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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16
Justice

Index Number : 104987/2008
PARK, MARIA
vs
KOVACHEVICH, THOMAS DR.
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the accompanying memorandum decision.

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

Dated: MAR 12 2013

ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MARIA PARK, as Executor of the Estate of COOPER PARK, deceased, and MARIA PARK, Individually,

Plaintiff,

Index No. 104987/08
Motion Seq. No. 005 & 006

-against-

DR. THOMAS KOVACHEVICH, DR. ARYEH KLAHR, DR. CHARLES SHAMOIAN, THE PAYNE WHITNEY CLINIC, NEW YORK PRESBYTERIAN HOSPITAL, GREENWICH HOSPITAL, and JOHN DOE 1-5 INTENDED TO BE THOSE PHYSICIANS WHO RELEASED/DISCHARGED PLAINTIFF'S DECEDENT FROM PAYNE WHITNEY CLINIC AND/OR NEW YORK PRESBYTERIAN HOSPITAL IN OR ABOUT MAY, 2006,

Defendants.

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SCHLESINGER, J.:

On May 20, 2006, Cooper Park, a twice married man with three small daughters, killed himself. This was not the first attempt he made. On the evening of April 21, 2006, pursuant to threats of suicide that Cooper had conveyed to his estranged wife Maria, she called 911 which brought the Police to his home. Cooper was then taken to Greenwich Hospital for an attempted suicide by drug overdose. He was released the next day. The second attempt was far more serious and almost succeeded. This attempt occurred on May 1, 2006 when his father, who had come from Australia after being notified by Maria of the first attempt, found Cooper unconscious in his bed. Cooper was again taken to Greenwich Hospital. This time he was in respiratory arrest, again from overdosing on drugs, and he required serious efforts to keep him alive. He was kept in ICU at Greenwich until May 4. On the 3rd of May, a psychiatric consult

found that he was still suffering with suicidal ideation. On the following day, he was transferred to Payne Whitney for a "2PC", involuntary admission. The "2PC" refers to two physicians, usually psychiatrists, certifying that the patient was a danger to himself or others.

At Payne Whitney, Mr. Park came under the care of defendant Dr. Aryeh Klahr, who authorized his discharge from the Hospital on May 10, 2006. On the discharge note, Dr. Klahr wrote that Cooper reported feeling well and denied plans to hurt himself. He had no suicidal ideation on that day and his insight and judgment were noted to be "fair". Earlier in the admission, these were reported to have been "poor". As noted earlier, ten days later, Cooper was found in his garage, dead of an overdose.

Dr. Klahr and Payne Whitney and all related staff at the Hospital are moving for summary judgment to dismiss the complaint that Cooper's estate has brought which charges them with negligence in their care and treatment of him and their decision to discharge him when they did. The first named defendant in this action, Dr. Thomas Kovachevich, is also moving for summary judgment. The action was previously discontinued against the only other defendant, Greenwich Hospital.

Dr. Kovachevich is an osteopathic physician and family medicine practitioner. In 2006, he had been Cooper's primary care physician for almost seven years. The two had seen each other for routine physical examinations and for the treatment of various physical complaints.

Relevant to the events leading to the suicide, on April 20, 2006, Cooper called Dr. Kovachevich to tell him that he was separating from his wife and that his nerves were shot and to ask whether the doctor could prescribe something. The doctor did so,

by phoning in a prescription for 20 pills of Xanax, a Benzodiazepine tranquilizer. He also directed Cooper to come into his office the next day.

Cooper did come in on April 21, when he related more circumstances about the dissolution of his marriage. He again told the doctor that he was distraught, particularly regarding his wife now being with a different man. Dr. Kovachevich noted that Cooper told him that suicide had crossed his mind but that he would not do this because of his three children. He was also having sleep problems. The doctor assessed him as suffering from depression and anxiety. He prescribed Lexapro, a serotonin re-uptake inhibitor, in addition to the Xanax. He encouraged Cooper to consult a psychiatrist, a Dr. Moss, but also told him he could call him at any time and that if he was thinking of suicide he should go to an emergency department.

But Dr. Kovachevich testified at his deposition that he did not believe Cooper was at risk for self harm that day. However, that night, as noted earlier, Cooper made his first attempt at suicide. He did go to Greenwich Hospital, but not on his own and not before any attempt. Rather, he was taken by the Police, pursuant to a 911 call after he had made the attempt.

