[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

MADDALONI JEWELERS, INC.,

Plaintiff,

-against-

ROLEX WATCH U.S.A., INC., ALLEN BRILL and LAWRENCE MAZZEO,

Defendants.

INDEX NO. 602457/2002

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Comm

Pursuant to the agreement of all parties, the Decision and Order of this court dated February 6, 2006 is recalled and vacated and the attached Decision and Order is substituted.

FILED
FEB 28 2006
NEW YORK

Dated: February 17, 2006

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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MADDALONI JEWELERS, INC.,

Plaintiff, Index No. 602457/2002

-against- **DECISION and ORDER**

ROLEX WATCH U.S.A., INC., ALLEN BRILL and LAWRENCE MAZZEO,

Defendants.

----------x

KARLA MOSKOWITZ, J.

The United States District Court for the Southern District of New York has just remanded this case to this court, and defendants now move for summary judgment dismissing the plaintiff's two remaining causes of action (motion sequence number 002). For the following reasons, the court denies the motion.

BACKGROUND

The Parties

Plaintiff Maddaloni Jewelers, Inc. (Maddaloni) is a New York corporation, that operates a business in Suffolk County and has been engaged in the retail sale of jewelry and watches since 1978. See Notice of Motion, Exhibit A (third amended complaint), ¶ 4; Maddaloni Affidavit in Opposition, ¶ 3. Defendant Rolex Watch U.S.A., Inc. (Rolex) is also a New York corporation, with its principal place of business in New York County, that imports and sells luxury wristwatches. See Notice of Motion, Exhibit A (third amended complaint), ¶ 5. During the relevant time period, defendant Allen Brill (Brill) was Rolex's national sales manager, and defendant Lawrence Mazzeo (Mazzeo) was the Rolex regional sales manager whose assignment

included Nassau County. Id., ¶¶ 6,7,15.

The Dispute

Maddaloni alleges that it became an "Official Rolex Jeweler" in May 1996, that permitted it to engage in the retail purchase and sales of Rolex watches and to maintain a Rolex service department. See Notice of Motion, Exhibit A (third amended complaint), ¶¶ 9, 10. Maddaloni also alleges that it expended a large amount of money to renovate its store and to install a Rolex service department. Id. Rolex admits that it "designated" Maddaloni as an "Official Rolex Jeweler" in 1996, but that the parties did not sign an "Official Rolex Jeweler Agreement" until 2000. See Memorandum of Law in Support of Motion, at 3-6. Rolex states that, prior to 2000, Maddaloni sold Rolex watches on an "open account" basis and that Maddaloni ordered watches from Rolex for any Maddaloni customers who were interested in buying them. Id., at 5, fn 7.

Maddaloni states that Mazzeo became its Rolex regional sales manager in February of 1997. See Notice of Motion, Exhibit A (third amended complaint), ¶ 14. Maddaloni alleges that, immediately afterwards, Mazzeo began to request cash payments as an inducement for Rolex continuing its relationship with Maddaloni. Id., ¶¶ 16, 17. Maddaloni also alleges that Mazzeo indicated that both he and Brill should receive the cash payments. Id. Maddaloni's owner, Louis Maddaloni, asserts that he refused to pay any bribes, however, and that Rolex thereafter began to cancel or delay Maddaloni's orders and service requests in retaliation. Id., ¶ 18. Maddaloni claims that it lost a great many customers and millions of dollars worth of business as a result of Rolex's actions. Id., ¶ 20. Maddaloni names two of its former customers and describes the circumstances under which the customers allegedly chose to stop doing business with Maddaloni because of Rolex's alleged cancellations and delays fulfilling Maddaloni's orders. See Notice of

Motion, Exhibit A (third amended complaint), ¶¶ 21-22; Maddaloni Affidavit in Opposition, ¶ 21.

On April 3, 2000, Maddaloni and Rolex executed an "Official Rolex Jeweler Agreement" (the ORJ Agreement). See Notice of Motion, Ruffino Affirmation, ¶ 2; Exhibit B. Louis Maddaloni claims that he neither understood nor wished to sign the ORJ Agreement, but that he did so out of fear that Maddaloni would lose all of Rolex's business otherwise. See Maddaloni Affidavit in Opposition, ¶ 30. The relevant portions of the ORJ Agreement provide as follows:

> 1. Appointment as an Official Rolex Jeweler
>
> > 1.1. Rolex appoints [Maddaloni] as an Official Rolex Jeweler ("ORJ") and grants to [Maddaloni] the non-exclusive right to purchase Rolex products and resell them at retail. ... [Maddaloni] agrees to sell Rolex products in a manner consistent with the high standards, goodwill and prestigious reputation of the Rolex name...
>
> 3. Retail Sales Only. [Maddaloni] will sell Rolex products only to ultimate consumers, in transactions that originate over-the-counter at its authorized location(s). All other methods of sale ... are considered transshipping. ...
>
> 7. Additional Promises and Duties. [Maddaloni] agrees to comply with all policies and procedures as issued from Rolex from time to time. ... [Maddaloni] represents that it: (I) has received and read copies of all of the foregoing policies and procedures; and (ii) accepts all terms of those policies and procedures. ...
>
> 8. Term and Termination
>
> > 8.1. This Agreement is made for an indefinite term, and will continue at the will of the parties, unless terminated as provided in this agreement.
> > 8.2. Either party may terminate this Agreement as of right, without cause, on sixty (60) days notice, without incurring any liability as a result for direct, incidental, consequential or any other form of damages, including loss of clientele, investments or profits.
> > 8.3. In the event of a breach of this Agreement, or of any Rolex policy or procedure, or for any other just cause, either party may

terminate the Agreement effective immediately, upon giving written notice to the other party.
8.4. "Just cause" shall include, but not be limited to, the following examples:

8.4.1. Failure to pay any sum when due;
8.4.2. Transshipping (both intentional and unintentional);
8.4.3. Failure to comply with any applicable federal, state or local law ...
8.4.4. Involvement by a party, or its owners or employees, in any activity that could damage the other party's reputation, or that is generally considered immoral, illegal or contrary to public policy;
8.4.5. The sale, distribution or any other disposition of substantially all of a party's assets or any material change in control;
8.4.6. The closing of a party's business ...
8.4.7. The filing of a petition in bankruptcy...

10. Disclaimer of Franchise or Fiduciary Relationship. Rolex does not enter into any franchise arrangements with ORJs, and has not with [Maddaloni]. ... [Maddaloni] acknowledges that it has not paid any fee to Rolex in exchange for the rights granted in this Agreement ... [Maddaloni] acknowledges that this is an arm's length agreement between commercial equals, that this is not a contract of adhesion, and that Rolex does not act as a fiduciary with respect to [Maddaloni].

11. Mutual Release. The parties hereby release all claims they might have against each other as of this date. Notwithstanding the foregoing, this release does not apply to any claim by Rolex relating to merchandise purchased by [Maddaloni] for which [Maddaloni] has not yet paid.

See Notice of Motion; Exhibit B.

Louis Maddaloni states that, still fearful of losing Rolex's business, he paid Mazzeo a cash bribe of $2500.00 in January of 1999. See Maddaloni Affidavit in Opposition, ¶ 26. By January 1999, Steve Hodgkins (Hodgkins) had replaced Mazzeo as the Rolex area sales manager for Nassau County. See Maddaloni Affidavit in Opposition, ¶ 24. Maddaloni attempted to pay a second cash bribe to Hodgkins in April of 2000 but Hodgkins refused to accept it. Id., ¶ 29.

Maddeloni does not claim to have attempted to pay any bribes to Brill. He also states that, despite having taken the bribe, Rolex continued to cancel and delay Maddaloni's orders afterwards. Id., ¶ 27.

Rolex sent Maddaloni a letter terminating the ORJ Agreement on January 29, 2002 (the Termination Letter). See Notice of Motion, Ruffino Affirmation, ¶ 2; Exhibit D. The relevant portion of the Termination Letter provides as follows:

> Please be advised that we are terminating the Official Rolex Jeweler Agreement ("the Agreement) for Maddaloni Jewelers due to violations of Rolex policies, including, but not limited to those reflected in paragraphs 1, 3, 7 and 8 of the Agreement. This termination is effective immediately.

Id.; Exhibit D.

Prior Proceedings

Maddaloni originally commenced this action in this court on July 3, 2002. See Notice of Motion, Ruffino Affirmation, ¶ 3. On August 13, 2002, defendants removed this action to the United States District Court for the Southern District of New York. Id., ¶ 4. While in federal court, the parties completed discovery and Maddaloni eventually served three amended complaints. Id., ¶¶ 5-9. Maddaloni's third amended complaint sets forth causes of action for: 1) violation of RICO; 2) same; 3) violation of the Robinson-Patman Act; 4) tortious interference with business relations; and 5) violation of the implied covenant of good faith and fair dealing. Id., ¶ 10; Exhibit A. Defendants served their answer to the third amended complaint on April 20, 2004. Id.; Exhibit L. On December 28, 2004, the U.S. District Court (Castel, J.) granted defendants' motion for a summary judgment dismissing Maddaloni's first, second and third causes of action and remanded the remaining two causes of action to New York State Supreme

