

Fortune v Cahn

2007 NY Slip Op 34074(U)

November 11, 2007

Supreme Court, Nassau County

Docket Number: 2756-06/

Judge: F. Dana Winslow

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**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

**HON. F. DANA WINSLOW,
Justice**

KIZZY FORTUNE AND DEBBIE SWERDLOW,

**TRIAL/IAS, PART 9
NASSAU COUNTY**

Plaintiffs,

MOTION DATE: 8/20/07

-against-

**MOTION SEQ. NO.: 003
INDEX NO.: 2756/06**

DAVID CAHN,

Defendant.

The following papers read on this motion (numbered 1-3):

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

Defendant David Cahn’s motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff Kizzy Fortune (“Fortune”), age 25, and plaintiff Debbie Swerdlow (“Swerdlow”), age 49, allege that on December 31, 2004 at approximately 1:45 p. m., a motor vehicle operated by Fortune and owned by Fortune’s aunt, Gracie Wilson, came into contact with a vehicle owned and operated by defendant David Cahn. The accident occurred at or near the intersection of Grand Boulevard and Van Buren Street in Nassau County. Defendant now moves for an order dismissing plaintiffs’ complaint pursuant to **CPLR §3212**, on grounds that both plaintiffs failed to sustain a “serious injury” within the meaning of **Insurance Law §5102(d)**.

Insurance Law §5102(d) provides that a “serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a

fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiffs' injuries constitute a permanent consequential limitation of use of a body organ or member (7), significant limitation of use of a body function or system (8), or whether plaintiffs have demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiffs from performing all of the material acts constituting their usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

Defendant's evidence to support motion for summary judgment as to plaintiff Kizzy Fortune

In support of his motion for summary judgment as to plaintiff Fortune, defendant submits an affirmed report of examination, dated February 23, 2007, of dentist Robert Madison, DDS, covering an examination on February 17, 2007, affirmed report of examination of orthopedist Gregory Lieberman, MD, dated February 14, 2007, covering an examination of that date, affirmed report of examination of neurologist Maria Audrie DeJesus, MD, dated February 13, 2007, covering an examination of that date, and unaffirmed electrodiagnostic testing report ("EMG/NCV") of neurologist Iqbal S. Merchant, MD, dated February 3, 2005. The Court notes that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106; Grasso v. Angerami**, 79 NY2d 814; **Bravo v.**

Rehman, 28 AD3d 694; **Kunz v. Gleeson**, 9 AD3d 480; **Magro v. He Yin Huang**, 8 AD3d 245; **Grossman v. Wright**, 268 AD2d 79; **Young v. Ryan**, 265 AD2d 547. However, the Court may consider the EMG/NCV report because it was prepared by a physician of plaintiff. *See* **Passaretti v. Yung**, 39 AD3d 517; **Meely v. 4 G's Truck Renting Co., Inc.**, 16 AD3d 26; **Sherin v. Roda**, 14 AD3d 604; **Mantila v. Luca**, 298 AD2d 505; **Pagano v. Kingsbury**, 182 AD2d 268. Dr. Merchant's report covering the EMG/NCV test of Fortune's upper extremities, concludes that the study was normal.

Dr. Madison noted that although Fortune reported pain on the right and left sides of her face that "comes and goes", he found a lack of objective symptoms of temporomandibular joint disease ("TMJ") and stated that Fortune no longer requires any TMJ treatment. Dr. Madison concluded that "based upon the history, chief complaints, review of records, lack of present objective findings, and [his] clinical evaluation, there is no longer any TMJ injury."

Dr. Lieberman provides range of motion testing, comparing the results to normal, of the cervical spine, thoracolumbar spine and shoulders and found all the tests to be normal. Dr. Lieberman also reported a negative straight leg raise test, normal heel/toe gait and no evidence of muscle spasms in the cervical and thoracolumbar spine area. With respect to the shoulders, Dr. Lieberman did note "some mild crepitation with rotation on the right" but found intact sensation and no "tenderness, warmth, swelling or erythema" or effusion. Dr. Lieberman diagnosed "cervical sprain, thoracolumbar sprain, right shoulder sprain, resolved."

