

Dunn v Khan

2007 NY Slip Op 33311(U)

September 28, 2007

Supreme Court, Nassau County

Docket Number: 6494-05/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

**MITCHELL DUNN, as Administrator of the Estate of
PAULINE DUNN, Deceased,**

Plaintiff,

-against-

**AIJAZ KHAN, M.D., CESAR DUMAYAS FLORITA,
M.D., ETHEL CWIBEKER, PSY.D., and SOUTH
NASSAU COMMUNITIES HOSPITAL,**

Defendants.

_____ X

Index No. 006494/05

**Motion Dated: 6/01/07
7/02/07**

Motion Submitted: 7/09/07

Motion Sequence: 003, 004, 005

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XXX
Answering Papers.....	XX
Reply.....	XX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	X

Motions by defendants, Aijaz Khan, M.D. [Sequence #3], Ethel Cwibeker, Psy.D. [Sequence #4], and motion by defendants, Cesar Dumaya Florita, M.D. and South Nassau Communities Hospital (hereinafter "SNCH") [Sequence #5], all pursuant to CPLR § 3212, for an Order awarding them summary judgment and dismissing the complaint of plaintiff, Mitchell Dunn, as Administrator of the Estate of Pauline Dunn, are determined as follows:

This case arises out of the death of Pauline Dunn on August 25, 2003. Plaintiff, Administrator, Mitchell Dunn, husband of Pauline, brings this action for medical and psychiatric malpractice against a hospital (SNCH), an internist (Dr. Khan), a psychiatrist (Dr. Florita), and a psychologist (Dr. Cwibker).

The medical and psychiatric history of Pauline Dunn, a 51 year old married woman at the time of her death, is as follows. Pauline Dunn gave birth to triplet daughters in 1982. After the birth of her daughters, she experienced post partum depression and was, for a brief period of time, hospitalized in the psychiatric ward of the hospital where she gave birth (*Mitchell Dunn EBT*, pp. 28, 31). Thereafter, following the September 11, 2001 terrorist attacks, Pauline Dunn suffered from severe anxiety. A non-party physician prescribed Xanax (*Id.*, p. 68).

On or about August 12, 2003, her daughter Nicole attempted suicide by taking "pills" after her friends' drowning deaths (*Id.*, pp. 91-105). Mitchell Dunn testified at his deposition that Pauline also was depressed as a result of the children's death and their daughter's suicide attempt. On August 15, 2003, Nicole sought psychological care with Dr. Ethel Cwibeker. She was accompanied by her parents, Pauline and Mitchell Dunn, to the appointment.

Five days after her daughter's suicide attempt, on August 17, 2003, Pauline drove herself to the Emergency Room (hereinafter "ER") at New York University Hospital. Upon learning where she had gone, Mitchell went there to meet her. In the ER, Pauline confessed that she had had an extramarital affair about 2 months earlier and that she was afraid she had contracted a sexually transmitted disease (*Id.*, pp. 107-110).

Mitchell Dunn testified that after returning home from the hospital that night, he and Pauline had an argument concerning her affair and discussed divorce. Ultimately, they decided to hold off on making any decisions until their daughters left for college later that month (*Id.*, p. 119).

On Tuesday, August 19, 2003, at approximately 5:00 A.M., Mitchell Dunn found Pauline lying on the bed in a spare bedroom. She was unresponsive and he called 911. Pauline was brought into the ER at SNCH with a suspected drug overdose. Dr. Khan, as an attending on call, became her attending internist for admission to SNCH. His admitting diagnosis was "Xanax Overdose." She was admitted to the intensive care unit with "impression of drug overdose and respiratory failure." As a result, she was intubated upon her arrival. The same day, on August 19, Mitchell Dunn, contacted his daughter, Nicole's psychologist, Dr. Cwibeker "to speak with [her] concerning his relationship with Mrs. Dunn" (*Cwibeker Affidavit*, ¶7). Dr. Cwibeker made an appointment to see him on the following day.

The next morning, Pauline Dunn was extubated. Jackie Rosen, a registered nurse, testified that it was difficult to provide emotional support to her because she was not talking much that day (*Rosen Tr.*, pp. 79-80). On August 20, and again on August 21, Mitchell met with Dr. Cwibeker and sought counseling concerning his marriage and Pauline's infidelity (*Cwibeker Affidavit*, ¶9).

