judgment, no liability will attach, despite the fact that the "honest professional judgment to release" the patient was wrong. *Id.* at 49; *see also Park v. Kovachevich*, 116 A.D.3d 182, 190 (1st Dept. 2014); *Durney,* 42 A.D.3d at 336; *see generally Pike v. Honsinger*, 155 N.Y. 201, 210 (1898). Despite the foregoing policy considerations, the psychiatrist has a duty to base his or her determinations on an appropriate examination and evaluation of the patient. *Park*, 116 A.D.3d at 191; *see also Bell,* 90 A.D.2d at 280. When a claim exists of a psychiatric patient's wrongful release, the "courts have refused to impose liability unless there was something more than an error of judgment." *Id.* at 281 (internal

citations and quotation marks omitted); *Park*, 116 A.D.3d at 191; *Vera v Beth Israel Med. Hosp.*, 214 A.D.2d 384, 385 (1st Dept. 1995).

Discussion

Cross-Motion to Amend

The branch of Kapatos' cross-motion which seeks leave to amend his bill of particulars is granted as to the proposed allegations that Warren departed from accepted standards of psychiatric practice in failing to properly assess psychological stressors to which Kapatos was subject and in underestimating his risk of suicide.

These claims are merely repetitions and amplifications of the allegations set forth in Kapatos' bill of particulars and supplemental bill of particulars that HHC's agents, servants, and employees, including Warren, were negligent in failing to consider Kapatos a high suicide risk, take a proper history, including proper family and social histories, properly identify psychological stressors, properly diagnose Kapatos' condition, and in failing to use appropriate assessment tools for the risk of suicide.

Furthermore, some of these stressors, including his father's hospitalization with brain cancer, his lack of employment, his landlord's attempt to evict him, and his lack of a social network, were set forth in Rubenstein's discharge summary, which was emailed to Warren before the visit, and which Kapatos was instructed to, and did bring, to that visit. In addition, Wolfsthal testified that the parents' hospitalization/institutionalization were stressors and that she "imagined" that an eviction proceeding would be a stressor. [Wolfsthal EBT at 50].

Rubenstein testified that the parents' illnesses were significant factors in assessing suicide risk, and that the eviction proceeding could constitute such a factor, as could Kapatos'

marijuana abuse, age, and sex. [Rubenstein EBT at 116-17; Rubenstein note of 11/27/2010 (re: psychosocial factors contributing to suicide risk)].

The application to amend Kapatos' pleadings to allege that Warren departed from accepted psychiatric standards in decreasing Kapatos' Risperdal dose from the daily maximum recommended dosage of six milligrams to four milligrams, without intensive monitoring, e.g., by an individual or via re-hospitalization, in failing to advise Kapatos and his family of the potential risks associated with that decreased dosage, and in failing to advise his aunt and uncle to "continually monitor" and "be with him at all times" over the holiday weekend [Kapatos' expert's aff., ¶ 34], is granted as to the proposed allegation that Warren was negligent in reducing the Risperdal dose without informing Kapatos of the potential ramifications of eliminating the morning dose,[11] and without providing for intensive monitoring. These are amplifications of the supplemental bill of particulars' allegation that Warren departed from standards of appropriate medical practice in negligently prescribing Risperdal and failing to properly prescribe antipsychotic medication.

Any proposed amendment relating to Warren informing Kapatos' aunt and uncle about the potential ramifications of the Risperdal reduction or that Warren should have told them to intensively and constantly monitor Kapatos is denied. Kapatos was an adult at the time in question, and had not been declared incompetent. His aunt and uncle had no legal authority over him or any right to his healthcare information. Any such claims would involve speculation as to what Kapatos would have authorized his aunt and uncle to know, whether Kapatos would have

[11] Kapatos does not appear to be seeking to allege that Warren was negligent in reducing the Risperdal dose without advising Kapatos of the risks of such reduction as a means of asserting a lack of informed consent cause of action. Any such attempt would seemingly be futile because the facts giving rise to such a claim were never asserted in any prior pleading and the statute of limitations for that cause of action has expired. *Jolly v. Russell,* 203 A.D.2d 527, 528-29 (2d Dept. 1994); *see also Tinajero v. Board of Educ. of City of N.Y.*, 294 A.D.2d 564, 565 (2d Dept. 2002); *Quinones v. Waltz*, 258 A.D.2d 420 (1st Dept. 1999).

permitted his aunt and uncle to "continually monitor him," which would have effectively required Kapatos to live with his relatives or his relatives to move in with him, and whether his aunt and uncle would have wished to undertake that obligation.