Dr. DeJesus provides range of motion testing, comparing the results to normal, of the cervical and lumbar spines and noted normal results. Dr. DeJesus also reported no spasms or tenderness upon palpation of the cervical and lumbar spines, equal and symmetrical deep tendon reflexes of 2+ in both the upper and lower extremities, normal sensory examination, 5/5 power in the motor system of the upper and lower extremities, normal heel and toe gait and normal finger-to-nose and heel-to-shin-testing.

Defendant also submits the deposition testimony of Fortune conducted on December 4, 2006. Fortune testified that following the accident, her aunt drove her to the emergency room of "Nassau" [South Nassau Communities] hospital where they prescribed Motrin and painkillers but did not conduct any x-rays and did not refer her to any physicians. Fortune stated that a few days thereafter, she sought medical treatment at Baldwin Medical ("Baldwin") complaining of fear, headaches, back and shoulder pain and jaw and gum pain. Fortune testified that she treated with various medical providers, including a chiropractor, dentist, physical therapist, acupuncturist and psychologist and that Baldwin provided free transportation. Fortune testified that she was also sent for an MRI and a "test with needles."

Fortune testified that she continued receiving treatment at Baldwin three times a week for six to eight months, but that because her insurance benefits were cut off, she stopped two months thereafter as she "didn't want the bill to be too high" (although she admitted that she in fact never received any bills). Fortune testified that after stopping treatment in or about June to August of 2005, she returned to Baldwin twice in June of 2006 and treated with the massage therapist and dentist. With respect to current complaints, Fortune testified that she had pain in her back for one year after the accident and still experiences headaches twice a month and pain in her shoulders every two months. Fortune's testimony is ambiguous regarding whether the accident caused her to curtail or change her activities. She testified that she was unemployed at the time of the accident and in 2005 she joined a gym. She stated that she engaged in skating and rollerblading as recently as one week before her deposition. The Court notes that Fortune testified that she was confined to home but not to bed for two weeks post accident while Fortune's bill of particulars states that following the accident, she was confined to her bed for one week and confined to home for one month.

Defendant's evidence to support motion for summary judgment as to plaintiff Debbie

Swerdlow

In support of his motion for summary judgment as to plaintiff Swerdlow, defendant submits an affirmed report of examination, dated January 5, 2007, of dentist Robert Madison, DDS, covering an examination on that date, affirmed report of examination of orthopedist Gregory Lieberman, MD, dated January 3, 2007, covering an examination of that date, affirmed report of examination of neurologist Maria Audrie DeJesus, MD, dated January 11, 2007, covering an examination of that date, affirmed report of examination of orthopedist S. Farkas, MD, dated March 30, 2005, covering a no fault insurance examination of that date, unaffirmed report of Harold Augenstein, MD, dictated on January 17, 2005, covering a CT examination of Swerdlow's facial bones conducted on January 14, 2005, and unaffirmed x-ray report of Walter Ploski, MD, dated January 18, 2005, covering an x-ray of Swerdlow's ribs. The Court may consider the unaffirmed reports because they were prepared by physicians of plaintiff. *See Meely v. 4 G's Truck Renting Co., Inc., supra; Sherin v. Roda, supra; Mantila v. Luca, supra; Pagano v. Kingsbury, supra.* Dr. Augenstein reported that the CT scan of Swerdlow's facial bones revealed no evidence of facial fracture and Dr. Ploski found no fracture of Swerdlow's ribs.

Dr. Madison reported that Swerdlow stated she had pain in her left jaw with TMJ clicking, difficulty opening her jaw and that one tooth became loose and was eventually lost. Dr. Madison, however, found a lack of objective symptoms of TMJ and concluded that "based on the history, chief complaints, review of records, lack of present objective findings, and [his] clinical evaluation, there is no longer any TMJ injury and there is no indication for any further treatment or testing related to a TMJ injury."

Dr. Lieberman provides range of motion testing, comparing the results to normal, of Swerdlow's cervical spine, thoracolumbar spine and shoulders and reported normal results with the exception of flexion of the cervical spine of 35 degrees (45 normal) and flexion of the thoracolumbar spine of 80 degrees (90 normal). Dr. Lieberman reported a negative

straight leg raise test, normal heel/toe gait and “no tenderness, swelling erythema or effusion in the upper extremities.” Dr. Lieberman did note that Swerdlow had subjective complaints of minimal tenderness in the left paracervical muscles and toward the left paralumbar muscles but Dr. Lieberman noted no spasms in these areas. Dr. Lieberman concluded, “besides subjective complaints of pain and restriction of motion performed in an active fashion, there were no objective findings noted on examination” and diagnosed “cervical sprain and lumbar sprain, resolved.”

Dr. DeJesus provides range of motion testing, comparing the results to normal, of Swerdlow’s cervical and lumbar spines and noted normal results. Dr. DeJesus also reported no complaint of pain and no spasms in the cervical and lumbar spines, tendon reflexes of 2+ in the biceps, triceps, supinator, patellar and achilles, normal sensory examination and normal muscle tone and strength in the upper and lower extremities. Dr. DeJesus diagnosed “status-post cervical and lumbar sprain, resolved and “normal neurological examination.” Dr. DeJesus concluded that Swerdlow can perform all her usual daily activities and seek employment.

Three months post accident on March 30, 2005, Dr. Farkas provided range of motion testing of Swerdlow’s cervical and lumbar spines, comparing the results to normal and noted normal results. In addition, Dr. Farkas reported a negative straight leg raise test, normal deep tendon reflexes of the cervical spine and at the achilles tendon and patellar tendon regions, motor exam of the cervical and lumbar spines of 5+, normal toe and heel walking, and no spasms to palpation of the cervical spine. Moreover, Dr. Farkas states that Swerdlow did not complain of pain upon palpation of the sternum or anterior chest wall. Dr. Farkas did note that Swerdlow complained of pain in the lower back upon palpation and of left knee pain when she bent forward. With respect to the sensory examination, Dr. Farkas states that Swerdlow reported feeling more about the left than the right upper extremity, more about the right face than the left and more about the right than the left lower extremity. Dr. Farkas diagnosed “resolved cervical sprain, resolved lumbar

to the emergency room of South Nassau Communities Hospital where they gave her drops in her eye and gave her the name of an eye doctor. Swerdlow stated that approximately two days after the accident, she went to Baldwin complaining of loose teeth, her eyesight, nerves, jaw pain, neck pain, breast pain, back pain and leg pain. At Baldwin, Swerdlow saw an acupuncturist, chiropractor, orthopedist who sent her for x-rays, physical therapist, neurologist and psychologist. Swerdlow also saw a plastic surgeon who sent her for a Cat Scan of her face. Swerdlow testified that the doctors wanted to send her for an MRI but that she refused because she suffers from claustrophobia. She testified that after her emergency room visit, she saw an eye doctor in Rockville Centre twice who told her that she had abrasions in her eye and gave her drops.

Swerdlow testified that she had medical treatment as a result of the accident for the last time in July or August of 2005. With respect to current complaints, Swerdlow testified that she has flashing in her eyes, pains if she sits down and does not get up, pain in her left shoulder, lower back and jaw. With respect to her activities, Swerdlow testified that she was not employed at the time of the accident and stated that it is presently difficult for her to make a bed, go shopping, lift bags, go up and down stairs, do laundry, carry a vacuum and clean. Swerdlow also stated that she does not walk anymore, gets very nervous in cars and has trouble sleeping. She testified that she was in bed for a couple of months following the accident, and as a result, she hired someone for three to four months to cook. She also hired another person to clean, whom she still employs. Finally, Swerdlow testified that she was involved in the following prior accidents: (1) in 1992 she was assaulted on the job and sustained injuries to her cheek bone and suffered post traumatic stress disorder, (2) during or prior to the 1990s, she was in two motor vehicle accidents as a taxicab passenger. She testified that after one of these accidents, she treated in the emergency room of Jamaica Hospital and believes that thereafter she treated with an orthopedist and neurologist; and (3) in or about 1980, she injured her ankle in a trip and fall accident. She testified that she made a claim for personal injuries suffered as a result of one of the motor vehicle accidents but cannot remember the nature of her injuries.

in the emergency room of Jamaica Hospital and believes that thereafter she treated with an orthopedist and neurologist; and (3) in or about 1980, she injured her ankle in a trip and fall accident. She testified that she made a claim for personal injuries suffered as a result of one of the motor vehicle accidents but cannot remember the nature of her injuries.