On August 21, Dr. Khan obtained a psychiatric consultation for Pauline from Dr. Florita, who, like Dr. Khan, practiced at SNCH (*Florita Answer*, ¶3). Dr. Florita, upon examining Pauline at her bedside noted that she was alert and oriented and was not suicidal or delusional. Pauline identified her betrayal of her husband by having an affair, her daughter's problem and the recent loss of family friends as stressors. She also expressed concern regarding her medical condition. Pauline expressed a willingness to work with her husband in therapy and indicated she wanted her children to do well (*Florita Affirmation*, ¶7).

Dr. Florita's diagnosis was that Pauline was "suffering from a major depressive disorder and that she was status post an overdose attempt" (*Id.*, ¶8). As a result, Dr. Florita started Pauline on Lexapro and Buspar. Lexapro is a medication indicated for the treatment of major depressive disorders and Buspar is a medication indicated for the treatment of anxiety (*Id.*, ¶13).

Dr. Florita's treatment plan for Pauline also included seeing her husband, Mitchell Dunn. During a 30 to 45 minute conversation with Mitchell Dunn on August 21, Dr. Florita asked him questions regarding collateral history of signs and symptoms, the presence of stressors, the patient's support system and motivation for follow up care, as well as his involvement in his wife's care. Dr. Florita claims that upon speaking to Mitchell, he learned that Pauline "had been seen by a doctor in the city regarding the affair that contributed to the marital stress; that [Pauline] had written a letter to her family expressing remorse for her actions; that [Mitchell] had asked a therapist he was seeing to become involved in her care, co-defendant Ethel Cwibeker, Psy.D" (*Florita Affirmation*, ¶10).

Pauline Dunn was next seen by Dr. Florita on August 22, 2003. Dr. Florita notes:

At that time the patient did not demonstrate any untoward side effects to the psychiatric medications previously begun. Further discussions with Pauline Dunn and Mitchell Dunn with regard to Pauline Dunn attending outpatient psychiatric care took place at that time. The plan was for Pauline Dunn to be seen on an outpatient basis at [SNCH] psychiatric facility located in Baldwin, New York. Both Pauline Dunn and

Mitchell Dunn expressed a willingness for Pauline Dunn to undergo said outpatient psychiatric treatment (*Florita Affirmation*, ¶15).

Pauline Dunn's admission continued to August 23, 2003. According to the SNCH discharge report, Dr. Khan notes:

"[o]n 08/20/2003, the patient was feeling better. She was ambulating. She was not on close observation. She was eating well. She admitted that she was nonsuicidal and she explained to [Dr. Khan] that it was time for healing then. [She] was cleared by psych for discharge."

Dr. Khan also reports,

"[o]n 08/23/2003, the patient was discharged back home with her husband. She will have a follow-up appointment in my office on Tuesday and she will have a follow-up appointment with Dr. Florita if she prefers. The patient will also have counseling by their own psychologist, who was brought in by the family" (*Plaintiff's Aff. In Opp.*, Ex. A).

Acting on Dr. Florita's recommendation, Dr. Khan discharged Pauline Dunn. The next day, August 24, Mitchell and Pauline Dunn met with Dr. Cwibeker for an initial interview whereupon Dr. Cwibeker explained the marital counseling process and asked for copies of Pauline's discharge papers from SNCH in order to determine how best to proceed with the marital counseling. They both scheduled another appointment to see Dr. Cwibeker on August 25, 2003 at 1:00 pm.

On the morning of August 25, 2003, at 9:00 A.M., Mitchell contacted Dr. Cwibeker insisting on seeing her immediately. Mitchell arrived at her office at around 9:30 A.M. at which time he told her that contrary to her advice, he had continually harassed Pauline about her infidelity the preceding night and that she was at home resting when he left her that morning. Mitchell Dunn testified that Pauline had advised him that earlier that morning she had taken several Fiorcet tablets for a migraine headache. The active ingredients in Fiorcet are 50 milligrams Butalbital, 325 milligrams Acetaminophen and 40 milligrams Caffeine.

When Mitchell Dunn returned home that morning, he found Pauline Dunn submerged in the bathtub. The bathroom door had been locked. Pauline was still wearing her underwear, though submerged in the tub. Mitchell pulled her out of the tub and forced water out of her mouth and chest. He then called the police. Pauline was taken back to SNCH where she was pronounced dead. A toxicology report revealed that she had 2.63 mg/L of Butalbital and 25.7 milligrams Acetaminophen in her Femoral Blood. (*Plaintiff's Aff in Opp*, Ex.G). The

Medical Examiner never determined drug overdose to be the cause of death. In fact, no cause of death was ever stated by the medical examiner. The Dunn family, on religious grounds, refused to have an autopsy done on Pauline.