As Kapatos' expert knows and relies on in alleging certain acts of malpractice, the persecutory thoughts which led to Kapatos' hospitalization involved his aunt and uncle, including that they abused him and his mother, interfered in her marriage, spied on Kapatos, and sabotaged his development. After discharge, Kapatos again thought that his aunt and uncle were monitoring him by camera and feared that they would control his life. [Kapatos EBT at 116-17, 133-34; Kapatos 50-h Hearing at 66]. Kapatos' expert cannot urge that Warren, whose notes indicate that he was aware that Kapatos' delusions included his aunt and uncle, should have advised Kapatos' aunt and uncle to spend all their time closely monitoring him to ensure that he did not come to any harm, while simultaneously asserting that HHC was negligent in sending Kapatos home to the building where several of those who were the focus of his delusions were because that would destabilize and cause Kapatos to decompensate. [Kapatos' expert's aff., ¶¶ 23, 30, 36].

Kapatos had cut off all relations with his aunt and uncle for about two years before his initial hospitalization and would not even greet his uncle when they passed each other. Kapatos' decision to permit his aunt and uncle to visit him in the hospital and his main activity in dealing with them, once home, seemingly involved his desire to be fed. Both in the hospital and at home he departed from his aunt's company shortly after he ate. Indeed, his aunt testified that within about five to seven days after she first visited Kapatos at Bellevue, he began to withdraw from her, informed her that he did not want her to come during the afternoon visiting hours and only

wanted her to come in the evening when she brought him dinner, and that he would send her away shortly after he ate. [*See* Capatos EBT at 82-83].

The fact Kapatos agreed to give his relationship with his aunt and uncle a try because he recognized that they were all that he had did not mean that he wished an intrusive relationship with them, particularly since he believed that they did not treat him and his mother well, meddled in his parents' marriage, and were responsible, to some extent, for his mother's institutionalization. Further, Kapatos testified that one of the reasons he did not want to return to his apartment was that he could not relate to his aunt and uncle. [Kapatos EBT at 116-17].

Moreover, his aunt was cautious about crossing boundaries in dealing with her nephew, kept the conversations light, did not pump him for information about his medical condition, and testified that Kapatos did not discuss his psychiatric condition with her and her husband, except in the most general way. This behavior limited the flow of information and was consistent with the lack of any relationship or meaningful contact for two years before Kapatos' hospitalization, even though they lived a floor apart.

Aunt Katherin testified that she never asked any hospital personnel about his condition, never learned of his diagnosis or specifically why he had been hospitalized, never saw his medical chart, and did not see his discharge papers or know the name or the nature of the outpatient program he was to attend. [Capatos EBT at 75-78, 80, 81, 94, 100, 106-07]. Kapatos confirmed that he never spoke to his aunt and uncle about his psychiatric condition, his feelings toward them, or about any feelings or thoughts of suicide during his hospitalization. [Kapatos 50-h Hearing at 60]. Contrary to Wolfsthal's testimony, the aunt claims that she first learned at her deposition Kapatos' claims against her and her husband. She asserted that Kapatos never accused them of trying to hurt or abuse him. [Capatos EBT at 95-96, 99].

In light of the foregoing circumstances, the proposed amendment that Warren negligently reduced the Risperdal without telling Kapatos' aunt and uncle of the risks and instructing them to "continually monitor him," is palpably deficient and would involve speculation.

The Court notes, in passing, that it is also unlikely that Kapatos would have voluntarily agreed to return to the hospital before Warren reduced his Risperdal dose because he was afraid of everyone in CPEP and the aides on the floor and feared for his life there. [*See also* B. Capatos EBT at 24 (Kapatos informed his uncle that he wanted to leave the hospital, but was not allowed to because he was not ready to be discharged); Kapatos 50-h Hearing at 68 (Kapatos did not believe, after his discharge, that he should have returned to Bellevue); Kapatos 50-h Hearing at 50; "Close Observ" notes of 12/13/2010, 12/27/2010 (Kapatos unsuccessfully tried to run out the CPEP unit's door, and his chart indicates that, at least for some period during his hospitalization, he was to be closely observed because "there [wa]s a potential for elopement")].

The branch of Kapatos' cross-motion which seeks to amend his bill of particulars to allege that Warren was negligent in failing to act on his assessment that Kapatos was at a medium to high risk of committing suicide is denied.

