

**Ruszkowska v Blumberg**

2007 NY Slip Op 30713(U)

April 5, 2007

Supreme Court, Queens County

Docket Number: 0024942/2004

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14  
**Justice**

----- Index  
JOLANTA RUSZKOWSKA, No. 24942/04

Plaintiff, Motion  
-against- Date January 30, 2007

EUGENE BLUMBERG AND FINANCIAL Motion  
SERVICES VEHICLES TRUST, Cal. No. 19

Defendants. Motion  
----- Seq. No. 1

PAPERS  
NUMBERED

Notice of Motion-Affid-Exhib.....	1-4
Cross-Motion-Affid-Exhib.....	5-11
Reply.....	12-13

Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained as a result of a motor vehicle accident on July 19, 2003 at the intersection of Mineola Avenue and Willow Street, in the Town of North Hempstead, County of Nassau, State of New York.

Defendant Eugene Blumberg (Blumberg) moves for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury as a result of the subject accident pursuant to Insurance Law § 5102(d) so that her claims for non-economic loss are barred by § 5104(a) thereof.

Defendant Financial Services Vehicle Trust (Trust) cross-moves for an order seeking the same relief and adopting the arguments and evidence submitted by defendant Blumberg.

Contentions of the Parties

Defendant Blumberg asserts that, based upon the medical evidence, its medical experts and plaintiff's admissions at

her deposition, plaintiff's injuries are pre-existing and do not fall within any of the categories set forth in Insurance Law § 5102(d). The 54 year old plaintiff has pre-existing degenerative changes to the neck and back that were not caused by the subject accident. Plaintiff's bill of particulars sets forth the following injuries: posterior herniated disc at L3-L4 impinging upon the thecal sac and narrowing the neural foramina bilaterally; posterior herniated disc at L5-S1 impinging upon the thecal sac and narrowing the neural foramina bilaterally; grade II listhesis of L-5 upon S-1; bulging disc at L4-L5 impinging upon the neural foramina bilaterally; bulging disc at C4-C5 impinging upon the thecal sac; bulging disc at C5-C6 impinging upon the thecal sac; bulging disc at C6-C7 impinging upon the thecal sac; post concussion syndrome; cervical and lumbar derangement; lumbar myofascitis; cervical myofascitis; cervicobrachial syndrome; post traumatic right knee pain; cervical radiculopathy; lumbar radiculopathy; sublaxations at C5, T8 and L5 levels; and traumatically induced arthritis.

Defendant Blumberg asserts that plaintiff's admissions as to minimal medical treatment that she sought and received show that she did not suffer any permanent or significant injury. She testified at her deposition that although she went to the emergency room on the accident date, she did not seek treatment because it was too crowded. Four days later she went to a medical clinic and saw Dr. Hausknecht. She received treatment for about one year until July 2004. She saw a doctor for a pain in her knee in December 2004. No other treatment was received after that date. Defendant Blumberg asserts that the examinations and tests by Dr. Hausknecht showed plaintiff's condition to be within normal limits.

Defendant Blumberg submits an affirmation by Dr. Michael Katz, an orthopedic surgeon, who examined plaintiff on August 4, 2005. He diagnosed cervical and lumbosacral strain resolved and right knee contusion resolved. He performed various medical tests on the cervical and lumbosacral spines, right hand and right knee with all results in normal ranges and all tests negative. He found that she currently showed "no signs or symptoms of permanence on a causally related basis relative to the musculoskeletal systems." The affirmation of Dr. Monette G. Basson, M.D., a neurologist, states that there was normal range of motion of the cervical spine. Plaintiff refused to attempt to move her lumbar spine in any direction or to

allow straight leg raising. However, no muscle spasm or focal tenderness was found. Dr. Basson found no objective abnormalities referable to the back or lower extremities. An MRI of the lumbar spine showed herniations at two levels which appear to be most likely degenerative changes and an independent review thereof was suggested. Dr. Basson found no objective neurologic disability as a result of the accident or need for tests or treatment. Two affirmations by Dr. Alan E. Greenfield, M.D., a radiologist, were submitted with respect to the reading of the MRI's of the cervical and lumbar spines. Both spines showed diffuse degenerative disc disease and no abnormalities were attributable to the subject accident.

In opposition to the motion, plaintiff argues that defendants have failed to sustain their initial burden of showing entitlement to judgment. Their medical experts have failed to address specific facts upon which plaintiff's actions are based. Plaintiff's claims include serious, non-permanent injury. Plaintiff's bill of particulars alleges that she was confined to bed and home for about four months from the time of the accident. She testified at her deposition that she was employed as a housekeeper and was unable to perform her job or work at all for four months following the accident. None of defendants' doctors address this issue.

Plaintiff argues that the medical evidence sufficiently establishes that plaintiff sustained a 90/180 day injury, a significant limitation and a permanent consequential limitation of motion. An affirmed report dated January 22, 2007 by Dr. Hausknecht sets forth his recent evaluation of plaintiff based upon his examination on November 13, 2006. Based upon certain tests performed, he found specific limitations of motion in the cervical and lumbar spines. Straight leg raising was positive and there was restriction from the normal range of motion in certain flexion tests. He stated that plaintiff stopped treatment because she reached maximum medical improvement after approximately one year of rehabilitation. He felt that she would benefit from a home exercise program to help her function throughout the day. He states that she has sustained significant limitation of function of her neurologic and musculoskeletal system and has a permanent partial disability.

#### Decision of the Court

The motion by defendant Blumberg is denied. The cross-

motion by defendant Trust is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant case, the defendants have established their entitlement to judgment as a matter of law. They have submitted affirmations from a neurologist, an orthopedic surgeon and a radiologist which show that plaintiff has not sustained a serious injury as required under Insurance Law Article 51. The neurologist and orthopedic surgeon set forth specific findings from objective tests which show that plaintiff's condition falls within normal ranges. They find neither neurological or orthopedic disabilities as a result of the subject accident.

However, in opposition to the motion, plaintiff submits her doctor's affirmations relating to his initial evaluation and treatment of plaintiff after the accident as well as a recent evaluation. In each instance, the doctor sets forth numerous objective tests with specific results showing that plaintiff's condition is below normal with respect to loss of range of motion in the lumbar spine and cervical spine. He states that there is objective evidence of cervical and lumbosacral impairment including clinically significant restriction of mobility, positive Spurling maneuver and positive straight leg raise testing. He indicates that she was totally disabled from work from August 25, 2003 through December 10, 2003. He states that she has sustained significant limitation of function of her neurologic and musculoskeletal system and has a permanent partial disability.

Accordingly, the motion by defendant Blumberg is denied. The cross-motion by defendant Trust is denied.

Dated: April 5, 2007

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HON. DAVID ELLIOT