During the investigation into Pauline Dunn's death, the Police Department found an undated note written by her in which she wrote that she had done "something shameful" in June and that she was "running away." She also wrote that she was deserting her family (*Aff in Opp*, Ex. G). With respect to this note, Mitchell Dunn testified that his wife had personally handed him a note on the night before she overdosed on Xanax. He stated:

Q: As you were going to bed [on August 18, 2003] she handed you a note. What did the note say?

A: It said – I didn't read it so much other than she said something about running away. Once again in her life she has to run, something like that.
(*Aff in Opp*, Ex. B, p. 168).

Mitchell testified that he read the note in his wife's presence and without even finishing reading it, he put it in his pocket (*Id.*, pp. 169-170).

In bringing this malpractice action, plaintiff alleges that Dr. Khan departed from accepted medical practice in discharging the decedent from SNCH on August 23, 2003 because the discharge deprived the decedent of an opportunity to avoid suicide on August 25, 2003.

Plaintiff alleges that Dr. Florita and the hospital also negligently and carelessly departed from good and accepted standards of medical practice and procedures by, *inter alia*, negligently treating major depression and negligently discharging Pauline prematurely from SNCH and failing to provide a complete careful examination of Pauline Dunn, the circumstances of her overdose and surrounding circumstances of her underlying mental illness. Plaintiff claims that as a result of the allegations against Dr. Florita and SNCH, Pauline Dunn "suffered from unfettered progression of major depression leading to the commission of suicide by overdosing/overmedicating in a bathtub, drowning, and suffering a cardiopulmonary arrest" (*Florita Motion*, ¶11).

Plaintiff alleges that Dr. Cwibeker also negligently and carelessly departed from good and accepted standards of medicine and psychology in that, *inter alia*, she failed to recognize and appreciate the signs and symptoms of plaintiff's condition and negligently discharged the plaintiffs' decedent from a health care facility.

Dr. Cwibeker's Motion

In moving for summary judgment dismissal of plaintiff's complaint, Dr. Cwibeker argues that plaintiff's claims as against her must fail on the grounds that, *inter alia*, Mrs. Dunn was never her patient. Plaintiff does not oppose Dr. Cwibeker's motion. Nevertheless, this Court is not relieved of its obligation to ensure that the movant has demonstrated her entitlement to the relief requested. (See, *Zecca v. Riccardelli*, 293 A.D.2d 31, 742 N.Y.S.2d 76 [2d Dept., 2002]).

A cause of action to recover damages for medical malpractice must be founded upon the existence of a physician-patient relationship (*Forrester v. Zwanger-Pesiri Radiology Group*, 274 A.D.2d 374, 710 N.Y.S.2d 620 [2d Dept., 2000]; *Delacy v. University Radiology Assoc.*, 254 A.D.2d 450, 679 N.Y.S.2d 151 [2d Dept., 1998]). Here, there is no question that the defendant, Dr. Cwibeker, was the decedent's daughter, Nicole's, therapist and the plaintiff, Mitchell Dunn's therapist. To the extent that Dr. Cwibeker met with Mrs. Dunn on August 24, 2003 for an initial interview where she explained the marital counseling process and asked for copies of her discharge papers in order to determine how best to proceed in the marital counseling, this Court finds that defendant has submitted ample proof in admissible form which establishes that no doctor-patient relationship was formed between the plaintiff's decedent and defendant, Dr. Cwibeker. (*Heller v. Peekskill Community Hosp.*, 198 A.D.2d 265, 603 N.Y.S.2d 548 (2d Dept., 1993); *see also Koltz v. Bezmen*, 822 F. Supp. 114 [E.D.N.Y., 1993]). There is also no evidence on this record that defendant, Dr. Cwibeker, had ever agreed to undertake plaintiff's decedent's care or had treated or advised the plaintiff's decedent. (*Heraud v. Weissman*, 276 A.D.2d 376, 714 N.Y.S.2d 476 (1st Dept., 2000); *Murphy v. Blum*, 160 A.D.2d 914, 554 N.Y.S.2d 640 [2d Dept., 1990]). Here, the decedent, Pauline Dunn, participated in her husband, Mitchell Dunn's care and treatment with Dr. Cwibeker; however, there is no evidence that treatment or care of the wife, alone, was contemplated. (*Cohen v. Cabrini Med. Ctr.*, 94 N.Y.2d 639, 730 N.E.2d 949, 709 N.Y.S.2d 151 [2000]).