While Kapatos' prior pleadings allege that HHC was negligent in failing to recognize that Kapatos was at a high risk of suicide, that is entirely different from Kapatos' proposed allegation that Warren, recognized that Kapatos was at a medium to high risk and did nothing about it and suggests gross negligence. Further, although Kapatos' expert contends that Warren's opinion related to the time he saw Kapatos, the expert offers no evidence of such assertion. Kapatos' counsel informed Warren at his deposition of things of which he had been unaware at the time of Kapatos' visit, such as his father's impending death, his mother's psychiatric institutionalization, that there was a history of violence in the family, and that before his November 2010

hospitalization, Kapatos had engaged in unspecified "self-harming behaviors." [*see* Warren EBT at 33-34, 37]. Warren was then asked to quantify Kapatos' risk of suicide and answered, "I would say that his – medium to high. It was – there was – there was a risk." [*Id.* at 44].

The self-harming behavior was evidently a shrouded reference by Kapatos' counsel to two incidents, on unspecified dates, one in 2009 and the other in 2010, in each of which Kapatos used a razor to incise on a different thigh each time a former girlfriend, Funda's, name in a heart, once to remind himself that she did not love him and the second time to remind himself that the relationship was over and that he had to go on with his life. Kapatos claimed that these two incidents reflected his desire to hurt himself. Kapatos never disclosed these incidents to Rubenstein or Wolfsthal [Wolfsthal EBT at 56], nor is there any evidence that he disclosed them to anyone else at HHC before his discharge.

Warren's December 30, 2010 notes recite that Kapatos lacked any prior history of having been a danger to himself. In addition, Warren testified [*id.* at 20-21] that Kapatos denied feeling unsafe or that he might want to hurt himself. Warren also testified, before opining on Kapatos' suicide risk, that he could not recall whether he had been aware at the time in issue that Kapatos' landlord was trying to evict him. [*Id.* at 38]. However, Warren found, as reflected in his notes of Kapatos' visit, that as to Axis IV (stressors), he had "none (stable living has apt. with aunt downstairs)," rendering it unlikely that, at that visit, Warren had been aware of the eviction proceeding or any other stressor. Most, if not all, of the aforementioned information disclosed to Warren at his deposition was unknown to him on the day of Kapatos' visit. Therefore, Warren's opinion offered at his deposition and grounded on that information is not a basis for the proposed amendment that he had been aware during Kapatos' visit, that his suicide risk was medium to high and negligently failed to act on that knowledge.

The branch of Kapatos' cross-motion that seeks to add as a separate departure that Warren failed to readmit Kapatos to the hospital on December 30, 2010 either voluntarily or involuntarily, is denied. This departure is too vague and was never alleged before Kapatos filed his note of issue and HHC moved for summary judgment. However, this discussion does not bar Kapatos from asserting at trial that, because Warren departed from accepted standards of psychiatric practice in a manner either previously alleged in Kapatos' pleadings or permitted to be alleged in accordance with this order (such as in the negligent administration of Risperdal), he was required to, but failed to have Kapatos readmitted to the hospital, voluntarily or involuntarily, thereby leading to Kapatos' attempted suicide and his alleged injuries.

Summary Judgment Motion

To begin with, HHC's claim that the record is devoid of evidence that Kapatos jumped out the window is meritless. HHC supports this claim by arguing that were no known witnesses to the event and Kapatos testified that he could not recall anything that happened after his January 1, 2011 nap [*see* Kapatos EBT at 129, 137; Kapatos 50-h Hearing at 70-71]. However, although Kapatos' testimony was internally inconsistent and his psychiatric condition sometimes rendered his testimony lacking in logic, his assertion that all he remembered about his attempted suicide was "[o]pening the window and doing it" [Kapatos 50-h Hearing at 71], is sufficient to create an issue of fact.

Further, Kapatos' testimony that his suicidal ideation emerged after his visit to Warren and lasted until he attempted suicide [Kapatos 50-h Hearing at 67-69], undercut his other testimony that he could not recall anything after his January 1st nap. Also, given Kapatos' testimony about his thoughts following his discharge, there is sufficient evidence to raise an

inference that Kapatos jumped out or fell from the window while trying to escape from his terrifying, delusional thoughts.

