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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**THAYS SPIERTO and ANTHONY SPIERTO,
Plaintiffs,**

**Motion Sequence #1
Submitted September 11, 2008
XXX**

-against-

INDEX NO: 8574/07

EUGENE FREUND,

Defendant.

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Plaintiffs, THAYS SPIERTO and ANTHONY SPIERTO, move for an order, pursuant to CPLR §3101(a), compelling the defendant, EUGENE FREUND, to provide authorizations for cell phone records for October 18, 2006 from 5:00 p.m. to 6:00 p.m. as well as for the lessor of defendant's Nissan automobile. Defendant opposes the motion, which is determined as follows:

This action arises from an automobile accident that occurred on October 18, 2005, at approximately 5:30 p.m., at the intersection of Broad Street and Hempstead Avenue in West Hempstead, New York. It is alleged that THAYS SPIERTO was the driver of a

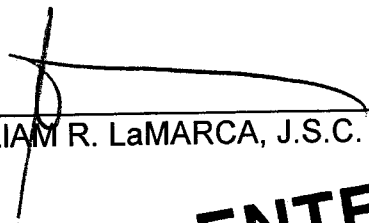
vehicle, in which her husband ANTHONY was a passenger, and that they were rear-ended by defendant's Nissan vehicle causing serious personal injuries and property damage. At his deposition, defendant testified that he was not using his cell phone at the time of the accident, however, this is in direct conflict with THAYS testimony that, prior to impact, she observed defendant coming up behind her while talking on his cell phone. Additionally, defendant alleged that he suffered no damage to his vehicle, however the police report indicates damage to the front of his car and both plaintiffs observed damage to defendant's fog light. Plaintiffs have demanded discovery of defendant's phone records for the time of the accident as well as the repair records for defendant's vehicle and, despite assurances from defendant's counsel that same will be forwarded, a six (6) month delay has occurred, despite the clear order of the Court. Counsel urges that, if the correct authorizations are not produced, defendant's answer be struck.

Although it appears that plaintiffs are entitled to the requested discovery, the Court is advised that plaintiffs' failure to timely file a Note of Issue within ninety (90) days of the Certification Conference, held on May 8, 2008, has resulted in the automatic dismissal of the action, on August 8, 2008, prior to submission of the instant motion. Accordingly, absent restoration to the active calendar, the case is no longer pending and the Court is without jurisdiction to grant the requested relief.

All further requested relief not specially granted is denied.

This constitutes the decision and order of the Court.

Dated: January 6, 2009


WILLIAM R. LaMARCA, J.S.C.

ENTERED

JAN 14 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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