Defendant makes a prima facie case that both plaintiffs did not sustain a serious injury

The Court finds that the reports of defendant's examining physicians, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, so as to satisfy the Court that an "objective basis" exists for their opinions. Accordingly, the Court finds that defendant has made a *prima facie* showing, that plaintiffs Kizzy Fortune and Debbie Swerdlow did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiffs to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiffs' opposition

In opposition with respect to Fortune, plaintiffs submit an affirmation of Josephine A. Brawner, MD, dated August 13, 2007, covering examinations performed on January 3, 2005, February 7, 2005, March 14, 2005, April, 2006 and July 9, 2007. On January 3, 2005, Dr. Brawner found limitations in the range of motion of Fortune's cervical and lumbar spines, comparing the results to normal. Dr. Brawner also found moderate tenderness over the cervical paraspinal muscles, including the "upper triceps and bilateral rhomboids" and of the thoracic paraspinal and the upper paraspinal muscles. Dr. Brawner reports that an MRI of Fortune's cervical spine was performed on January 13, 2005 and revealed a disc bulge at C5-6. Based upon this initial visit, Dr. Brawner diagnosed "disc bulge at C5-6 level, where disc material is approximating the ventral thecal sac, a contour abnormality of the thecal sac due to encroachment by the annulus fibrosus of the disc,

marked straightening of the lordosis” and post traumatic cervical, thoracic and lumbar sprain/strain, headaches and TMJ dysfunction.

The Court notes that Dr. Brawner fails to provide any results of examinations presumably conducted during any of the aforementioned follow-up visits other than a conclusory recitation of Fortune’s complaints. Likewise, Dr. Brawner fails to provide results from Fortune’s recent examination on July 9, 2007, other than reciting Fortune’s complaints of pain and stating that, (1) a cervical examination “revealed point tenderness over the C7 spinous process, pulling pain to the left upper traps during right lateral flexion” and that (2) “range of motion was diminished in lateral flexion, bilaterally”, without giving the percentage loss of range and comparing such to normal. Dr. Brawner states that her current diagnosis is “cervical disc bulge C5-6.”

In addition, plaintiffs submit an affirmation of radiologist Allen Rothpearl, MD, dated August 7, 2007, covering an MRI of Fortune’s cervical spine, performed by Dr. Rothpearl on January 13, 2005. Dr. Rothpearl concludes that there is a “marked straightening of the lordosis. There is a disc bulge at the C5-C6 level where disc material is approximating the ventral thecal sac. At this level, a contour abnormality of the thecal sac due to encroachment by the annulus fibrosus of the disc, is appreciated.”

Plaintiffs also submit an affidavit of Fortune, sworn to on August 13, 2007, attesting that as a result of the accident she experienced neck pain, back pain, shoulder pain, pain in her jaw and gums, fear and “flashbacks from the accident.” She stated that she no longer treated two months after her insurance stopped payment because she could not afford to pay for treatment on her own. Fortune claims further that she is completely unable to skate, rollerblade or ride her bike, walk long distances and has difficulty “lifting or carrying anything heavy, sleeping and lifting [her] arms.”

With respect to Swerdlow, plaintiffs submit an affirmation of Dr. Brawner, dated August 13, 2007, covering examinations performed on January 3, 2005, February 7, 2005, March 14, 2005, August 8, 2005 and July 9, 2007. On Swerdlow’s first visit, Dr. Brawner

found limitations in the range of motion of the cervical and lumbar spines, comparing the results to normal. Dr. Brawner also found moderate to severe tenderness over the cervical paraspinal muscles, upper traps and bilateral rhomboids and of the thoracic paraspinal muscles, especially on the left. Based upon this initial visit Dr. Brawner diagnosed "left eye injury, post traumatic cervical, thoracic and lumbar sprain/strain, post traumatic headaches, anterior chest wall contusion, post traumatic stress disorder and TMJ dysfunction." Dr. Brawner's report of the February 7, 2005 visit merely noted Swerdlow's subjective complaints and different degrees of tenderness in the cervical and thoracic paraspinal muscles. The only range of motion results reported subsequent to the initial January 3, 2005 visit, were Dr. Brawner's findings covering the March and August 2005 examinations, when Swerdlow was purportedly only able to bend forward to 70 degrees in the lumbar spine (normal 90 degrees).