For example, he testified that: he again believed there were cameras in his home, giving rise to his fear that he would never again have privacy and would be monitored for the remainder of his life [Kapatos 50-h Hearing at 67; Kapatos EBT at 111]; he was afraid to shower in his home after his discharge because he believed that someone would come through the door and laugh at him [*id.* at 68]; he desired to live somewhere beside his apartment, and, therefore, requested to live with and/or be adopted by his landlord-tenant attorney or with a California friend [Kapatos EBT at 131-32]; he feared that people were coming out of nowhere in his apartment, such as trap doors, leading him to ensure that his house and windows were locked; he ran around with a knife, which he pressed on his throat; he was terrified because he knew that the fire escape window had no lock [*id.* at 127-28]; he felt helpless and hopeless [*id.* at 133]; and he believed that his aunt, uncle, the landlord, and the building's managing agent were going to watch him and control his life [*id.* at 133-34].

In addition, HHC's assertion that there is no evidence that the Risperdal reduction caused Kapatos to become suicidal does not meet the prima facie burden of establishing a lack of causation. It is true that Kapatos testified that he became suicidal later in the morning of the day he saw Warren, which was before he allegedly stopped taking his morning Risperdal dose. Nevertheless, this testimony does not eliminate the possibility that any discontinuation of the morning dose on December 31st through January 2nd increased or caused Kapatos' psychosis, delusions, fears, panic, hopelessness, lack of insight and judgment, and impairments in risk perception, self-care and self-protection, to the point where he was unable to control his panic and impulses and fled through or jumped out the window.

Muskin's mere assertion that the Risperdal reduction made no difference in this case and did not lead to Kapatos' "fall" from the window [Muskin affirmation at 7-8] is conclusory and is, therefore, inadequate to meet HHC's evidentiary burden. *Pullman v. Silverman*, 28 N.Y.3d 1060 (2016). Muskin offers no evidence as to how long it would take for the decreased dosage to begin to have any significant effects or the possible manifestation of such effects.

As for the lack of departures, it should initially be noted that many of Kapatos' expert's opposing opinions are meritless. For example, Kapatos' expert's contention that Rubenstein took an inadequate history because she failed to learn of the prior 2010 razor incising incident lacks evidentiary support. Rubenstein's November 27, 2010 assessment of whether Kapatos had a high risk psychiatric history reveals that Kapatos denied any prior psychiatric history and any history of self-harm. This assessment was essentially confirmed by Kapatos' own testimony, by Jessie's discussions with Dark and Wolfsthal, and by Kapatos to Warren as set forth in his December 30, 2010 notes. Kapatos never revealed the incident to Bellevue's staff before his discharge. Further, Kapatos testified that he just let the cuts heal without seeking treatment. Nor does Kapatos' expert claim that a full inspection of Kapatos' body for scars was required or that there was anything significant to see at the time in issue.

Kapatos' expert's apparent claim that Rubenstein departed from accepted standards of practice by failing to ask Kapatos before his discharge whether there was still a camera in his apartment's window frame [Kapatos' expert's affirmation, ¶ 17] is also meritless. At the time, Kapatos was in the hospital and would not have known whether the imaginary camera was still in his window frame. Moreover, after the date he was brought to the hospital, Kapatos never again mentioned that camera or advised of any reluctance to return to his apartment because of

any perceived camera. Furthermore, any answer that the expert believes Kapatos would have given had that question been posed before his discharge would be wholly speculative.

Kapatos' expert claims that the doctors' failure to tell Kapatos when he was discharged from Bellevue that one side effect of Risperdal could be the inability to have an erection added to Kapatos' fright and panic and caused him to become more overwhelmed and unable to protect himself from his suicidal impulses. Yet, Kapatos provided nothing to indicate that he became frightened, panicked, overwhelmed, or even concerned when that risk materialized. To the contrary, during Kapatos' February 2013 deposition, in response to the question of whether during the time he took Risperdal he ever experienced "any type of side effects or anything out of the ordinary," the only evidence offered by him of fear suffered as a result of a Risperdal side-effect dealt with his having an unwanted erection, not his inability to achieve one. [*See* Kapatos EBT at 103, 130].

Kapatos' expert also asserts that Rubenstein's testimony supports the premise that on December 21, 2010, the day Kapatos and his aunt and uncle had the meeting with Rubenstein and Wolfsthal to discuss discharge planning (and six days after Kapatos first informed Rubenstein that he wanted to return to his apartment), Kapatos still had delusions that his uncle was going to hurt and abuse him. This assertion, too, is inconsistent with the evidence. [Kapatos' expert's aff., ¶ 37]. Rubenstein merely testified that she was attempting to determine whether Kapatos' worries about his uncle's torture of him were true; that she discussed that matter at the family meeting; and that she found that those claims were not "validated." [Rubenstein EBT at 183-86]. Rubenstein did not testify that Kapatos was still having delusions about his uncle on December 21. Further, Wolfsthal indicated in her December 21st notes, including of that day's meeting, that Kapatos denied any concerns about his family, the

apartment, or the Witness Protection Program. He subsequently reaffirmed this statement on December 29 and informed Wolfsthal that he no longer feared his uncles and felt safe with the discharge plan and returning to his apartment with his aunt and uncle's help. [*See* Wolfsthal's notes of 12/28 and 12/29/2010; Rubenstein discharge note (patient agreed with discharge plan); Kapatos EBT at 91-93 (expressing his desire to give his aunt and uncle a chance/try)].

