

Donelin v Ested

2021 NY Slip Op 34017(U)

December 1, 2021

Supreme Court, Bronx County

Docket Number: Index No. 22728/2019E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

2To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

-----X
ANNE MARIE DONELIN,

Plaintiff ,

-against -

**Index No. 22728/2019E
DECISION/ORDER
Motion Seqs. 2**

ANTHONY ESTED,

Defendant.

-----X
VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendant ANTHONY ESTED [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ANNE MARIE DONELIN has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on June 8, 2018 (the Accident).

Based on the bill of particulars and opposition papers, in relevant part, plaintiff alleges that, as the result of the Accident, plaintiff suffered injuries to the left shoulder, neck, and back that fall within the serious injury categories of permanent consequential limitation; significant limitation; and 90/180 days. Plaintiff testified that she was not confined to bed or home post-accident.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendant argues that plaintiff’s claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, deposition transcripts, plaintiff’s medical records, and the expert affirmations of Dr. Kashyap (orthopedist), and Dr. Luchs (radiologist).

Dr. Kashyap bases his opinion in his December 10, 2019, report on the details of a physical examination conducted on plaintiff on the same date (over one year post-Accident). The doctor states that he reviewed the bill of particulars and plaintiff’s medical records, including the MRI report.

The expert finds no loss of range of motion in the cervical spine, thoracic spine, lumbar spine, both shoulders, and both elbows, all with negative objective tests. In the impression section he finds the cervical spine, thoracic spine, lumbar spine and left shoulder are each: “sprain/strain-resolved”. There is no evidence of causally related orthopedic disability, no need for continued orthopedic treatment, no indication of surgery or injections and no need for household help, special transportation, durable medical equipment, diagnostic tests or prescription medicine.

In the causal relationship section, the expert finds that it is apparent to a reasonable degree of certainty that the injuries sustained and the accident reported are causally and solely related.

Dr. Luchs reviews the July 5, 2018 MRI of plaintiff’s left shoulder (“the Left Shoulder MRI”). The expert finds a subacromial impingement resulting in tendinosis and chronic degenerative arthropathy of the joint with associated chronic degenerative changes of the glenoid labrum. In the conclusion section, the expert finds that the MRI was performed four weeks post-accident and showed subacromial impingement resulting in supraspinatus more

than infraspinatus tendinosis. There is chronic glenohumeral joint osteoarthropathy and chronic degenerative changes of the glenoid labrum. The findings on the exam are chronic and degenerative, and not post-traumatic and there are no post-traumatic findings on the examination. There are no findings on the MRI causally related to the plaintiff's alleged injury.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff opposes the motion, submitting an attorney affirmation, plaintiff's affidavit, plaintiff's medical records, the affirmation and records of Dr. Rose (orthopedic medicine) and the MRI report of Dr. Wagner (radiologist-reviewed the Left Shoulder MRI).

In total, plaintiff's evidence raises triable issues of fact as to the left shoulder under the threshold categories of permanent consequential limitation and significant limitation categories (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that plaintiff received medical treatment for the claimed injury promptly after the Accident, and that plaintiff had substantial limitations in motion in the relevant body part at the examinations immediately after the Accident, and more recently at the recent examination in January 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). The expert opines that the plaintiff suffers from a decreased in range of motion that is significant, and that plaintiff suffered permanent injury to the left shoulder that requires surgery. Plaintiff's expert reviewed the records and opines that the injury to the left shoulder was caused by the Accident, and is permanent (see *Morales v Cabral*, *supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under the threshold categories of permanent consequential limitation and significant limitation as to the left shoulder (see *Smith v Green*, 188 AD3d 473 [1st Dept 2020]; see *Bonilla v Vargas–Nunez*, 147 AD3d 461 [1st Dept 2017]; *Morales v Cabral*, *supra*).

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Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra; Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

As for plaintiff's 90/180-day category, defendant set forth a *prima facie* case based on plaintiff's deposition testimony and medical evidence, and plaintiff's submissions fail to generate a question of fact as to the issue (*Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; see *Licari v Elliott*, 57 NY2d 230 [1982]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant ANTHONY ESTED [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ANNE MARIE DONELIN has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: December 1, 2021

ENTER,

s/Hon. Veronica G. Hummel/signed 12/01/2021

Hon. Veronica G. Hummel, A.J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT