Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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ALEXANDRA CVEJIC,
Plaintiff,

Index No.: 6381/05
Motion Date: 2/14/07
Motion Cal. No.: 24

-against-

LAWRENCE T. DAVIS,
Defendant.

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The following papers numbered 1 to 9 read on this motion by defendant, for an order granting summary judgment in his favor and dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-.....	1-4
Affirmation in Opposition Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that defendant's motion for summary judgment is denied, for the following reasons:

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v. County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v. March, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in Daliendo v. Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied.

The action herein stems from a collision between plaintiff and defendant, both experienced bicyclists, while they were riding their bicycles on the path adjacent to the Cross Island Parkway, running from Northern Boulevard to Fort Totten, on August 20, 2004. On that

day, plaintiff was riding south and defendant north. According to plaintiff the bicycle path is separated from the pedestrian path by painted lines and as she approached a curved area of the path, she saw defendant approaching from the opposite direction. Apparently, as the two bicycles got closer, their handlebars hit each other and plaintiff and defendant were knocked off their bikes. Both stated that they tried to apply their brakes to avoid the collision, but were unsuccessful. As a result of her fall, plaintiff suffered injuries and brought this action to recover damages. Defendant has now moved for summary judgment on the ground that plaintiff assumed the risk of her injury, since colliding with other bicyclists is an inherent risk of riding a bicycle on this bicycle path.

Plaintiff opposes this motion and has submitted, *inter alia*, portions of the deposition testimony of plaintiff, defendant, and Bradley Gunner, a non-party witness. Plaintiff's testimony indicates that she was riding on the right side of the path and defendant was riding on her side of the path and riding directly at her. Defendant stated that as he was approaching the area of the collision, his view was obstructed by some shrubbery. Mr. Gunner stated that from what he saw of the collision, it seemed that defendant's inability to see the path fully caused the collision.

The doctrine of assumption of risk generally applies where the plaintiff is injured while voluntarily participating in a sport or recreational activity, and the injury-causing event is a known, apparent, or reasonably-foreseeable consequence of the participation. Turcotte v Fell, 68 NY2d 432 (1986.) By engaging in a sport or recreational activity, the participant "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation". Morgan v State of New York, 90 NY2d 471 (1997.) For the assumption of risk doctrine to apply, it is not necessary that the injured plaintiff foresee the exact manner in which his or her injury occurred, "so long as he or she is aware of the potential for injury of the mechanism from which the injury results" Maddox v City of New York, 66 NY2d 270 (1985.)

Contrary to the defendant's contention, this Court cannot say, as a matter of law, that encountering a bicycle riding in the opposite direction on the wrong side of the path is a reasonably foreseeable or inherent danger associated with bicycle riding. There are issues of fact as to whether the defendant negligently rode his bicycle into the path of plaintiff's bicycle and as such, was a danger over and above the usual dangers associated with bicycle riding on a public bicycle path. *See*, Sauray v. City of New York, 261 A.D.2d 601 (2d Dept 1999.) *(* The plaintiff's

decision to ride her bicycle on the trail through the woods was a factor relevant in the assessment of culpable conduct, not a basis to bar the action based on the doctrine of assumption of risk.) *Compare*, DeJesus v. City of New York, (1st Dept 2006.) (Action barred based on the doctrine of assumption of risk where, the 14-year-old plaintiff, an experienced cyclist, should have realized that certain risks, including having to swerve to avoid a pedestrian or that his tire might come in contact with the abutting curb, causing him to fall, were inherent in riding a bike on a pedestrian-only cement walkway.) Accordingly, defendant's motion for summary judgment is denied

Dated: February 20, 2007 **.....**

ORIN R. KITZES, J.S.C.