Kapato's expert's attempt to undercut HHC's assertion that Kapatos was doing well because he was attending his hospital therapy sessions is not supported by the record. Kapatos' expert speculates that Kapatos only started going to therapy on December 17, 2010 and may have stopped going to therapy a few days later, relying on Goldman's December 23, 2010 note that Kapatos advised her he was too tired to go to activities. In fact, Rubenstein first assessed Kapatos with the "CAT," apparently the activities therapist, on November 30, 2010. Moreover, Goldman's December 8th note reflects that, by that date, Kapatos had already attended a variety of therapy sessions. Also, while one therapy group took a break after December 17th, effectively ending Kapatos' participation in it, that was only because the psychologist leading it was going away. [*See* A. Wilkes note of 12/17/2010]. In addition, Goldman's December 23rd note indicates that she would encourage Kapatos to continue attending and Kapatos dispelled any notion that he failed to attend, testifying that he attended "each and every one" of his therapy sessions. [Kapatos EBT at 95; *see also* Kapatos 50-h Hearing at 49 (he went to therapy "every time")]. Also, Wolfsthal's December 28, 2010 note recites that Kapatos "continues to attend groups."

The record is also devoid of evidence that HHC was aware of any delusion Kapatos had about his landlord spying on him. HHC only knew that Kapatos' landlord had commenced an

eviction proceeding and that Kapatos was worried about losing his apartment, a concern that appears to be based in reality.

Kapato's expert asserts that Kapatos was impulsive throughout his hospitalization. Yet, the expert does not address Rubenstein's testimony on why she found Kapatos to have been impulsive – that his paranoia was so bad that he was unable to control himself as manifested by his seeking the help of the Witness Protection Program at the Criminal Court. Nor did the expert present evidence of Kapatos' supposed impulsive acts that were known to HHC. Moreover, assuming Kapatos' attempt to run out the door when he was at CPEP was an impulsive act, that occurred only once and during the first few days of his hospitalization, and never thereafter. Kapatos' expert does not address the evidence that on December 22nd nurse Lungay-Fabiosa found Kapatos to be calm and cooperative as did nurse Alhabsi on December 23, 2010. Also, Nurse Savage, in conducting a fall risk assessment on December 26th, found that Kapatos was not impulsive. Similarly, in her December 29, 2010 discharge summary Wolfsthal wrote that Kapatos had "maintained good behavioral control." Finally, on discharge, Rubenstein found him to be cooperative with intact impulse control.

In addition to the abovementioned deficiencies in Kapatos' expert's affidavit, it is important to note that Muskin has demonstrated, and the record supports, that Kapatos had in certain respects improved while in the hospital. While he was at first afraid of, and had delusions about, his aunt and uncle and feared returning to his apartment, Kapatos eventually permitted them both to visit him. On December 15, 2010, he then agreed to return to his apartment. On December 21, 2010, he asked his aunt and uncle to the discharge planning meeting, then later called to advise them of his discharge date, and had them escort him home.

Further, although initially Kapatos was not well-groomed and constantly needed prompting with ADLs, toward the later part of his stay he appeared to be better groomed and, at least one nursing note [Johnson note of 12/27/2010] asserted that he was independent with the ADLs. Kapatos also became less tense and anxious; his thought process became more organized; he was allegedly less overtly paranoid; he never expressed any history of self-harm or suicidal ideation during his hospitalization; and he consistently denied suicidal ideation. Whether the lack of expression of any ideation of self-harm, including suicidal ideation, to those treating him at HHC was caused by Kapatos' mental affliction or by a rational conscious decision to follow his friend's advice to act "as normal as possible," is unclear. [*See* Kapatos 50-h Hearing at 56, 62-63; Kapatos EBT at 109].