Dr. Kovachevich had also prescribed Ambien, a sleep aid for Cooper. The Greenwich Hospital records stated that it was 20-30 Ambien tablets that Cooper had used in this attempt. Dr. Kovachevich testified that no one had told him of this event, although at Cooper's next visit with this doctor on April 25, 2006, Cooper told the doctor that he had gone to the emergency room merely with thoughts of suicide. This, of course, was not a true account. On April 25, Cooper denied suicidal thoughts to Dr. Kovachevich and said he was feeling better. Dr. Kovachevich noted again his

diagnosis of depression and continued the three medications, Xanax, Lexapro and Ambien. He also encouraged Cooper to see a psychiatrist. He testified that Cooper was likely provided with contact information for a psychiatrist.

Further, at Dr. Kovachevich's deposition he explained that he had continued the medications because he had sought to diminish Cooper's anxiety and impulsiveness and foster reasonable behavior (Exhibit H, pp. 141-42). He felt that he was professionally obliged to keep prescribing medication as long as Cooper failed to consult with a psychiatrist. Not to do so would be effectively "abandoning the patient," he said (Exh. H, p.144, lines 22-24).

With regard to the more serious May 1 suicide attempt, it appears that testing showed that Cooper had likely overdosed on both Xanax and Ambien, as well as Tylenol PM.

Dr. Kovachevich next saw Cooper on May 16, 2006. However, while the decedent was hospitalized at Payne Whitney, Maria testified that she had called the doctor because she had seen his name on the prescription bottles. She relates that she accused Dr. Kovachevich of providing the medication for Cooper's second suicide attempt. She says she told him that she expected the Hospital to provide him a "psychologist, psychiatrist, whatever" and that "if he comes to you again, don't treat him, don't see him." (Exhibit G, p. 129, lines 22-25). Dr. Kovachevich emphatically denies ever having received such a call, and he says he knew nothing then of the Payne Whitney admission. However, in his records he notes speaking to Maria about Cooper on May 5 and 9th (days that he was confined at Payne Whitney).

May 16 was the last time Dr. Kovachevich saw Cooper, although two days later, on the 18th, Cooper called asking the doctor to prescribe more Lexapro which he said he needed because he was about to leave for Brazil on a business trip. This was not true. The doctor called in a prescription for 15 Lexapro pills.

At the last visit on May 16, the doctor noted that Cooper was doing much better. The decedent lied about being in therapy with a Ms. Neibur and denied suicidal thoughts. Dr. Kovachevich thought Cooper looked "great" and did not manifest any kind of feeling of deteriorating depression. "He did not have a low self esteem. He had an expansive self esteem ... He was acting great and he was in a good mood. I would not have been more delighted" (Exh. H, p. 170, lines 18-22).

At the last contact, on May 18 two days before Cooper's death, Dr. Kovachevich asked Cooper to have his therapist write him a note. He said he wanted this "because if I am going to provide these medications I would like to form a treatment team and hear periodically from the psychologist about the progress of Mr. Park". (Exh. H, p. 187, lines 5-8). Cooper was not in fact seeing any psychologist and because of this, naturally a note from one to Dr. Kovachevich never came.

It seems apparent here that Cooper's actions, whether they were related to a depressive disorder or a narcissistic personality (which some of the psychiatrists here believe), his actions had a great deal to do with the marital strife he was experiencing. All three of his suicide attempts followed failed or traumatic encounters with Maria, his estranged wife, and the man she was now living with, Steve.

The papers all outline in detail the days Cooper remained involuntarily in a locked-up part of Payne Whitney, specifically referred to as "The Haven". This was from May 4 until his discharge on May 10, 2006. The Haven was for affluent patients,

which Cooper was, who could pay much higher additional charges than that paid for by insurance.[1]

His initial assessment on May 4 was made by LCSW Nancy Klein and was reviewed by defendant attending physician Dr. Charles Shamoian. It summarized his immediate past history, with particular attention to the two suicide attempts. It also described his marital difficulties. At the time, Cooper denied depression or suicidal ideation. His insight was noted as "fair" and his judgment "impaired". The initial assessment was "depressive disorder" and it was noted that "pt made very serious SA [suicide attempt], is impulsive and is at risk of harming himself."