At the July 9, 2007 examination of Swerdlow, Dr. Brawner found "moderate tenderness and tightness of the cervical, thoracic and lumbar paraspinal muscles, moderate tenderness to the entire spinous processes", "pain on all cervical ranges of motion" and fifty per cent reduction in cervical spine lateral flexion. In addition, Dr. Brawner found that Swerdlow's "truncal range of motion was diminished in all planes, especially forward flexion." Dr. Brawner diagnosed "post traumatic cervical, thoracic and lumbar myofascial derangement."

Plaintiffs also submit an affidavit of Swerdlow, sworn to on August 13, 2007, attesting that as a result of the accident she experienced neck pain, breast pain, pain to her right side and left leg, back pain, jaw pain, loose teeth, blurred eyesight and nervousness. She represented that she no longer treated two months after her insurance stopped payment because she could not afford to pay for treatment on her own. Swerdlow states that she hired a cook to work for her family for four months post accident and hired a cleaning woman who continues to help her with household chores. Swerdlow asserts that presently she has flashing in her eyes, pain in her legs, neck, shoulder, lower back and jaw. She claims further that she has difficulty performing daily activities without pain, such as

“lifting or carrying anything heavy, shopping and sleeping.” Swerdlow also claims that she cannot walk long distances and has difficulty walking up and down stairs, doing laundry and doing any kind of cleaning.

The Court’s determination

It is the determination of this Court that plaintiffs have failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not Fortune or Swerdlow sustained a “serious injury” within the meaning of **Insurance Law §5102(d)**. With respect to Fortune, Dr. Brawner only provides range of motion findings comparing these findings to normal as a result of plaintiffs’ first post accident visit. Dr. Brawner’s report of Fortune’s subsequent visits fails to compare her range of motion findings to normal “leaving the court to speculate as to the meaning of those figures” **Kouros v. Mendez**, 41 AD3d 786 *citing Manceri v. Bowe*, 19 AD3d 462, 463. *See Tobias v. Chupenko*, 41 AD3d 583; **Cotto v. JND Concrete & Brick, Inc.**, 41 AD3d 415; **Thomason v. Thomason**, 40 AD3d 627; **Osgood v. Martes**, 39 AD3d 516; **Caracci v. Miller**, 34 AD3d 515. With respect to Swerdlow, the only range of motion findings provided subsequent to Swerdlow’s initial visit to Dr. Brawner, are findings that in March and August 2005, Swerdlow was allegedly only able to bend forward to 70 degrees in the lumbar spine (normal 90 degrees) and a finding that at the most recent visit on July 9, 2007, Swerdlow’s bilateral flexion of her cervical spine was reduced by 50 percent. This one range of motion finding comparing to normal is not sufficient medical evidence to raise an issue of fact. Plaintiffs have thus failed to set forth the extent and duration of the injuries alleged in their initial medical examinations. *See King v. Islam*, 43 AD3d 1001; **Furrs v. Griffith**, 43 AD3d 389. In addition, the Court notes that Dr. Brawners’ reports are otherwise conclusory and fail to specify the objective tests performed. *See Patalano v. Curreri*, 30 AD3d 497; **Vazquez v. Basso**, 27 AD3d 728; **Kelly v. Rehfeld**, 26 AD3d 469; **Edwards v. New York City Transit Authority**,

17 AD3d 628; **Mendolia v. Harris**, 16 AD3d 561.

There is also insufficient evidence that plaintiffs' alleged injuries are permanent §5102(d)((7)). Dr. Brawner's assertions that both Fortune's and Swerdlow's injuries "are permanent in nature" are conclusory as she fails to offer any evidence of permanency. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." **Lopez v. Senatore**, 65 NY2d 1017, 1019. *See also*, **Grossman v. Wright**, 268 AD2d 79; **Lincoln v. Johnson**, 225 AD2d 593; **Orr v. Miner**, 220 AD2d 567.