Kapatos' statement during Rubenstein's first evaluation that he knew that they knew what it was about and that they could just finish him off and kill him could be viewed as an expression of suicidal ideation in some situations. However, the evidence here does not support this theory. During that evaluation Kapatos clearly denied any suicidal ideation and Rubenstein noted that day that he had no such ideation. Kapatos never again verbalized anything akin to suicidal ideation. To the contrary, he repeatedly denied such thoughts.

Notwithstanding that Kapatos showed improvement over the course of his hospitalization, and irrespective of the deficiencies in Kapatos' opposing papers, Muskin has failed to meet HHC's prima facie burden of demonstrating that it did not depart from accepted standards of psychiatric practice when it discharged Kapatos. Specifically, Muskin claims that Kapatos did not have delusions, distorted perceptions, or psychotic symptoms and that he was not psychotic at the time of his discharge [Muskin affirmation at 11, 12], concluding that Kapatos' discharge was appropriate. However, this theory is refuted by the record.

Rubenstein's discharge summary clearly indicates that, while Kapatos had fewer delusions, he was still delusional, had persecutory delusions, paranoid ideation, and, though not acutely psychotic, was still psychotic. [Rubenstein EBT at 90, 187-88 (Kapatos continued to have paranoid delusions throughout his hospitalization, but that, on discharge, he was less delusional and his thought process was more organized)]. Further, Kapatos testified that, although the Risperdal subdued his paranoid feelings, it did not eliminate them. [Kapatos 50-h Hearing at 56]. Additionally, only five days before his discharge Goldman wrote that Kapatos' "[i]nability to safely maintain self in community was evidenced by continued paranoid ideation; risk of impulsive or reckless behavior." [Goldman note of 12/23/2010]. The nature of these continuing persecutory delusions was never revealed in the discharge summary nor does Rubenstein's deposition testimony elucidate the matter.

The chart reveals that Jessie advised Dark that Kapatos was at times afraid to leave his apartment because he thought that people were watching him. It also shows that Kapatos informed Dark that people were trying to harm him as evidenced by a change of Kapatos' name on his passport. Nevertheless, there is no indication that Rubenstein read these notes or tried to elicit from Kapatos who these people were and whether they included the hospital's staff. Kapatos might not have volunteered such feelings without a probing inquiry as he testified that starting with his CPEP admission and during his entire stay he was delusional about the staff, particularly the aides, feared them, and was afraid for his life and therefore decided to keep to himself and try to stay out of trouble. Nor did Wolfsthal indicate that she pursued her perception that Kapatos appeared almost afraid when she spoke to him during the week of December 21, 2010. Rubenstein and Wolfsthal seemed principally focused on Kapatos' delusions about his aunt and uncle, presumably because those delusions complicated the hospital's discharge

planning by impeding Kapatos' return to his apartment, evidently causing Kapatos to believe that the "whole point" was for him to have a relationship with his aunt and uncle. [Kapatos EBT at 91-93].

Further, it is unclear from an apparent inconsistency in Muskin's affirmation whether accepted standards of practice required Kapatos to be free of delusions at the time of his discharge or only less delusional. [*See* Muskin affirmation at 11-12]. In any event, Muskin consistently premised HHC's lack of negligence and the propriety of the December 29, 2010 discharge, in part, on Kapatos no longer being psychotic or having psychotic symptoms or distortions of perception at discharge. [*Id.*]. This was not the case. Muskin also asserts that Kapatos was better, in part, because he was no longer hearing voices. Yet, Rubenstein's November 27, 2010 note indicates that immediately after Kapatos complained that he was tired of hearing the voice in his head saying that he was not growing up and was insane, he clarified his statement by indicating that it was just his own voice. This concern was not pursued any further by Rubenstein during Kapatos' hospitalization. [*See also* Kapatos 50-h Hearing at 37]. Moreover, HHC's copy of EMS's report of the same day reveals that Kapatos denied hearing any voices, and Wolfsthal's November 30th note recites that Kapatos denied any auditory hallucinations.

Muskin's contention that the discharge was appropriate, in part, because the record is devoid of evidence that Kapatos was unable to care for himself is undercut by River's note on the morning of discharge. The note indicates that Kapatos needed prompting with ADLs and had severely impaired judgment and insight. In addition, Wolfsthal's note of the day before mentions that Kapatos was "still not dressing each day." These notes conflict with Rubenstein's discharge summary, which recites that Kapatos was independent with ADLs. Further, although

several nursing notes indicate that Kapatos was "compliant" with morning routines [*see* Alhabsi's notes of 12/23 and 12/26/2010], that does not signify that he independently initiated them. [*See e.g.* Nurse Salow notes of 12/9, 12/10/2010 (Kapatos is "prompt dependent"); River note of 12/12/2010]. It is true that at least one nursing note recites that Kapatos was independent with ADLs. [Johnson note of 12/27/2010]. Nevertheless, the inconsistent and ambiguous evidence creates an issue as to whether Rubenstein appropriately came to her conclusion.

Muskin's also asserts that the discharge was proper partially because there was a lack of evidence that Kapatos was depressed on discharge. While it is true that Rubenstein allegedly found that Kapatos, who had been brought to the hospital complaining of having been depressed for his entire life, had a euthymic mood and full affect when she saw him on the evening of December 29th, the nurses' notes throughout the hospitalization largely show that Kapatos appeared/felt depressed. Nurse Baez evaluated Kapatos on December 20th as "continu[ing]" to have a sad affect, nurse Lungay-Fabiosa noted, on December 22nd, that Kapatos was "still feeling depressed." Nurse Johnson found him to have a depressed affect on December 27th. Additionally, Kapatos, for most of his stay, had a flat affect, up to at least December 28, 2010. [*See* Wolfsthal notes of 12/14, 12/21, and 12/28/2010; Baez note of 12/20/2010]. Even when Warren saw Kapatos the morning after his evening discharge his affect was blunted.

Kapatos was also isolative and guarded throughout his hospitalization [*see e.g.* Baez note of 12/20/2010; Alhabsi note of 12/26/2010; Johnson note of 12/27/2010], and, except for required activities, spent most of his time in bed. In fact, nurse Salow concluded on December 5, 2010, that Kapatos' denials of various psychotic signs and symptoms could not be trusted because Kapatos was so guarded. This conclusion seems to mesh with Kapatos' claimed persecutory delusions involving certain hospital employees, his fear of them, and his decision to

keep to himself, withhold certain information, and to act "normal." Neither Wolfsthal [Wolfsthal EBT at 57] nor Rubenstein [Rubenstein EBT at 87] knew how much time Kapatos was spending in bed. However, Wolfsthal did note in the chart the day before Kapatos' discharge that he spent "a lot of time in bed."

There is also a dispute between Kapatos, who wanted to speak with Rubenstein to have her "check up on [his] thoughts" [Wolfsthal note of 11/30/2010], and Rubenstein as to how much time Rubenstein spent speaking with him during his stay [*compare* Rubenstein EBT at 108, 110-11 *with* Kapatos EBT at 99, 109; Kapatos 50-h Hearing at 57]. The group therapy sessions with the psychologist ended about two weeks before Kapatos' discharge.

Furthermore, Rubenstein was unable to answer the question of whether a denial of suicidal ideation meant that the patient was not at risk for suicide. [Rubenstein EBT at 115-16]. Warren, on the other hand, testified that the lack of expressed suicidal ideation during his meeting with Kapatos did not, in and of itself, obviate the risk of suicide. Although Kapatos continuously denied suicidal ideation, any intent to harm himself, and any prior history in those regards, a denial of suicidal ideation is not the sole test of whether a patient can be safely discharged. Specifically, Georgiev's December 9th note indicates that, due to Kapatos' severely impaired reality testing, he was unable to safely maintain himself. Georgiev's December 14, 2010 certification justifying Kapatos' continued involuntary confinement indicates that confinement was warranted, in part, for Kapatos' safety.

Furthermore, Goldman opined in her December 8th and 23rd, 2010 notes that Kapatos' inability to function/safely maintain himself in the community was evidenced by his continued paranoid ideation and by the risk of impulsive or reckless behavior.

In any event, Kapatos' expert raises an issue of fact as to whether Rubenstein departed from accepted standards of psychiatric care in ignoring River's December 29, 2010 note. The note indicated that Kapatos' insight and judgment were severely impaired, that he was isolative, poorly related, and required prompting with ADLs. The substance of River's note and Kapatos' apparent inability to function in the community seemed to have been validated as soon as he was discharged: He boarded the bus and became so overwhelmed with reality that he had to get off and walk home. Whether Wolfsthal and Rubenstein ever read River's note prior to discharge is unclear as their deposition testimonies are silent on the issue. Although River, years after the fact, could not recall the exact basis for his December 29th note, nevertheless, the note does exist and is part of a patient-nurse interaction. [*See* River EBT at 54-55].

Assuming for argument's sake that Kapatos was properly discharged on December 29, 2010, Kapatos' expert has raised an issue of fact as to whether Warren, and, thus, HHC departed from accepted standards of psychiatric care in reducing Kapatos' Risperdal dose by one third before the long holiday weekend. While this Court is not prepared to say that Warren was required to have read Kapatos' entire month-long on-line hospital record before he saw Kapatos the next morning, HHC had provided Warren with a copy of Rubenstein's discharge summary, which indicates that the Risperdal had been titrated with good results, and that Kapatos had become less delusional.

Warren had to have been aware that Risperdal was one of the reasons that Kapatos' condition improved enough to release him. His own note states that Kapatos had been "started on Risperdal with good response." Warren's note also indicates that he was under the misapprehension that Kapatos was "not delusional by discharge." Had Warren fully read the discharge summary he would have discovered that: Kapatos was delusional, only less so; he had

been compliant with his medication throughout his hospitalization; he was unemployed and had financial issues; his social network was thin; his landlord was trying to evict him; his father was terminally ill; and Rubenstein believed that Kapatos' stressors could be contributing to his mental condition.

Additionally, had Warren taken a thorough history during the 45-minute evaluation, he would likely have learned of Kapatos' mother's institutionalization. Instead, Warren did not ascertain Kapatos' numerous stressors, failed to realize that Kapatos was still delusional at discharge and did not consider the effect that the Risperdal reduction might have on his stressors, delusional state, or on his stability over the extended holiday weekend. Warren failed to warn Kapatos of the risks associated with a one third reduction of his Risperdal or provide for any monitoring of his condition over that weekend.

Moreover, Warren decided to reduce the Risperdal because Kapatos was complaining of sedation, a side-effect of which Rubenstein and Georgiev were aware, yet decided did not warrant a medication reduction. [*See* Georgiev note of 12/9/2010; Rubenstein note of 12/13/2010 (complaining of mild sedation); Rubenstein discharge summary at 7]. They possibly did not reduce the medication because Risperdal's benefits outweighed the risk of drowsiness, Kapatos had been compliant with his medication throughout his hospitalization, and he did not appear to be complaining often or vociferously to the physicians. [*But cf.* Goldman note of 12/23/2010 (patient feeling more sedated and fatigued)].

The discharge summary did not inform Warren of, nor did he attempt to discover, the course of the Risperdal titration or when, during that process, Kapatos agreed to return to his apartment with his aunt and uncle's help. These events occurred within five days that the amount of Risperdal was changed. Muskin opines that it was proper for Warren to reduce the

Risperdal before the holiday weekend because of the risk of noncompliance. However, this opinion is sufficiently rebutted by Rubenstein's discharge summary and the hospital chart, which reveal that Kapatos was consistently compliant with taking his medication during his hospitalization. Therefore, it would be unlikely that Kapatos would have been noncompliant if Warren informed him that he wished to wait until after the holiday weekend to decide whether to reduce the dose and why.

In addition, Kapatos testified that, following his discharge, although he had contemplated flushing his medication down the toilet because he believed it was not efficacious he decided for once "to listen to people." He testified that he, therefore, took his medication as prescribed. [Kapatos EBT at 130]. This testimony supports the likelihood that he would have taken his medication as prescribed over the holiday weekend, not only because he decided to listen to his doctors, but because his major concern relating to compliance was the medication's perceived lack of efficacy, not its side-effects.

In conclusion, it is

ORDERED that New York City Health and Hospitals Corporation's motion for an order granting it summary judgment dismissing plaintiff's complaint is denied, except that certain alleged departures are hereby dismissed in accord with today's decision; and it is further

ORDERED that plaintiff's cross-motion for an order permitting him to amend his bill of particulars to add certain departures on the part of Matthew Warren, M.D., for whom the defendant is claimed to be vicariously liable, is granted, but only to the extent that plaintiff can amend his bill of particulars to allege that Matthew Warren, M.D. departed from standards of good and accepted psychiatric practice in failing to properly assess psychological stressors to which plaintiff was subject, in underestimating plaintiff's risk of suicide, in decreasing plaintiff's

daily Risperdal dose from six milligrams to four milligrams without intensive monitoring, and in failing to inform Kapatos of the risks associated with that decreased dosage. The motion is otherwise denied; and it is further

ORDERED that, within 20 days of service of a copy of this order with notice of entry, plaintiff is directed to serve upon defendant an amended bill of particulars in conformity with the terms of this order; and it is further

ORDERED that the case is transferred to Part 10CMM and that the Part Clerk, Steve Welovnick has been notified to set a date for respective counsel to appear.

Dated: December 28, 2017

ENTER:

J.S.C.

MARTIN SCHOENFELD
J.S.C.