On the next day, May 5, 2006, in the three-page "comprehensive treatment plan", it was noted that Cooper "minimizes seriousness of attempt and has limited insight with "poor impulse control". His mood was, later in the day, described as "depressed". He was tearful and expressed shame at being in the hospital. He gave a good history of his suicide attempts and described them as "selfish and crazy" but said he was no longer at risk and would never do this again.

This note by LCSW, Linda Quinn commented that Cooper focused on convincing the team that he was safe to be discharged. But his judgment and insight were noted as "impaired". A second note of the day stated that Cooper minimized the seriousness of his attempt and had "limited insight".

Defendant Klahr's first note is also dated on May 5. This essentially repeated the earlier notes and stated that his plan was to monitor Cooper's mood and consider medications if symptoms of depression became apparent.

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[1]Mr. Park worked for Citibank in charge of foreign investments.

On that same day, Maria and their three year old daughter Lily visited Cooper. She reported that he had told her that he did not like the place and was anxious to get out. He was "scared and sad".

On May 6, there was only a nurse's note that said Cooper was remorseful and felt foolish over the suicide attempt. The May 7 progress note documented that Cooper presented himself with a "superficially bright affect. He sought to minimize his prior actions and he stated he was focused on discharge". This note by LCSW Megan Garson denied feelings of depression or suicidal ideation. Cooper urged Ms. Garson to put in a good word for him so that he could be discharged. He said that he had learned his lesson and was ready to leave, but Ms. Garson noted he had "impaired insight and judgment and that he could not function or manage outside an impatient setting due to the acuity of his symptoms". A note of that day by Dr. Ayadele Kinsler Adeigbola stated that Cooper's "affect was constricted and his judgment and insight were poor". Maria visited him once again and found him the same.

On May 8, the nursing progress note said that Cooper was doing much better. His appetite was returning and his sleep was improved. He felt hopeful about his future. He admitted that the break-up of his marriage was dominating his thoughts. He denied feelings of depression and suicidal ideation. Both Social Worker Cherico and Dr. Klahr stressed that Cooper continued to minimize his suicide attempt and distress before admission and that he continued to exhibit a lack of insight. Dr. Klahr noted that Cooper had been prescribed Lexapro but that he did not fill it. Dr. Klahr decided to start Cooper on daily dosages of it.

The next day, May 9, 2006, nursing progress notes reported that Cooper was feeling really good. He was more hopeful. Dr. Klahr noted that he had met with Cooper's father regarding a discharge plan that included his father staying with Cooper after he came home. Dr. Klahr decided to discharge Cooper, to continue him on Lexapro, and to work on a referral for treatment after discharge.

On May 10, 2006, Cooper was discharged in the company of his father. A discharge note by a nurse noted that all problems were resolved. He was provided with prescriptions and was told that he was to see a therapist the next morning. Social Worker Cherico noted that Cooper continued to push this incident aside and was not able to focus on it, to view the seriousness of it and the risk of it happening again as long as he did "not acknowledge that aspect of self which lead him to take overdose". Dr. Klahr wrote on May 10 that Cooper reported feeling well and denied he would ever hurt himself again. But his insight and judgment were deemed "fair". His condition was noted as improved and his prognosis was "fair".

Cooper did attend the session set up by the hospital the following morning. It was with Dr. Shuba Phansalker. He was also given the name of a Dr. John Tamerin, who I believe he never contacted. There was an obvious problem with the session. It was that Dr. Phansalker was never provided with any part of Cooper's medical records. Therefore, everything she learned was from the decedent. An example here is that she did not even know that his admission was involuntary or what his diagnosis was. She described Cooper as glib. But Cooper nonetheless made an excellent impression on this doctor. She noted that he was "attractive", "articulate", "intelligent" and "head of international investments at Citibank". She found "no thought disorder", "no suicidal

addiction" "no evidence of psychosis", that he did not "look melancholic or morose." She noted that he had reported that he had "never felt this way before" and "it was all a mistake". Cooper said he would call to set up an appointment. He never did. When Dr. Phansalker called him regarding seeing him at a future date, he called her back, saying he would seek treatment elsewhere. He did not.

In the next ten days, Cooper saw his daughters Marcia and Lily on several occasions, with Cooper telling Maria he wanted to reconcile. Cooper also contacted Dr. Kovachevich twice and obtained more medication, supposedly to tide him over on his feigned trip to Brazil.

It was on Friday, May 19, that events took a turn for the worse. Cooper went to Maria's home and took his daughter Lily back to his home. Maria then went to his home and fought over this unscheduled visit. Also on the 19th, Cooper told his father that he would be going to Brazil and that he, the father ,should return to Australia, which he did at once.

The next day, Saturday, May 20, Cooper invited Maria and Lily to dinner, but she declined. Maria was to bring Lily over to Cooper's the next day. When Maria asked if Cooper's father would be there, he answered "Yes", but that was not true as his father had already left for Australia. On the evening of the 20th, Cooper called Maria to speak to Lily, who was already in bed. Nonetheless, Cooper went to Maria's house to see Lily. But Maria ordered him to leave and she called the Police, who came and spoke to Cooper and Steve, Maria's live-in boyfriend. Cooper was ordered to leave and did. Later that night he called Maria' sister Tina to express his upset that Maria was leaving him for Steve. Tina then tried to call Cooper several times because she was worried

about Cooper, who had sounded so upset on the phone. But he did not answer the phone. In the morning, Tina called the Police. They went to Cooper's home. Later they told Maria that they had found Cooper in the garage, where they were working on him, but to no avail. He was dead. However, he had left a note for Maria blaming her for their relationship and why he had to kill himself. Apparently Cooper died as a result in part of Lexapro.

Later on during his deposition, Dr. Klahr testified that he had never known that Maria had visited Cooper, not once, but twice at Payne Whitney. He also acknowledged that he had never inquired of this possibility and had never tried to contact her himself. Dr. Klahr also denied that Cooper was suicidal and opined that he woke during the night of May 1 and impulsively tried to kill himself. He characterized the May 1st attempt as not a true attempt but rather as a suicide "gesture", when the person really does not want to hurt himself. This doctor believed Cooper at the time of his discharge was no longer a risk to himself because he was able to put things in perspective and was hopeful. Apparently, he was wrong.

It is on these facts and impressions that the defendants move to dismiss the action. Dr. Klahr, Payne Whitney and the staff's motion is supported by an affirmation from Dr. Neil Zolkind, a board certified psychiatrist. He is Director of Psychiatry at Westchester Medical Center and has been in private practice since 1981.

He, like all experts opining in these motions, repeats in detail Cooper's history, tracing his traumatic response to the break-up of his second marriage. This was particularly torturous for the decedent because even though it appears that he had been continuously unfaithful to Maria, the thought that Maria was now rejecting him and

doing so by choosing to love and live with another man, Steve, was something he simply could not bear.

Then after setting down this history, Dr. Zolkind begins by saying, "The allegations in the complaint and Bill of Particulars are without foundation and have no merit." He goes on to say that all the staff at Payne Whitney acted within the standard of care and exercised appropriate judgment during the decedent's admission from May 4, 2006 through May 10, 2006.

Dr. Zolkind then chooses (as we all do) certain parts of the Payne Whitney record to fill out and support his opinions. He notes that at the beginning, Dr. Klahr appropriately concluded that Cooper was depressed because his wife had left him, though he did not meet the criteria for a specific depressive disorder.

Dr. Zolkind then points out that the records documented Cooper's participation in support and stress management groups. On May 7, the records show entries by LCSW Garson and Dr. Adeigbula that Cooper's judgment and insight were poor. This was three days before his discharge. On May 8 there was an entry that he displayed little affect or distress over the seriousness of his actions. Social worker Cherico determined that he lacked insight into his situation and problems. This was two days before his discharge. That same day Dr. Klahr prescribed Lexapro for the first time. This, the expert says, was appropriate to help Cooper feel less depressed and make him better able to deal with the dissolution of his marriage. Regarding the effect of this medication, Dr. Zolkind states that the patient would be monitored in the hospital and outside by aftercare providers. However, the Court notes that with the exception of the May 11 appointment that was set up by Payne Whitney with Dr. Phansalker, to whom

no records were given, and the giving of the name of a psychiatrist whom Cooper never called, no provisions for aftercare or monitoring aftercare by the hospital were made. As best as is known, Cooper may have made a phone call or two to a therapist between his discharge and his suicide, but the truth appears to be that he saw no mental health specialist other than Dr. Phansalker.