Having carried her initial burden of entitlement to judgment as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact. (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). In the absence of any opposing papers presented by the plaintiff, summary judgment is herewith granted to defendant, Dr. Cwibeker (*Banasik v. Reed Prentice Div. of Package Mach. Co.*, 34 A.D.2d 746, 310 N.Y.S.2d 127 (1st Dept., 1970), *affd.* 28 N.Y.2d 770, 269 N.E.2d 918, 321 N.Y.S.2d 376 [1971]).

Dr. Khan's Motion

In moving for summary judgment dismissal of plaintiff's complaint, Dr. Khan argues that he sought appropriate consultations from a psychiatrist, and appropriately relied on the psychiatrist's opinion that Ms. Dunn was ready to be discharged from a psychiatric standpoint. Dr. Khan submits the expert affidavit of Dr. Richard Blum, M.D., who confirms the foregoing and also opines that Dr. Khan appropriately determined that the decedent was medically stable and suitable for discharge from an internal medicine standpoint.

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (*DiMitri v. Monsouri*, 302 A.D.2d 420, 421, 754 N.Y.S.2d 674 (2d Dept., 2003); *Feinberg v. Feit*, 23 A.D.3d 517, 518-519, 806 N.Y.S.2d 661 (2d Dept., 2005); *Holbrook v. United Hosp. Med. Ctr.*, 248 A.D.2d 358, 359, 669 N.Y.S.2d 631 [2d Dept., 1998]). Thus, "on a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Chance v. Felder*, 33 A.D.3d 645, 823 N.Y.S.2d 172 (2d Dept., 2006) (internal quotation marks and citation omitted); *Hernandez-Vega v. Zwanger-Pesiri Radiology Group*, 39 A.D.3d 710, 833 N.Y.S.2d 627 [2d Dept., 2007]). "Once the defendant has made a prima facie showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (*Chance v. Felder, supra* at 645-646; *Hernandez-Vega v. Zwanger-Pesiri Radiology Group, supra*; *Micciola v. Sacchi*, 36 A.D.3d 869, 871, 828 N.Y.S.2d 572 [2d Dept., 2007]).

Inasmuch as defendant, Dr. Khan's expert, Dr. Richard Blum's affirmation "addresses the facts as contained in the medical record" (*Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561, 582 N.Y.S.2d 712 [1st Dept., 1992]) and responds to plaintiff's claims in the bill of particulars, Blum's expert affirmation is competent evidence that defendant, Dr. Khan, did not depart from good and accepted medical practice when he relied upon and deferred to the directions given to him by plaintiff's psychiatrist, Dr. Florita with respect to the whether she was ready to be discharged from a psychiatric standpoint. Moreover, the medical function undertaken by defendant Khan was that of an internist and not plaintiff's psychiatric care and thus Dr. Khan's duty of care did not extend to the treatment rendered to plaintiff by her psychiatrist. (*Boone v. North Shore Univ. Hosp. at Forest Hills*, 12 A.D.3d 338, 784 N.Y.S.2d 151 [2d Dept., 2004]; *Wasserman v. Staten Is. Radiological Assoc.*, 2 A.D.3d 713, 770 N.Y.S.2d 108 [2d Dept., 2003]).

Dr. Blum's expert affirmation stating that it was normal procedure for an on-call ER attending to call for a psychiatric consult, i.e., an area outside of his expertise, constitutes competent evidence concerning routine professional practice. (*Gier v. CGF Health Sys.*, 307 A.D.2d 729, 762 N.Y.S.2d 472 (4th Dept., 2003); *Soltis v. State of New York*, 188 A.D.2d 201, 203-205, 594 N.Y.S.2d 433 (3rd Dept., 1993); see generally *Halloran v. Virginia Chems.*, 41 N.Y.2d 386, 361 N.E.2d 991, 393 N.Y.S.2d 341 (1977); *Greenberg v. New York City Tr. Auth.*, 290 A.D.2d 412, 413, 736 N.Y.S.2d 73 [2d Dept., 2002]).

Dr. Blum further states that "[i]t would have been inappropriate and inconsistent with the standards of care to keep Ms. Dunn in [SNCH] for non urgent gynecological complaints" (*Khan Motion*, Ex. A, ¶9). Dr. Blum opines that "the fact that [Pauline Dunn's] results [of her HIV testing] were pending did not require the decedent's discharge to be delayed" (*Id.*). Finally, Dr. Blum states that "[t]he ultimate injury alleged to have resulted from the [sic] Dr. Khan's treatment was the decedent's alleged death by suicide...It is [] my opinion, however that the decedent did not commit suicide by drug overdose" (*Blum Affirmation*, ¶12).