Furthermore, Dr. Brawner's conclusory statements that plaintiffs' injuries are "causally related to [the] motor vehicle accident of December 31, 2004," fail to adequately establish a causal relationship between the accident and plaintiffs' injuries. *See* **Howell Reupke**, 16 AD3d 377. With respect to Swerdlow, Dr. Brawner fails to acknowledge or account for Swerdlow's prior accidents and resulting injuries thus rendering speculative Dr. Brawner's findings that Swerdlow's injuries were caused by the December 31, 2004 accident. *See* **Munoz . Koyfman**, 2007 NY Slip Op. 08046; **Vidor v. Davila**, 37 AD3d 826; **Cervino v. Gladysz-Steliga**, 36 AD3d 744; **Moore v. Sarwar**. 29 AD3d 752; **Ponce v. Magliulo**, 10 AD3d 644. With respect to Fortune, radiologist Dr. Rothpearl's affirmation finding that Fortune suffered from a disc bulge at C5-6 level, also fails to express an opinion on causation. *See* **Albano v. Onolfo**, 36 AD3d 728; **Chan v. Casiano**, 36 AD3d 580. The Court notes that the existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, 4 NY3d 566, 574; **Bravo v. Rehman**, *supra*; **Howell Reupke**, *supra*; **Kearse v. New York City Transit Authority**, 16 AD3d 45.

Plaintiffs' complaints of subjective pain do not by itself satisfy the "serious injury" requirement of the no-fault law. **Scheer v. Koubek**, 70 NY2d 678; **Ranzie v. Abdul-**

Massih, 28 AD3d 447; **Picott v. Lewis**, 26 AD3d 319; **Nelson v. Amicizia**, 21 AD3d 1015; **Kivlan v. Acevedo**, 17 AD3d 321; **Rudas v. Petschauer**, 10 AD3d 357; **Barrett v. Howland**, 202 AD2d 383. The affidavits of Fortune and Swerdlow do not raise an issue of fact as they consist of self serving and conclusory statements with respect to their current pain and abilities. Plaintiffs have also failed to submit competent medical evidence that the injuries that they sustained rendered them unable to perform all of their usual and customary daily activities for ninety days of the first one hundred eighty days following the accident.

With respect to Fortune, there is a gap in treatment between the purported end of Fortune's treatment in August 2005, the one visit to Dr. Brawner in April 2006 (as reported by Dr. Brawner) or June 2006 (as testified by Fortune), and Dr. Brawner's recent examination on July 9, 2007. With respect to Swerdlow, there is a gap in treatment between the purported end of Swerdlow's treatment in August 2005 and Dr. Brawner's examination on July 9, 2007. Both plaintiffs testified that they stopped medical treatments when their insurance stopped payments and that they could not afford any further treatments. *See Francovig v. Senekis Cab Corp.*, 41 AD3d 643. *See also Black v. Robinson*, 305 AD2d 438. It is unnecessary for the Court to determine whether plaintiffs have provided a reasonable explanation for their two year gap in treatment (**Pommells v. Perez**, *supra*), as the Court has found that plaintiffs have failed to raise an issue of fact even without considering this gap.

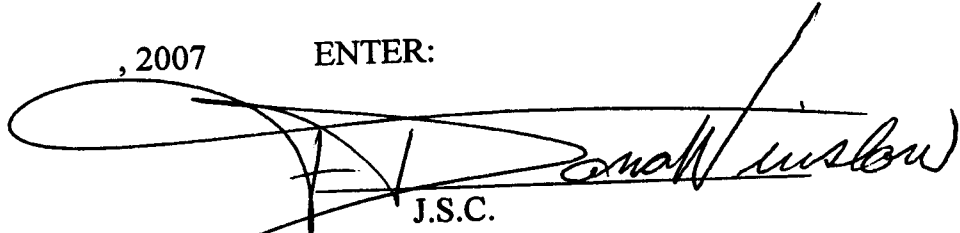
The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendant DAVID CAHN's motion for summary judgment dismissing the complaint of plaintiffs KIZZY FORTUNE and DEBBIE SWERDLOW, on the grounds that plaintiffs failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is granted.

Defendant shall serve plaintiffs with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the Court.

Dated: 11/11, 2007 ENTER: 
J.S.C.

ENTERED
DEC 12 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE