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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

MICHAEL D'AMBROSIO, Plaintiff,	TRIAL / IAS PART 32 NASSAU COUNTY
- against -	Index No. 8911/05
INCORPORATED VILLAGE OF FREEPORT and TERA BAKER, Defendants.	Motion Sequence No. 002 & 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2
Answering Affidavits 3
Replying Affidavits 4
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defendant Incorporated Village of Freeport moves, in Motion Sequence 2, for an order pursuant to CPLR 3211 and 3212 dismissing all claims and cross claims. The defendant Tera Baker cross moves, in Motion Sequence 3, for an order pursuant to CPLR 3211 and 3212 dismissing all claims and cross claims. The plaintiff opposes both motions. The underlying personal injury action arises from a motor vehicle accident on June 19, 2004, at approximately 11:59 a.m., at the intersection of North Bergen Place and Brooklyn Avenue, Freeport, New York.

The defense attorney for the defendant Incorporated Village of Freeport states, in a supporting affirmation dated August 17, 2007, the plaintiff claims, as a result of the

occurrence to have sustained a tear in the medial meniscus of the right knee requiring arthroscopic surgery. The defense attorney for the defendant Incorporated Village of Freeport states it is alleged in the bill of particulars there was no pre-existing injury to the plaintiff's right knee prior to the accident on June 19, 2004. The defense attorney for the defendant Incorporated Village of Freeport points out the plaintiff ran a stop sign was allegedly was obscured by a tree. The defense attorney for the defendant Incorporated Village of Freeport contends there is no causal relationship between the accident and the plaintiff's alleged injury. The defense attorney for the defendant Incorporated Village of Freeport notes the plaintiff had a pre-existing degenerative condition in the right knee, supported by a clinical history, which was not caused by the accident. The defense attorney for the defendant Incorporated Village of Freeport points to a certified copy of Dr. Peter Lesniewski's medical records which state on June 16, 2004, three days before the alleged accident, the plaintiff, a professional bowler, had an appointment with Dr. Lesniewski for complaints of pain in the right knee. Dr. Lesniewski notes the plaintiff was having difficulty standing on the right knee and tenderness noted along the medial joint line, a positive McMurray signed, and a diagnosis was a probable tear of the medial meniscus of the right knee. The defense attorney for the defendant Incorporated Village of Freeport states Dr. Leon Sultan, M.D., an orthopedic and reconstructive surgeon, in an affirmation dated February 1, 2007, states his impression is:

> It is quite apparent from the pre-accident notes from Dr. Lesniewski that [the plaintiff] was already suspected of having a medial meniscal tear prior

> to the occurrence of 6/19/04 and the meniscal tear was in fact confirmed with t he MRI of 6/21 and the operative intervention of 7/12/04. It is therefore my professional opinion that one cannot state with a reasonable medical certainty that the occurrence of 6/19/04 was the initiating factor of the right medial meniscal tear.

The defense attorney for the defendant Incorporated Village of Freeport notes the operative report from the North Shore University Hospital at Syosset specifically states there is a chronic tear, and in the progress notes of Dr. Jeffrey N. Guttman it is indicated the defendant "on his way to get the MRI done he had a twisting injury to his knee and described increased pain to his knee." The defense attorney for the defendant Incorporated Village of Freeport points out Dr. Scott Coyne's report, who reviewed the right knee MRI, reveals degenerative joint changes which are certainly chronic, pre-existing and causally unrelated to any injuries two days earlier on June 19, 2004. The defense attorney for the defendant Incorporated Village of Freeport maintains Dr. Coyne's MRI examination of the right knee shows the plaintiff's prior injury to the right knee is remote and unrelated to any trauma on June 19, 2004. The defense attorney for the defendant Incorporated Village of Freeport asserts Dr. Coyne finds there is no evidence of any osseous or soft tissue abnormality causally related to the June 19, 2004 accident. The defense attorney for the defendant Incorporated Village of Freeport contends causation here is no more than mere speculation or guess work regarding the subject motor vehicle accident.

The attorney for the defendant Tera Baker, in a supporting affirmation, to the cross

motion, adopts and incorporates the facts, legal arguments, exhibits and procedural history set forth in supporting affirmation by the codefendant's counsel dated August 17, 2007, for the purposes of judicial economy and this cross motion. The attorney for the defendant Tera Baker contends the plaintiff cannot make out a prima facie case of sustaining a causally related serious injury, and the complaint should be dismissed.

The plaintiff's attorney states, in an opposing affirmation dated September 14, 2007, to the motion and cross motion, the plaintiff was unaware there was a stop sign on the right side in the direction of travel because is was not visible as obscured by an overgrown tree and the white stop line/bar was obliterated. The plaintiff's attorney states the plaintiff was caused to strike the right knee on the steering wheel column as a result of the heavy impact, and the vehicle sustained $3500.00 in damage. The plaintiff's attorney points to the deposition testimony of Robert F. Capozzoli, an Assistant Superintendent of Public Works employed by the defendant Incorporated Village of Freeport for 41 years regarding the ownership, operation, management, maintenance and control of the stop sign and the white stop line/bar at the intersection of Brooklyn Avenue and North Bergen Place, in the County of Nassau, State of New York. The plaintiff's attorney asserts that deposition testimony, New York Pattern Jury Instruction 2:80B, and the Manual on Uniform Traffic Control Devices for Streets and Highways published by the United States Department of Transportation Federal Highway Administration demonstrate the defendant Incorporated Village of Freeport was negligent, and the plaintiff's view of the

stop sign is a jury question. The plaintiff's attorney avers the defendant Tera Baker admitted in deposition testimony never seeing the plaintiff's Jeep SUV before the collision, therefore this defendant was negligent, too. The plaintiff's attorney states the plaintiff's treating surgeon, Dr. Guttman, raises questions of fact regarding causation which prevent the defendants from having the case dismissed. The plaintiff's attorney notes Dr. Guttman states:

> It is my opinion with reasonable degree of medical certainty that the injuries visualized and treated at the time of the surgery are consistent with the patient's mechanism of injury, complaints, and physical examination. The aforementioned injuries were caused by the motor vehicle accident of June 19, 2004 and the surgery performed was medically necessary.

The plaintiff's attorney also points to the plaintiff's supporting affidavit dated September 10, 2007, where the plaintiff indicates no problem with the right knee prior to the accident, and explains intending to have an MRI on the left knee prior to the accident, so Dr. Lesniewski made a mistake in the doctor's notes when mentioning which knee was addressed.

The attorney for the defendant Incorporated Village of Freeport states, in a reply affirmation dated September 17, 2007, the plaintiff argues liability issues are not now before the Court, and should not be considered by the Court. The attorney for the defendant Incorporated Village of Freeport retorts John McManus, the defense accident reconstructionist opines the plaintiff could have seen the stop sign and stopped before the impact. The attorney for the defendant Incorporated Village of Freeport states the motion

and cross motion concern only issues of causation and the damages and lack of proximate cause of the plaintiff's injuries to the subject accident. The attorney for the defendant Incorporated Village of Freeport asserts the plaintiff erroneously states he never had any problem with the right knee. The attorney for the defendant Incorporated Village of Freeport avers Dr. Lesniewski states, in a June 16, 2004 progress note, three days before the accident: "New problem, Comes in with pain in the right knee. Having difficulty standing on it. No history of injury. No interval history. Positive McMurray sign. Probably tear of the medial meniscus." The attorney for the defendant Incorporated Village of Freeport points out Dr. Lesniewski's notes were authenticated and affirmed. The attorney for the defendant Incorporated Village of Freeport asserts the affirmation by Dr. Guttman should be disregarded as incredulous, and in direct contradiction to Dr. Guttman's operative report and preoperative history and physical. The attorney for the defendant Incorporated Village of Freeport specifically points to paragraph four of the operative report of North Shore University Hospital at Syosset, which has been certified as a business record, which states "there were degenerative changes noted on the medial femoral condyle (Grade II to Grade III chondromalacia), and the physician admitted chondromalacia is degenerative changes of the knee. The attorney for the defendant Incorporated Village of Freeport also notes, in paragraph four of the second page of the operative report of North Shore University Hospital at Syosset, the tear was listed as chronic tear. The attorney for the defendant Incorporated Village of Freeport stresses the

post-operative diagnosis was right knee medical meniscus tear, chondromalacia of medial femoral condyle and chondromalacia of patella, all indicating degenerative changes of the plaintiff's right knee. The attorney for the defendant Incorporated Village of Freeport maintains Dr. Guttman's recent sworn statement is in contradiction with the doctor's own operative report where there is degeneration of the right knee which is confirmed by Dr. Sultan's sworn statement, annexed in the motion, and Dr. Coyne's review of the MRI of the right knee noting degenerative joint changes which are certainly chronic, pre-existing, and causally unrelated to any injuries two days earlier on June 19, 2004, and the MRI examination of the right knee shows there is prior injury to the right knee which is remote and unrelated to any trauma on June 19, 2004. The attorney for the defendant Incorporated Village of Freeport avers the plaintiff has failed to even address the pre-existing degenerative condition of the plaintiff's right knee identified by the defendant's expert. The attorney for the defendant Incorporated Village of Freeport argues the plaintiff has a pre-existing degenerative condition of the right knee not caused by the subject motor vehicle accident which the plaintiff has failed to rebut, so summary judgment is warranted under these circumstances. The attorney for the defendant Incorporated Village of Freeport contends it is merely speculative to conclude the right knee tear and the arthroscopy were causally unrelated to the June 19, 2004 accident, especially where the plaintiff admitted to popping his knee when he was walking to the MRI facility, and Dr. Guttman noted it as a twisting injury.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing***

v. United Rubber Supply Co., supra).

The Court of Appeals has concluded: "even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate." (***Pommells v. Perez***, 4 N.Y.3d 566, 572, 797 N.Y.S.2d 380 [2005]). The plaintiff's submission in ***Pommells v. Perez*** (***supra***, at 574-575), as analogous here, left wholly unanswered the question whether the claimed symptoms diagnosed by the physician were caused by the accident, and the high Court determined the defense motion for summary dismissal of the complaint was properly granted. This Court has carefully reviewed and considered all of the parties' submissions on both the motion and cross motion, and determines the statements by the plaintiff's physician submitted in opposition to the motion and cross is insufficient to raise a triable issue of fact (***see generally Mooney v. Edwards***, 12 A.D.3d 424, 784 N.Y.S.2d 599 [2nd Dept., 2004]).

Accordingly, the motion and cross motion are granted. So ordered.

Dated: **November 30, 2007**

ENTER:

J. S. C.
HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION XXX NON FINAL DISPOSITION