Based upon defendant's deposition testimony coupled with Dr. Blum's Affirmation, defendant Dr. Khan has demonstrated his *prima facie* entitlement to judgment as a matter of law thereby shifting the burden to the plaintiff to submit competent evidence showing a departure from accepted medical practice and a nexus between the alleged medical malpractice and plaintiff's injury. (*Alvarez v. Prospect Hosp.*, *supra* at 324; *Domaradzki v. Glen Cove Ob/Gyn Assoc.*, 242 A.D.2d 282, 660 N.Y.S.2d 739 [2d Dept., 1997]).

In opposition to defendant Dr. Khan's application, plaintiff submits three expert affirmations: one from a psychiatrist, one from an internist and one from a forensic pathologist. The negligence claimed against Dr. Khan as set forth in the psychiatric and internist expert affirmations are that he failed to communicate appropriate information to Dr. Florita, which contributed to an incomplete evaluation of Mrs. Dunn and that Dr. Khan failed to keep the decedent in the hospital for further psychiatric treatment and evaluation because he should have known that she did not receive any meaningful psychiatric medications or therapy and counseling in the hospital.

Here, the record is clear however that Dr. Florita was well aware of Pauline's medical concerns. Dr. Florita acknowledged at his deposition that he was advised by Dr. Khan of the decedent's HIV testing, and considered it in connection with his clinical evaluation (*Florita EBT*, pp. 161-164). Moreover, Dr. Florita testified that he took a full mental status examination of the patient including history, complaints, history of present illness, past psychiatric history, past medical history, family history, personal and social history, and mental status evaluation (*Id.*, p. 8). Thus, the failure to communicate information that was

already known by Dr. Florita could not possibly have affected his decision to clear the patient for discharge.

Plaintiff's psychiatric and internist experts also claim that despite Dr. Florita's psychiatric clearance for discharge, Dr. Khan should have kept the decedent in SNCH for further psychiatric treatment and evaluation. Such conclusory opinions are insufficient to raise a triable issue of fact concerning proximate cause. (*Dellacona v. Dorf*, 5 A.D.3d 625, 774 N.Y.S.2d 776 (2d Dept., 2004); *Kaplan v. Hamilton Med. Assoc.*, 262 A.D.2d 609, 610, 692 N.Y.S.2d 674 (2d Dept., 1999); *Yasin v. Manhattan Eye, Ear & Throat Hosp.*, 254 A.D.2d 281, 283, 678 N.Y.S.2d 112 [2d Dept., 1998]). Plaintiff's expert fails to identify the content of Dr. Florita's considered opinions that should have alerted Dr. Khan to their unreliability. Further, plaintiffs' experts do not discuss what Dr. Khan could have hoped to have achieved after the consulting psychiatrist had already determined that the decedent was not in need of in patient psychiatric treatment.

While it is true that when medical experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution (*Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d Dept., 2003); *Halkias v. Otolaryngology-Facial Plastic Surgery Assoc.*, 282 A.D.2d 650, 724 N.Y.S.2d 432 [2d Dept., 2001]), it is equally true that where the opinions of the plaintiffs' expert are based upon allegations of medical malpractice that are merely conclusory in nature and unsupported by competent evidence, such expert affirmations are insufficient to defeat defendant physician's entitlement to summary judgment. (*Alvarez v. Prospect Hosp.*, *supra*; *Toledo v. Ordway*, 208 A.D.2d 518, 616 N.Y.S.2d 1006 [2d Dept., 1994]).

Finally, plaintiffs' forensic pathologist expert states that plaintiff's decedent's death was a suicide because:

The most telling evidence of [Pauline's] intention to take her own life is suicide note, in which she wrote that she had done something "shameful" and that she was "running away." Furthermore, less than a week earlier, she had attempted to take her own life by ingesting a large enough quantity of Xanax pills to induce respiratory distress requiring intubation and intensive medical care.

Plaintiff's expert pathologist fails to offer any evidence or foundation that this note is not the same note that the plaintiff, Mitchell Dunn, received personally from his wife on August 18, 2003. In his reply papers, defendant, Dr. Khan submits a "Nassau County Telephone Notice of Death" Form, which states, in pertinent part, that the Police Department,

in investigating the plaintiff's home on the morning of August 25, 2003 "found a note *in the bedroom* in which she expressed sorrow for what she had done" (*Dr. Khan's reply Aff.*, Ex I [Emphasis Added]). That note alone fails to support the plaintiff's assertion that the plaintiff's decedent committed suicide.

Plaintiff's forensic pathologist expert further states:

"[l]ess than a week earlier, she had attempted to take her own life by ingesting a large enough quantity of Xanax pills to induce respiratory distress requiring intubation and intensive medical care. Finally, the fact that she was still wearing some clothing in the bathtub shows that her intention was not to take a bath. As for the pills she ingested, the level of Butalbital in her system exceeded the therapeutic dose and was high enough to render her unconscious. Also, it would have produced a level of unconsciousness deep enough that her protective reflexes, such as her gag reflex and her natural choking reflex, would not have awoken her as her lungs filled with water" (*Plaintiff's Aff. In Opp.*, Ex. J, ¶7).

Even assuming *arguendo* the truth of plaintiff's expert's opinion that Pauline in fact committed suicide, there is no evidence on this record that Dr. Khan departed from the standards of good and acceptable medical practice. Significantly, there is no allegation that Dr. Khan departed from those standards of care applicable to an internist. Dr. Khan is not subject to liability for any alleged failure to exercise the degree of skill and care expected of a specialist in psychiatry. (*Toth v. Community Hosp. at Glen Cove*, 22 N.Y.2d 255, 239 N.E.2d 368, 292 N.Y.S.2d 440 (1968), *Bernard v. Block*, 176 A.D.2d 843, 846, 575 N.Y.S.2d 506 [2d Dept., 1991]).

Accordingly, defendant Dr. Khan's motion for summary judgment is granted.

Dr. Florita and SNCH's Motion

Dr. Florita and SNCH ground their motion for summary judgment dismissal of plaintiff's complaint arguing that the appropriate standard concerning the care and treatment of psychiatric patients and more particularly, Pauline Dunn, was met in this case and that consistent with the controlling case law regarding this issue, plaintiff is not entitled to recover against these defendants as a matter of law. Defendants further submit that there is no actual proof that Pauline Dunn's death was the result of suicide or a drug overdose. There was no autopsy of Pauline Dunn undertaken, at the request of her family, so there is simply

no way, without the usual and specific customary investigation to rule out other possible causes of death.

“It is a well-established principle of medical jurisprudence that no liability obtains for an erroneous professional medical judgment”. (*Bell v. New York City Health & Hosps. Corp.*, 90 A.D.2d 270, 279, 456 N.Y.S.2d 787 (2d Dept., 1982); *see also Schrempf v. State of New York*, 66 N.Y.2d 289, 296-297, 487 N.E.2d 883, 496 N.Y.S.2d 973 [1985]). This rule is applicable to psychiatry (*Id.*). Therefore “[f]or liability to ensue, it must be shown that the decision to release a psychiatric patient was ‘something less than a professional medical determination’”. (*Id.* at 282; *see also McDonnell v. County of Nassau*, 129 Misc.2d 228, 492 N.Y.S.2d 699 (Sup.Ct., Nassau Co., 1985), *aff’d*, 140 A.D.2d 500, 528 N.Y.S.2d 352 (2d Dept., 1988) *lv. denied* 72 N.Y.2d 807 (Table), 529 N.E.2d 424, 533 N.Y.S.2d 56 [1988]). Evidence of a difference of opinion among experts does not provide an adequate basis for a *prima facie* case of malpractice (*Centeno v. City of New York*, 48 A.D.2d 812, 813, 369 N.Y.S.2d 710 [1st Dept., 1975] *aff’d*. 40 N.Y.2d 932, 358 N.E.2d 520, 389 N.Y.S.2d 837 (1976); *Wilson v. State of New York*, 112 A.D.2d 366, 367, 491 N.Y.S.2d 818 [2d Dept., 1985]).

Here, defendants contend that the discharge of the plaintiff’s decedent from SNCH on August 23, 2003 was a matter of professional judgment, and that they cannot be held liable in malpractice for the patient’s subsequent death allegedly by suicide two days later. (*Mohan v. Westchester County Med. Ctr.*, 145 A.D.2d 474, 535 N.Y.S.2d 431 [2d Dept., 1988]).

In support of their motion for summary judgment, defendants provide the affirmation of Dr. Florita and the affirmation of Dr. Steven Fayer, defendants’ expert witness, as well as copies of the medical and hospital records, EBT transcripts, Medical Examiner’s report and copies of the pleadings and Bill of Particulars. Dr. Fayer, upon review of all of the records formed and expressed his opinion that there was no departure from good and accepted medical and psychiatric practice on the part of Dr. Florita and SNCH in the treatment of Pauline Dunn. He pointed out twenty-nine factors that influenced and formed the basis for his opinion that Dr. Florita reviewed the patient’s chart, took an appropriate history and that a thorough and appropriate psychiatric evaluation, assessment and plan was arrived at by Dr. Florita and that the hospital records, including observations by nurses and other individuals did not give any evidence to suggest suicidal ideation or behavior. Dr. Fayer found that Dr. Florita’s evaluation of the patient and then a consultation with her husband resulted in appropriate medical treatment consisting of indicated and appropriate dosages of Lexapro for the treatment of major depressive disorder and anxiety disorder and Buspar for anxiety.

The need for outpatient therapy was discussed and the patient was referred to an

outpatient psychiatric facility for follow up care. The patient and her husband agreed to go for marriage counseling and in fact, Dr. Florita met with the marriage counselor and discussed the ongoing care of the patient, prior to her discharge and his final consultation with the patient.

Dr. Fayer specifically refuted the anticipated opinion as set forth in plaintiff's CPLR § 3101(d) response of plaintiff's expert, a forensic pathologist, that the level of medication in Pauline's bloodstream was sufficient to cause her to lose consciousness and drown and that her level of consciousness would have been such that her inhaling of water would have continued without her arousing to a point at which she would have been able to stop herself from drowning and that her death was the result of a suicidal act. The plaintiff's expert's conclusory opinion was contradicted by the Medical Examiner, who did not declare the death a suicide or drug overdose, but rather "Undetermined" after toxicology reports, and is based on pure speculation. Furthermore, plaintiff's expert did not address Dr. Fayer's findings. Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion (*Shaw v. Time-Life Records*, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975)).

Dr. Fayer concurred with Dr. Blum's opinion that the findings on the toxicology report are consistent with the ingestion of 2 tablets of Fiorcet but in no event more than 4 tablets and that the amount was not sufficient to induce unconsciousness, nor is ingestion of pills in this amount consistent with an attempt to commit suicide by drug overdose. He concurs that the decedent's death was most likely accidental, if not the product of an intentional act of a third-party, which would be consistent with the findings of the Medical Examiner. Pursuant to CPLR § 4520, the death certificate and Medical Examiner's report is properly accepted as proof of causation.

In light of defendants' showing of entitlement to judgment as a matter of law, the burden shifts to plaintiffs as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial. (*Alvarez v. Prospect Hosp., supra*).

In opposing defendants' application for summary judgment, plaintiff principally relies on the opinions of two of the same experts as those offered in opposition to defendant, Dr. Khan's motion: namely, a forensic pathologist and a psychiatrist.

Plaintiff's psychiatric expert also opines that "[Dr.] Florita departed from good and accepted medical standards by discharging Mrs. Dunn without [her] [sic] having received any meaningful medical therapy or counseling and that his decision to discharge Mrs. Dunn under those circumstances was NOT based upon a full and proper examination or understanding of her condition" (*Aff in Opp*, Ex. I, ¶20 [Emphasis in Original]). He did not reveal in what aspect

the examination was deficient but merely expressed his opinion that more meetings were necessary to determine her condition, without reference to the other indications in the chart reflecting the notes of the nurses and others who found the patient improved and future oriented, not suicidal, remorseful and intending to heal. Plaintiff's expert also states that the medication had not yet had an opportunity to be beneficial, but does not opine on the fact that the prescriptions were not filled upon discharge. The conclusory opinion of the plaintiff's expert is simply not supported by the record.

Plaintiff's psychiatric expert opines that "[r]ather than addressing her guilt [over her affair] Florita recommended that she return home to the same situation that had produced a serious suicide attempt just days before without first receiving any meaningful psychiatric intervention. Under these circumstances, the standard of care required Florita to keep her in the hospital for a sufficient amount of time to identify and treat the psychiatric problems that made her try to kill herself" (*Aff in Opp*, Ex. I, ¶19). The record, however, reflects that Dr. Florita was aware of the patient's gynecological concerns, discussed the patient's infidelity with her and actually met with the marriage counselor, brought to the hospital by the plaintiff. A mere difference of opinion among experts does not provide an adequate basis for a *prima facie* case of malpractice (*Centeno v. City of New York, supra*), and this Court finds that plaintiff's expert has failed to raise a question of fact as to whether Dr. Florita's decision to discharge Pauline was something less than a professional medical determination (*Bell v. NYC Health & Hosps., supra*).

A physician's duty is to provide the level of care acceptable in the professional community in which he practices. He is not required to achieve success in every case and cannot be held liable for mere errors of professional judgment (*Rivera v. New York City Health & Hosps. Corp.*, 191 F.Supp.2d 412 (S.D. N.Y., 2002) *citing Schrempf v. State, supra*), nor are psychiatrists required to be omniscient when making a diagnosis. Where a treatment decision is based upon a careful examination, an expert's opinion that an alternative treatment should have been followed is insufficient to establish a *prima facie* case of malpractice. (*Fotinas v. Westchester County Med. Ctr.*, 300 A.D.2d 437, 752 N.Y.S.2d 90 (2d Dept., 2002); *Durney v. Terk*, 42 A.D.3d 335, 840 N.Y.S.2d 30 [1st Dept., 2007]). Prediction of the future course of a mental illness is a professional judgment of high responsibility and in some instances it involves a measure of calculated risk. (*Bell v. New York City Health & Hosps. Corp., supra*). The mere fact that plaintiff's expert would have opted for a different treatment represents at most a difference of opinion, which is not sufficient to sustain a *prima facie* case of malpractice. (*Davis v. Patel* 287 A.D.2d 479, 731 N.Y.S.2d 479 (2d Dept., 2001); *Weinreb v. Rice*, 266 AD2d 454, 698 N.Y.S.2d 862 [2d Dept., 1999]). The affidavits of plaintiff's experts are conclusory in nature and unsupported by competent evidence tending to establish the essential elements of medical malpractice and thus plaintiff has failed to rebut defendants' *prima facie* entitlement to summary judgment. (*Grzelecki v. Sipperly*, 2 A.D.3d 939, 768

N.Y.S.2d 47 (3d Dept., 2003); *Bickford v. St. Francis Hosp.*, 19 A.D.3d 344, 796 N.Y.S.2d 149 [2d Dept., 2005]).

Plaintiff's expert pathologist relies on the "suicide note" in forming his opinion that the decedent committed suicide but fails to offer any evidence or foundation that the note Pauline left behind and the police later discovered as part of their investigation, is not the same note that plaintiff, Mitchell Dunn, received personally from his wife on August 18. The expert does not address plaintiff's testimony and the Medical Examiner's report that indicate it is the same note. Thus, based solely on the single note, there is no evidence that Pauline committed suicide on August 25, 2003. Again, the cause of death has been found to be "Undetermined" by the Medical Examiner. The pathologist's opinion was based on impermissible speculation that the August 19th overdose was a suicide attempt, which buttressed his conclusion that the August 25th incident was also a suicide attempt. (See *Romano v. Stanley*, 90 N.Y.2d 444, 684 N.E.2d 19, 661 N.Y.S.2d 589 (1997); *James v. Crystal*, 267 A.D.2d 429, 699 N.Y.S.2d 738 (2d Dept., 1999); *Gage v. Dutkewych*, 3 A.D.3d 629, 771 N.Y.S.2d 202 (3rd Dept., 2004). The pathologist failed to address the defendant's expert opinion and the finding of the Medical Examiner that the decedent had not overdosed or committed suicide on August 25, 2003, and though he speculated homicide was unlikely, he did not establish the cause of death as a suicide, nor did he rule out accident or murder. (*Sheikh v. Sinha*, 272 A.D.2d 465, 707 N.Y.S.2d 241 [2d Dept., 2000]).

Plaintiff failed to lay bare proof that the allegedly premature release of the decedent was the proximate cause of her death by suicide. In fact, Plaintiff tendered no proof that the decedent committed suicide, and in light of the record, such a finding would be pure speculation and unsupported by the evidence of this case. The plaintiff's expert opinions are conclusory in nature, unsupported by competent evidence and thus are insufficient to defeat defendant's entitlement to summary judgment. (*Alvarez v. Prospect Hosp.*, *supra*; *Fhima v. Maimonides Medical Center*, 269 A.D.2d 559, 703 N.Y.S.2d 743 [2d Dept., 2000]). Plaintiff has failed to submit competent evidence showing a departure from accepted medical practice and a nexus between the alleged medical malpractice and plaintiff's injury. (*Alvarez v. Prospect Hosp.*, *supra* at 324); *Domaradzki v. Glen Cove Ob/Gyn Assoc.*, *supra*).

Accordingly, the motion by defendants Dr. Florita and SNCH for summary judgment is granted and the complaint dismissed.

ENTERED

The foregoing constitutes the Order of this Court.

Dated: September 28, 2007
Mineola, N.Y.

OCT 15 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE
J. S. C.
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