Greene v Culley
2010 NY Slip Op 31794(U)
July 15, 2010
Supreme Court, Suffolk County
Docket Number: 07-21220
Judge: John J.J. Jones
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SHORT FORM ORDER

INDEX No. 07-21220
CAL. No. 09-01677-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 10-30-09
ADJ. DATE 3-3-10
Mot. Seq. # 002 - MG
003 - XMD; CASEDISP

MICHELLE E. GREENE,

Plaintiff,

- against -

THOMAS K. CULLEY, HUNTINGTON ORANGE & WHITE TRANSPORTATION CORP., JOSE LEONIDAS PERDOMO and JOSE L. HERNANDEZ,

Defendants.

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Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers 13 - 20 ; Answering Affidavits and supporting papers 21 -25; 26 - 33 ; Replying Affidavits and supporting papers 34 - 35; 36 - 37; 38 - 39; Other defendant's memorandum of law - 12; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants Thomas Culley and Huntington Orange & White Transportation Corp. seeking summary judgment dismissing the plaintiff's complaint is granted; and it is

ORDERED that the Court, sua sponte, grants summary judgment in favor of the defendants Jose Leonidas Perdomo and Jose Hernandez; and it is further

ORDERED that the defendants Jose Leonidas Perdomo and Jose Hernandez cross motion for summary judgment is denied, as moot.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Michelle Greene as a result of a motor vehicle accident that occurred at the intersection of Route 110 and Depot

Road on December 24, 2005. The accident allegedly occurred when the vehicle owned by the defendant Jose Hernandez and operated by the defendant Jose Leonidas Perdomo struck the left front corner of a taxicab owned by the defendant Huntington Orange & White Transportation Corp and operated by the defendant Thomas Culley as Mr. Perdomo attempted to make a left turn onto Depot Road. The plaintiff was riding as a passenger in the taxicab at the time of the accident. The plaintiff, by her bill of particulars, alleges that she sustained various personal injuries as a result of the subject accident, including a tear of the posterior horn of the medial meniscus of the right knee; a medial collateral ligament sprain of the right knee; and chondromalacia patella of the right knee. The plaintiff also alleges that she missed approximately 7 ½ weeks from her employment as an assistant sales manager at Manhattan Saddlery, and two semesters of her studies from New York University. The plaintiff further alleges that she was confined to her bed and her home from December 24, 2005 and that her confinement continues until today intermittently.

The defendants Huntington Orange & White Transportation Corp and Thomas Culley ("Huntington Defendants") now move for summary judgment on the basis that the plaintiff's injuries do not satisfy the "serious injury" threshold required by Insurance Law § 5102(d). The Huntington defendants, in support of the motion, submit a copy of the pleadings, excerpts of the plaintiff's deposition transcript, and the sworn medical reports of Dr. Robert April, Dr. Robert Goldstein, and Dr. Robert Tantleff. Dr. April conducted an independent neurological examination of the plaintiff at the Huntington defendants' request on January 25, 2008. Dr. Goldstein conducted an independent orthopedic examination of the plaintiff at the Huntington defendants' requests on January 25, 2008. Dr. Tantleff performed an independent radiological review of the magnetic resonance imaging ("MRI") film of the plaintiff's right knee at the Huntington defendants' request on February 11, 2009.

The defendants Jose Leonidas Perdomo and Jose Hernandez cross-move for summary judgment on the basis that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). The Jose defendants, in support of the cross motion, submit a copy of the pleadings, a copy of the plaintiff's and Mr. Perdomo's deposition transcripts, and the sworn medical report of Dr. Stephen Lastig. Dr. Lastig performed an independent radiological review of the MRI film of the plaintiff's right knee at the request of the Jose defendants on January 21, 2009. The plaintiff opposes the instant motion and the cross motion on the ground that the Huntington defendants and the Jose defendants have failed to establish their prima facie burden that she did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d). Alternatively, the plaintiff asserts that the proof submitted in opposition demonstrates that there are material issues of fact whether she sustained a "serious injury" under Insurance Law § 5102(d). The plaintiff, in opposition to the motions, submits her deposition transcript, her affidavit, the affidavit of John Green, the sworn medical report of Dr. Hussein Elkousy, and a copy of Dr. William Woods's letter, dated April 6, 2006, advising plaintiff to remain confined to her bed until June 6, 2006.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, *supra*; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v Ford***, 100 AD2d

579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [1991]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]). A plaintiff claiming injury under either of the "limitation of use" categories also must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Hackett v AAA Expedited Freight Sys.***, 54 AD3d 721, 865 NYS2d 101 [2008]; ***Ferraro v Ridge Car Serv.***, *supra*; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2008]; ***Laruffa v Yui Ming Lau***, *supra*; ***John v Engel***, 2 AD3d 1027, 768 NYS2d 527 [2003]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Furthermore, a plaintiff alleging injury within the "limitation of use" categories who ceases treatment after the accident must provide a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Ferebee v Sheika***, 58 AD3d 675, 873 NYS2d 93 [2009]; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2008]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692

[1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the "serious injury" threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a matèrial issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Dr. Goldstein, in his report, states that a visual range of motion test of the plaintiff's right knee reveals that the plaintiff's right knee is stable, that she has full range of motion, bilaterally, and that there is no joint line pain or tenderness upon palpation of the right knee. Specifically, the report states that the plaintiff's measurement of motion of her right knee is 0 degrees to 140 degrees of flexion (normal is 0-140 degrees), and that the range of motion of the plaintiff's ankles, bilaterally, is dorsiflexion of 20 degrees; vorlarflexion of 50 degrees; inversion of 35 degrees; and eversion of 15 degrees. Dr. Goldstein's report states that no crepitus is observed during the range of motion testing of the plaintiff's right knee, that McMurray's test is negative, and that the pivot shift, Lachman, and anterior drawer signs are negative. Dr. Goldstein opines that "the etiology of the diagnosed injury [to the plaintiff's right knee] was secondary to the [subject accident]. This type of injury typically occurs as a result of direct trauma." It states that the plaintiff had a temporary impairment of three months as a result of the subject accident and that at the present time she does not have any objective orthopedic findings in her right knee. The report concludes that the plaintiff does not have an orthopedic disability or a permanent impairment to the right knee, and that she has completely recovered from her alleged injuries.

Likewise, Dr. April, in his report, states that he conducted all of the plaintiff's range of motion testing with reference to an orthopedic protractor, and that plaintiff has full range of motion in her lumbar and cervical spine. In particular, Dr. April's report states that the plaintiff's measurement of motion in her lumbar spine is 90 degrees flexion (normal is 75-90 degrees); 45 degrees extension (normal is 40-60 degrees); 50 degrees bilateral bending (normal is 45-60 degrees); and 50 degrees bilateral rotation (normal is 40-60 degrees). The report states that the plaintiff's straight leg raising was negative to 80 degrees bilaterally (normal is 75 to 90 degrees), that there is no spasm of paraspinal musculature, and that the range of motion of the plaintiff's upper limbs is normal. The report concludes that the subject accident did not result in any neurological disability or limitation and that the plaintiff does not require additional treatment.

In addition, Dr. Tantleff, in his report, states that there is chondromalacia of the patella, most prominently along the medial facet and that there is mild degenerative change of the lateral facet. The

report states that there is increased body habitus with associated mild loss of height of the medial joint compartment and that there is mild chronic mucoid degeneration of the anterior cruciate ligament despite the plaintiff's age. Dr. Tantleff opines that the MRI of the plaintiff's right knee does not reveal any evidence of acute or recent injury or posttraumatic abnormality related to the subject accident.

Furthermore, the plaintiff testified at an examination before trial that as a result of the subject accident that she struck her right knee on the back of the front passenger seat of the taxicab, causing her knee to bleed. The plaintiff testified that she was taken to the emergency room at Huntington Hospital, where she was treated and released the same day. The plaintiff testified that the doctor wrapped her right knee and prescribed crutches for her usage, which she used for approximately three weeks. She testified that she wore the knee brace for approximately three months after the accident. She testified that the day following the accident, she traveled to Texas and that while in Texas she was treated by Dr. Michael Jones. She testified that Dr. Jones referred her to Dr. G. William Woods, who is a knee specialist. She testified that Dr. Woods referred her to physical therapy and placed her on bed rest for approximately one month. The plaintiff testified that she attended physical therapy three times per week for about one month.

The plaintiff also testified that at the time of the accident she was enrolled in New York University ("NYU") as a sophomore, and that as a result of the accident she missed two semesters from school. The plaintiff testified that she is a member of the NYU Equestrian team, but that after the accident she was unable to participate. The plaintiff testified that she resumed her placement on the NYU Equestrian team in the Fall of 2006, but that she was unable to perform any "jumps." She testified that she returned to work at part-time status, but resumed full-time status approximately one month later. She testified that she was able to perform all of her duties except shipping, because she was unable to lift heavy boxes. She testified that her right knee "flare ups" caused her to leave her employment in February 2007 and return to Texas. The plaintiff testified that her right knee "catches" the bone when she walks and that it "clicks" when she is walking or climbing stairs. The plaintiff testified that she is currently employed as a full-time technical theater director at A.M. Consolidated High School in Texas and that she is currently on medical leave from NYU, because her right knee still hurts. The plaintiff further testified that she is limited in her ability to run, play tennis, or take long walks, but that she does ride horses at least once a week.

Based upon the adduced evidence, the Huntington defendants' have established, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) inasmuch as the affirmed medical reports of their experts concluded, based upon objective range of motion tests, that the plaintiff had full range of motion in her right knee (*see* ***McIntosh v O'Brien***, 69 AD3d 585 [2010]; ***Saetia v VIP Renovations Corp.***, 68 AD3d 1092, 891 NYS2d 471 [2009]; ***Dietrich v Puff Cab Corp.***, 63 AD3d 778, 881 NYS2d 463 [2009]; ***DiFilippo v Jones***, 22 AD3d 788 [2005]; ***Casella v New York City Tr. Auth.***, 14 AD3d 585, 787 NYS2d 883 [2005]). The Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]). Dr. Goldstein and Dr. April were unequivocal in their medical reports in stating that the plaintiff has full range of motion in her right knee, that she does not have any orthopedic or neurological disabilities and that she is capable of returning to her normal daily living activities. Also, Dr. Goldstein and Dr. April, after examining the plaintiff and reviewing her

respective medical records, concluded that the plaintiff was not seriously or permanently injured by the subject accident. Additionally, Dr. Tantleff clearly states, after reviewing the MRI of the plaintiff's right knee, which was conducted five days post-accident, that there is no evidence of acute or recent injury to her right knee. Moreover, reference to the plaintiff's own deposition testimony sufficiently refuted the "limitation of use" categories of injury under Insurance Law § 5102(d) (*see* ***Colon v Tavares***, 60 AD3d 419, 873 NYS2d 637 [2009]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2008]). Therefore, the Huntington defendants have shifted the burden to the plaintiff to come forth with medical evidence in admissible form to demonstrate that the injuries she sustained meet the "serious injury" threshold and are causally related to the subject accident (*see* ***Gaddy v Eyler***, *supra*).

In opposition, the plaintiff primarily relies upon the affidavit of Dr. Hussein Elkousy, who states that the plaintiff first began treatment at his office, Fondren Orthopedic in Houston, Texas, on March 7, 2006. Dr. Elkousy states that the plaintiff has been treated by various doctors at the practice as well as at other medical facilities. Dr. Elkousy states that the plaintiff's most recent visit to the practice was on January 12, 2010. Dr. Elkousy states that he performed a full physical examination of the plaintiff, including her right knee on January 12, 2010. Dr. Elkousy states that upon an examination of the plaintiff's right knee, she exhibited tenderness in the mid lateral joint line and the anterolateral joint line and a positive finding of crepitus. Dr. Elkousy opines that the plaintiff has chondromalacia patella of the right knee and that the injury to her right knee is from the subject accident. The affidavit states that the plaintiff's right knee exhibits flexion of 135 degrees (normal is 135 to 150 degrees) and extension of 0 degrees (normal is 0 to -10 degrees). Dr. Elkousy states, in his affidavit, that he advised the plaintiff to continue with physical therapy, ice, compresses, and Glucosamine. The affidavit concludes that the plaintiff's current status "may be the best that it will be, and as such she may have to live with her current level of disability, which is chronic at this time due to [the] frequency [that] she experiences pain."

Plaintiff's opposition fails to meet her burden (*see* ***Gaddy v Eyler***, *supra*). In opposition, plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the "limitation of use" categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [1988]). Despite the fact that Dr. Elkousy's affidavit states that the plaintiff has chondromalacia patella, it is insufficient to defeat the Huntington defendants' prima facie showing that the plaintiff did not sustain a "serious injury" as a result of the subject accident (*see* ***Lozusko v Miller***, 72 AD3d 908, 2010 NY Slip Op 3291 [2010]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2008]; ***Patterson v Alarm Response Corp.***, 45 AD3d 656, 850 NYS2d 114 [2007]). The mere existence of an injury is not evidence of a serious injury within the limitation of use category in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Nannarone v Ott***, 41 AD3d 441, 837 NYS2d 311 [2007]; ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2006]). Dr. Elkousy, in his affidavit, relies upon the fact that plaintiff informed him that she did not have any pain in her right knee prior to the subject accident. Thus, the subjective complaints of pain and impaired joint function expressed by the plaintiff during her deposition and in Dr. Elkousy's affidavit are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Sham v B&P Chimney Cleaning & Repair Co., Inc.***, 71 AD3d 978, 900 NYS2d 72 [2010]; ***Villeda v Cassas***, 56 AD3d 762, 871 NYS2d 167 [2008]; ***Rudas v Petschauer***, 10 AD3d 357, 781 NYS2d 120 [2004]; ***Barrett v Howland***, 202 AD2d 383, 608 NYS2d 681

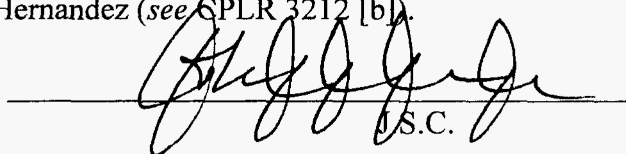
[1994]). Although Dr. Elkousy attempts to explains that people, such as the plaintiff, with chondromalacia patella usually have full range of motion, his explanation fails to refute the finding of Dr. Tantleff, the Huntington defendants' radiologist, that the plaintiff suffers from "mild chronic mucoid degeneration of the anterior cruciate ligament despite the plaintiff's age" (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [2009]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2007]; ***Ponce v Magliulo***, 10 AD3d 644, 781 NYS2d 703 [2004]). "Where a defendant in an action seeking damages for a 'serious injury' presents evidence that a plaintiff's alleged pain and injuries are related to a pre-existing condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation" (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; *see* ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]).

Moreover, neither the plaintiff nor Dr. Elkousy, in his affidavit, has presented competent objective medical evidence that revealed the existence of a significant limitation in the plaintiff's right knee that was contemporaneous with the subject accident (*see* ***Bleszcz v Hiscock***, 69 AD3d 890, 894 NYS2d 481 [2010]; ***Taylor v Flaherty***, 65 AD3d 1328, 887 NYS2d 144 [2009]; ***Fung v Uddin***, 60 AD3d 992, 876 NYS2d 469 [2009]; ***Gould v Ombrellino***, 57 AD3d 608, 869 NYS2d 567 [2008]). In addition, Dr. Elkousy's affidavit fails to state the duration of his treatment of the plaintiff, or provide any information regarding the nature of the treatment that the plaintiff received for her alleged injuries (*see* ***Bandoian v Bernstein***, 254 AD2d 205, 679 NYS2d 123 [1998]; ***Smith v Askew***, 264 AD2d 834, 695 NYS2d 405 [1999]; ***Williams v Ciamamella***, 250 AD2d 763, 673 NYS2d 186 [1998]). Furthermore, Dr. Elkousy's affidavit is in inadmissible form inasmuch as it was signed in and notarized in the State of Texas and was not accompanied by the required certificate of conformity (*see* CPLR 2309 [c]; *see generally* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]). The remaining submissions of the plaintiff were without probative value in opposing the motion because they were either unsworn, unaffirmed, or uncertified (*see* ***Vidor v Davila***, *supra*; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2006]; ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2006]).

Finally, the fact that the plaintiff is unable perform a few enumerated tasks for a lengthy period without pain does not constitute a curtailment from performing substantially all of her usual activities to a great extent (*see* ***Licari v Elliott***, *supra*; ***Crane v Richard***, 180 AD2d 706, 579 NYS2d 736 [1992]). As a result, the plaintiff failed to raise a triable issue as to whether she was substantially curtailed from all of her usual and customary activities for 90 of the first 180 days following the accident (*see* ***Rennell v Horan***, 225 AD2d 939, 639 NYS2d 171 [1996] ***Balshan v Bouck***, 206 AD2d 747, 614 NYS2d 487 [1994]; ***Kimball v Baker***, 174 AD2d 925, 571 NYS2d [1991]). Accordingly, the Huntington defendants' motion for summary judgment is granted.

Having determined that the plaintiff's injuries do not meet the "serious injury" threshold, the Court, sua sponte, grants summary judgment dismissing the complaint and cross claims against the defendants Jose Leonidas Perdomo and Jose Hernandez (*see* CPLR 3212 [b]).

Dated: 15 July 2010



J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**