On May 9, Cooper denied suicidal ideation and was noted to be compliant with unit routines. On that day, one day before his discharge, Dr. Klahr interviewed Cooper and met with his father, Donald Park. The latter told the doctor that he would stay with his son as long as needed. This promise seemed to reassure Dr. Klahr, although the Court notes that Mr. Park was living with his son Cooper when he made his second, very serious attempt at killing himself and, in fact, it was his father who discovered him in his bedroom, close to death. Also, unbeknownst to Dr. Klahr, Cooper told his father he could go home, which he did on May 19.

On the day of discharge May 10, Dr. Klahr met with Cooper and described his affect as bright. Also, he once again denied suicidal ideation, although the record for that day also describes his insight as only "fair".

Dr. Zolkind then provides his opinions with regard to specific aspects of the treatment, mainly with a discussion of why he believes the discharge was proper. Unfortunately, these opinions are very general in nature and conclusory. Also, he offers no explanation for why the suicide happened ten days later.

He opines that there was a sound medical basis for the team treating Cooper to find credible the patient's statements that his prior suicide attempts were "mistakes". Further, he states, somewhat redundantly, that the team's evaluations and observations

formed a sound basis on which to determine, on the day of discharge, that Cooper posed no risk to himself. But no further explanation is provided here as to how this decision was reached, in other words, specifically what it was based on. Perhaps it was the team's belief and Dr. Zolkind's that the earlier suicide attempts were actually mistakes.

Dr. Zolkind then comments that a "complete and appropriate discharge plan was in place". (¶37). But what was it? With the exception of the appointment for the next day with Dr. Phansalker, there seemed to be nothing. Yet the expert points to that evaluation on May 11, where Dr. Phansalker found Cooper to be "pretty stable" and not suicidal, to support the May 10 discharge. Further, Dr. Zolkind points to Cooper's visit with Dr. Kovachevich on May 16, where the physician found him to be in "a great mood" with "expansive self-esteem", to again confirm the wisdom of the discharge.

Finally, Dr. Zolkind opines that the team was not manipulated by the decedent into a false sense of security, thus not making the discharge a premature one. While the various evaluations in the hospital allowed the team to identify Narcissistic aspects of Cooper's personality, this doctor says that inpatient treatment is not suitable for that. Again without giving his reasons, he says that such a diagnosis cannot be effectively treated while a patient remains involuntarily committed.

Does Dr. Zolkind provide the moving defendants with a prima facie case for dismissal? I cannot find that he does. As stated earlier, not only does this expert mainly pick out parts of the records that support his opinions, he never really provides a meaningful basis for it. Also, he never comments on the team's failure to reach out to Maria, Cooper's estranged wife, who visited him twice. It seems clear that Cooper's

illness was strongly influenced by the disassembling of his marriage. Therefore, it is difficult to see why there was no contact and it is hard to understand Dr. Zolkind's failure to deal with it. This issue is, however, addressed by the opposition psychiatrist, which I will now discuss.

The doctor who submits an affirmation on behalf of the plaintiff is also board certified in psychiatry and in forensic psychiatry. I was not given any more information by counsel but I was offered his C.V. He also has reviewed all the facts and court records and offers his opinions with a reasonable degree of medical certainty. Not surprisingly, he begins his very long statement (39 pages!) by opining that all the defendants departed from accepted standards of psychiatric care, which departures were a proximate cause of Cooper Park's final and successful suicide attempt. He then sets out a chronological time line of events, beginning with Maria and Cooper's first meeting, approximately seven years before the suicide. He then mentions the attempts at suicide, the first being on April 21, 2006. Here he points out that earlier, in the Fall of 2005 when Maria retained a divorce lawyer, Cooper expressed thoughts of suicide to her involving a knife and/or a train.

This doctor then convincingly shows how connected these marital problems were to Cooper's illness and actions. It was on April 20, 2006, that the decedent first contacted Dr. Kovachevich and told him that he was distraught over the separation from his wife. Earlier that month, Maria had taken their daughter Lily and moved in with Steve. The day after Cooper saw his doctor, the evening of April 21, he made his first attempt. However, before he did this, he told Maria he was going to take pills for this purpose. And it was Maria who called 911 and the next day picked Cooper up at Greenwich Hospital and then she contacted his family and told them to come.

This expert then moves on to the May 1st attempt and its aftermath, the involuntary admission to defendant Payne Whitney on May 4th. He reviews each day's notes and comments on them. He also chooses portions supportive of his opinions. A central part of these opinions is that the mental health professionals at Payne Whitney, including the defendants doctors, failed to make the correct diagnosis. Rather than depression, this doctor asserts that Cooper was suffering from a Narcissistic Personality Disorder. This failure to make the right diagnosis was a very serious one and it happened, in this expert's opinion, because the doctors and social workers failed to properly examine Cooper and evaluate what was going on. This failure "left Cooper at an increased risk for future suicide ideation as he was returning to the same marital stresses that were in essence wreaking havoc on his already injured and fragile self esteem". (¶64).

His risk factors were "acute and severe" and no attempt was made to reduce them. According to this psychiatrist, it was clinically critical here to obtain information from the wife and family about his overall manner and style.

Specifically, this experts lists six risk factors which he believes had to be dealt with but were not. They were 1) Narcissistic personality disorder; 2) anhedonia (the inability to experience pleasure); 3) anxiety; 4) depression; 5) insomnia, and 6) two prior suicide attempts (¶65). This is specifically the explanation he gives:

> While a psychiatrist cannot prevent suicide, acceptable standards of care require that they look for, assess, and take clinical measures to decrease the risk factors for suicide, which in Cooper's case were acute and severe. Cooper was a high suicide risk because he was returning to the same unabated stressors that led to his suicide attempt, i.e., marital breakup.

> No treatment plan was provided aiming at helping Cooper reduce the risk factors for suicide and restore Cooper to previous (premorbid) level of functioning, based upon a combined approach of medication and individual psychotherapy aiming at helping him achieve sedation, improve mood and develop new and adoptive mechanisms to cope with anguish.

It is clear that the departures spelled out against the doctors and staff at Payne Whitney were the failure to properly evaluate him and come up with the correct diagnosis, the failure to come up with a proper treatment plan based on that diagnosis, the failure to work out a way to alleviate or reduce the stressors in his life, and the failure in prematurely discharging him when his chart had nothing in it to support the upgrade in his prognosis from "poor" to "fair" (¶77). Finally, there was the departure in making a referral to a doctor on May 11 without providing that doctor with a full history or in fact any history.

As to proximate cause, the Medical Examiner here said the death was due to an overdose of "acute mixed drug intoxication". Lexapro was specifically mentioned. The plaintiff's expert opines that Lexapro was a drug to treat depression. But since depression was not the correct diagnosis, Cooper did not really need it at all.

As to Dr. Kovachevich, his attorney submits two affirmations in support of his motion. One is from Dr. Alan A. Pollack, an internist, and the second from Dr. Philip Muskin, a psychiatrist.

Dr. Pollack believes that Dr. Kovachevich's treatment was fine, within acceptable standards, as an internist or family doctor. He also first traces the relevant history. As to prescribing medication for him, including Lexapro and Ambien, Dr. Pollack says the

doctor was competent to prescribe these psychotropic medications, but he prudently also recommended psychiatric treatment and gave Dr. Moss's name. On April 25, Cooper said he had learned his lesson but still needed the drugs. It turned out then that Cooper had not ever filled the Lexapro prescription.

On May 16, 2006, Cooper lied again to Dr. Kovachevich by saying he was now in therapy. That is when Dr. Kovachevich noted Cooper looked great, had lost a lot of weight and was working again. But he said he still needed Ambien. Cooper told his doctor nothing about the May 1 suicide attempt and the later involuntary commitment to Payne Whitney. On May 18, Cooper lied again about going to Brazil and needing Lexapro. Dr. Pollack states that it was acceptable under the circumstances to give Cooper this prescription. However, he did want a note from his psychologist, who we know did not exist. But Dr. Pollack states it would have been bad to discontinue the Lexapro. He said this prescription was validated by the fact that the other psychiatrists at both hospitals also had prescribed Lexapro.

Dr. Philip Muskin, a board certified psychiatrist who is now Chief of Consultation Liaison Psychiatry at New York Presbyterian, also speaks on behalf of Dr. Kovachevich. He opines that it was appropriate to prescribe psychotropic medications to treat an ongoing condition. Particularly in mid-May, Dr. Muskin says that there was no way this physician could have anticipated Cooper's use of these medications to attempt suicide.

Dr. Muskin opines that it is probable that Mr. Park took his own life out of rage at his wife, once he realized he had lost her and there was no hope of reconciliation. In other words, similar to plaintiff's expert, he believes that these attempts did not arise from depression.

Dr. Muskin provides the Court with opinions that are lucid and not conclusory. His position is that this doctor, Cooper's personal physician, acted properly and with compassion for his patient. However, that patient lied to him about critical facts and omitted others. The medication was properly prescribed and based on the information he received, and it would have been irresponsible and detrimental to Cooper to have stopped the Lexapro. After all, based on the May 16 visit where Cooper looked and felt great, and the May 18 request for Lexapro to take to Brazil, Dr. Kovachevich had every reason to believe that the Lexapro was working.

Finally, this expert does point out that the autopsy report showed a therapeutic level of Lexapro. However, Cooper combined this medication with strong over-the-counter drugs. The combination killed him. But Dr. Kovachevich would have no reason to believe this would have happened.

I find that the two affirmations do provide the Court with a prima facie case on behalf of Dr. Kovachevich. Therefore, the issue becomes whether the plaintiff's opposition, solely by a psychiatrist, sufficiently establishes the existence of factual issues as to this doctor's alleged malpractice. I find that it does.

First of all, in recalling the relevant history, this doctor points to Maria's testimony that at least on two occasions she spoke to Dr. Kovachevich and told him not to prescribe any more medication to Cooper as he would be provided a psychiatrist by the hospital. Dr. Kovachevich says these conversations did not occur. Further, plaintiff's expert notes that Dr. Kovachevich made no effort to speak to any of Cooper's doctors at Payne Whitney and thereby did not attempt to determine the severity of his condition.

In fact, this expert, despite his not being a psychiatrist, still had an obligation to examine his patient so as to better understand why he was considering suicide before

simply giving him medication for anxiety and insomnia. Also, despite giving Cooper the name of a psychiatrist, he was required to actually refer him to a specialist as Dr. Kovachevich was not equipped by knowledge, training or experience to properly diagnose and treat this patient (¶70). And it was particularly egregious and a departure not to reach out to Maria, particularly afer her warning to him, which he denies, and after it was clear that Cooper's desperation revolved around their marital discord. (¶74).

Pursuant to these opinions, I find that a fact finder is needed to, in the first instance, decide if Maria contacted Dr. Kovachevich and informed him of Cooper's hospital status. If she did, then a jury could find that the defendant departed from accepted standards of medical care in not inquiring further about his patient.

Also, while it is true that Dr. Kovachevich was relying on what he was being told by Cooper, he was also prescribing serious medications for him. Thus, a jury should also decide whether under the circumstances, this doctor should have simply taken Cooper's word about receiving therapy in light of his feelings that it was critical for his care to do that. Dr. Kovachevich may have felt an obligation to help his patient, but in light of his belief that Cooper really needed therapy by someone trained to provide it, which he was not in fact receiving and which Dr. Kovachevich was not himself trained to provide, and in light of his belief that the two professionals had to work together with a unified treatment plan, a jury should decide whether it was a departure to continue psychotropic medication without actually being in contact with such a professional trained to provide therapy. Finally, the Lexapro, which Dr. Kovachevich prescribed as late as May 18, two days before the suicide, was one of the drugs that did kill Cooper. That fact goes to causation.

While it is true that a psychiatrist may not be held liable for a mere error in professional judgment, he can be held liable where a treatment decision was based on something less than a professional medical determination. *Thomas v. Brady*, 86 AD3d 602, 604 (Second Dep't 2011). This is defined as one which is not the product of a careful examination. Here, similar to the plaintiff's expert in *Thomas*, there is an assertion that there was an incomplete and superficial assessment of the decedent's mental condition before his discharge from Payne Whitney.

As to Dr. Kovachevich, when he takes it upon himself to prescribe serious, psychotropic drugs, which he must know can be abused, and when he does this to relieve symptoms and actions in his patient that include attempts at suicide, an issue arises whether such prescriptions constitute sound professional judgment.

Accordingly, it is hereby

ORDERED that the motion for summary judgment (sequence 005) by defendants David Klahr, M.D., sh/a Dr. Aryeh Klahr and The New York Presbyterian Hospital s/h/a The Payne Whitney Clinic, New York Presbyterian Hospital is denied; and it is further

ORDERED that the motion for summary judgment (sequence 006) by defendant Dr. Thomas Kovachevich is denied; and it is further

ORDERED that counsel shall appear for a pre-trial conference on Wednesday, April 10, 2013 at 9:30 a.m. prepared to discuss settlement and select a firm trial date.

Dated: March 12, 2013

ALICE SCHLESINGER J.S.C.