Court. Id.; Exhibit Q. The relevant portions of Judge Castel's decision are as follows:

1. The Release Provision of the April 2000 Agreement ...

Defendants have failed to satisfy their initial burden of demonstrating to the Court that the release language establishes a defense to any of the claims that remain in this lawsuit. ... The language and context of this release provision are so non-specific that I cannot, on a motion for summary judgment, conclude as a matter of law that the parties intended to release the defendants of liability for the ... common-law tort claims. It is, for instance, unclear whether the plaintiff was aware of the damages it had incurred at the time the April 3, 2000 ORJ Agreement was executed. Neither the text of the release nor defendants' factual submissions demonstrates that the parties intended the release to apply to the claims brought in this litigation. ...

2. Plaintiff Fails to Raise a triable Issue of Fact as to Two Predicate Acts Under RICO

Based on the record before me, I conclude that the plaintiff makes out a prima facie case that Mazzeo committed a single violation of the Hobbs Act. ... True, two separate attempts to commit extortion under the Hobbs Act may suffice to establish the pattern [of a RICO violation], and an attempt and a completed act of extortion may constitute the two predicate acts. However, a completed act of extortion along with the intermediate steps toward completion of that act constitute one predicate act, not multiple distinct attempts. ... Defendants have demonstrated that the evidence, when viewed in the light most favorable to the plaintiff, can support only one predicate act, and the plaintiff has failed to raise a triable issue of fact as to the existence of two or more predicate acts within ten years. ...

4. Supplemental Jurisdiction ...

Two state-law claims remain in this action: one alleging that the defendants tortiously interfered with Maddaloni Jewelers's prospective business relations, and one alleging that the defendants breached a covenant of good faith and fair dealing implicit in the ORJ Agreement. I have examined defendants' summary judgment motion on the two claims that turn entirely on interpretation of New York law. While defendants view their arguments as calling for a straightforward application of settled legal principles, I conclude that plaintiff's opposition may require a court to test the reaches of those common-law claims. For example, while I have found that plaintiff has failed to raise a triable issue of fact as to RICO's requirement of a pattern of racketeering activity, I have also found that plaintiff has made out a prima facie case of a single act of extortion.

> Comity dictates that a New York court consider whether these common law theories encompass (or should be stretched to encompass) the facts present here. Accordingly, I decline to exercise supplemental jurisdiction.

Id.; Exhibit Q, at 6-7, 12, 15, 17, 26, 28-29.

Following remand to this court, Maddaloni filed a request for judicial intervention and the Clerk eventually transferred this action to the Commercial Division. Id.; Exhibit U. Defendants now move for summary judgment to dismiss Maddaloni's surviving fourth and fifth causes of action.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once the movant makes this showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1st Dept 2003). Here, defendants present three arguments to support their motion for summary judgment.

I. Plaintiff's Fourth Cause of Action for Tortious Interference with Prospective Business Relations

Defendants' first round of dismissal arguments are directed at Maddaloni's claim that defendants tortiously interfered with its prospective business relations. See Memorandum of Law in Support of Motion, at 7-16. The first of these arguments is defendants' assertion that

"plaintiff's claim for tortious interference is an improper attempt to recast a futile contract claim as a tort claim." Id. at 8-9. Defendants correctly recite the principle that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated;" and that "[t]his legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382, 389 (1987) [internal citations and quotations omitted]. However, Maddaloni also correctly states the rule that "where a party engages in conduct outside the contract, but intended to defeat the contract, its extraneous conduct may support an independent tort claim." New York University v Continental Ins. Co., 87 NY2d 308, 316 (1995). Here, the court is aware of Judge Castel's finding that plaintiff made out a prima facie case that Mazzeo committed one act of extortion in violation of the federal Hobbs Act. See Notice of Motion, Exhibit Q, at 12, 29. New York State law clearly treats commercial extortion as a species of tort. See e.g. Penn Warranty Corp. v DiGiovanni, __NYS 2d __, 2005 WL 2741947 * 7 (Sup Ct NY County 2005) ("Since defendant has the right to express his opinion to the public about plaintiff's services, the 'threat' to express such personal opinion cannot be actionable as coercion, extortion or any related tort"). Further, the facts of this case clearly show that defendants' alleged extortion was "connected with and dependent upon the contract" they had with Maddaloni - whether that contract was oral or written. Therefore, the court finds that Maddaloni's fourth cause of action presents more than an "improper attempt to recast a futile contract claim as a tort claim." Accordingly, the court rejects defendants' first argument.

Defendants next argue that Maddaloni has failed to establish that they intentionally

interfered with any specific contracts that Maddaloni had entered into with its clients. See Memorandum of Law in Support of Motion, at 9-12. However, defendants in their argument misconceive the nature of Maddaloni's cause of action that asserts tortious interference with prospective business relations. The Appellate Division, First Department, discussed this tort at length in Mandelblatt v Devon Stores, Inc., 132 AD2d 162 (1st Dept 1987). The court observed that:

> ... Intentional interference with a precontractual business relationship is actionable if effected by unlawful means or, under the theory of prima facie tort, by lawful means without justification. ... Prima facie tort is the intentional infliction of harm which results in special damages, without excuse and solely motivated by malice. ...
>
> While it is true that a party must allege special damages to plead an independent cause of action for prima facie tort successfully ..., no allegation of special damages is required to make out a claim for intentional interference with precontractual relations or prospective economic advantage for, in such a case, the measure of damages "is the loss suffered by the plaintiff, including the opportunities for profits on business diverted from it." ... Consequently, allegations of special damages are not required to plead a valid cause of action for intentional interference through means which constitute a prima facie tort. However, the acts of interference, although lawful, must be prompted solely by malice or ill-will and exceed the bounds of legitimate, robust competition. Here, however, respondent was appellants' consultant, not a competitor. As such, he was bound by a duty of fidelity to his principal. ...
>
> The counterclaim alleges that the purpose of [respondent]'s conduct was "solely to prevent a sale of [appellants' products] unless and until his demands for an enhanced consulting agreement were met", which would indicate that respondent was motivated not solely by malice but by the prospect of greater gain, as the court below noted. However, the [evidence] alleges that respondent disparaged [appellants]' business and financial condition after his demand for a longer and more lucrative contract had been rejected. It therefore appears that this was a retaliatory action, prompted by malice and intended solely to damage appellants with whom respondent had a confidential, fiduciary relationship. Such conduct is actionable. ...
>
> Finally, to maintain an action for intentional interference with prospective

> economic advantage there "must be some certainty that the plaintiff would have gotten the contract but for" the defendant's interference. In their counterclaim appellants state that the prospective buyers "would likely have purchased [appellants' products] but for [respondent's] conduct" and the allegations in the [evidence] are sufficient, at this stage, to sustain the pleading. "The day never existed in our jurisprudence when the courts required plaintiff not only to state a cause of action but also establish in the pleading that he could prove it."

132 AD2d at 168-169 [internal citations omitted]. The Appellate Division plainly states that there is no requirement that the proponent of a claim of tortious interference with prospective business relations identify "specific contracts," as defendants state. Accordingly, the court rejects defendants' claim to the contrary.

Defendants also argue that the Court of Appeals' holding in Carvel Corp. v Noonan (3 NY3d 182 [2004]) applies. See Memorandum of Law in Support of Motion, at 9-12. In that case, the Court observed that:

> Under NBT [the Court of Appeals' holding in NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc., 87 NY2d 614 (1996)] where a suit is based on interference with a nonbinding relationship, the plaintiff must show that defendant's conduct was not "lawful" but "more culpable." The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be "lawful" and thus insufficiently "culpable" to create liability for interference with prospective contracts or other nonbinding economic relations.

3 NY 3d at 190.

Here, defendants contend that the tortious interference that plaintiff alleges they have perpetrated did not rise to the level of "more culpable," as a matter of law, because it consisted only of indirect pressure on Maddaloni's customers. See Memorandum of Law in Support of Motion, at 9-12. However, this facile argument ignores Judge Castel's finding that plaintiff made out a prima facie case that Mazzeo committed an act of extortion in violation of the Hobbs' Act. See Notice of Motion,

Exhibit Q, at 12, 29. This conduct plainly amounts to "a crime or an independent tort." Therefore, the court finds that defendants have no recourse to the holding of Carvel Corp. v Noonan. Accordingly, the court rejects defendants' second argument.

Finally, defendants argue that Maddaloni has failed to establish the "economic damages" element of its fourth cause of action. See Memorandum of Law in Support of Motion, at 12-16. Defendants assert that it is incumbent on Maddaloni to demonstrate that it "has suffered 'reasonably certain' damages." Id., at 12. To support this assertion, defendants cite Wolf Street Supermarkets, Inc. v McPartland (108 AD2d 25 [4th Dept 1985]), an inapposite decision in which the Appellate Division, Fourth Department, reviewed a plaintiff's claim for defamation. Directly on point is the Appellate Division, First Department's decision in Mandelblatt v Devon Stores, Inc., supra, that plainly states that there is no requirement that the proponent of a claim for tortious interference with prospective business relations plead special damages. 132 AD2d at 169. Instead, the proponent need only demonstrate "some certainty that the plaintiff would have gotten the contract but for the defendant's interference." Id. Maddaloni retained an accounting firm to prepare an expert report in order to make that demonstration. See Notice of Motion, Exhibits N, O. The accountants' report compares Maddaloni's sales receipts from years before and after defendants engaged in the alleged tortious interference and concludes both that the visible drop off in Maddaloni's sales results from defendants' actions and that the differential between the amount that Maddaloni actually earned after the alleged interference and the amount that Maddaloni would have earned can be calculated with reasonable certainty. Id. In their reply papers, defendants question the accountants' methodology and conclusions. See Defendants' Reply memorandum, at 19-20. However, defendants' arguments clearly require a factual inquiry.

Accordingly, the court rejects defendants' third dismissal argument and denies the branch of defendants' motion that seeks summary judgment dismissing Maddaloni's fourth cause of action.

II. Plaintiff's fifth cause of action for breach of the implied covenant of good faith and fair dealing

Maddaloni contends that defendants destroyed Maddaloni's benefits under the ORJ Agreement by (1) soliciting illegal payments from Maddaloni, (2) refusing to provide certain products to Maddaloni and (3) delaying the delivery of merchandise to Maddaloni. Plaintiff claims these acts violated the covenant of good faith and fair dealing implicit in the ORJ Agreement.

Defendants argue that the terms of the ORJ Agreement do not impose the sort of duties upon which Maddaloni bases its claim and - in any event - defendants complied with the terms of the ORJ Agreement. See Memorandum of Law in Support of Motion, at 17-19.

A party cannot use the covenant of good faith and fair dealing to nullify other express terms of a party's contract or to create independent contractual rights. (National Union Fire Ins. Co. of Pittsburgh, PA v. Xerox Corp., ___ A.D. ___, 2006 WL 9600 [1st Dept. Jan. 3, 2006]). Nevertheless, a party cannot act within the contract in such a way as to frustrate the basic purpose of the agreement and deprive plaintiff of its rights under the agreement. (See Hirsh v. Food Resources, Inc., ___ A.D. ___, 2005 WL 3489871 at *3 [1st Dept. Dec. 22, 2005]).

The ORJ Agreement mainly contains various disclaimers of liability that redound more to Rolex's benefit rather than an ORJ's. The court agrees with defendants that the ORJ Agreement does not place any supply, delivery, fiduciary or franchisor duties on Rolex. Indeed, the ORJ Agreement places few discernible duties on Rolex at all, and both parties could terminate the

Agreement at will, either for cause or for no cause. Also, Maddaloni did not attempt to contest Rolex's termination of the ORJ Agreement. However, clearly, defendants prevented Maddaloni from enjoying its rights under the ORJ Agreement when it, inter alia, purposefully delayed shipment and demanded bribes. Accordingly, the court declines to dismiss the cause of action for breach of the covenant of good faith and fair dealing.

Finally, defendants argue that Maddaloni has failed to establish the "economic damages" element of its fifth cause of action. See Memorandum of Law in Support of Motion, at 20-21. Because New York State law regards claims for breach of the implied covenant of good faith and fair dealing as the same as claims for breach of the underlying contract, damages are an element. See Canstar v J.A. Jones Const. Co., 212 AD2d 452, 453 (1st Dept 1995), citing Fasolino Foods Co., Inc. v Banca Nazionale del Lavoro, 961 F2d 1052, 1056 (2d Cir 1992). However, in the preceding section of this decision, the court found that Maddaloni has presented sufficient proof of damages to overcome defendants' summary judgment motion. Accordingly, the court rejects defendants' fourth dismissal argument.

III. The Release Provision of the April 3, 2000 ORJ Agreement

Defendants' final dismissal argument is that the "Mutual Release" provision in paragraph 11 of the ORJ Agreement bars Maddaloni from asserting its fourth and fifth causes of action. See Memorandum of Law in Support of Motion, at 22-24. However, Judge Castel specifically rejected this argument in his December 28, 2004 decision disposing of the summary judgment motion that defendants submitted in federal court. See Memorandum of Law in Opposition to Motion, at 20-22; Notice of Motion, Exhibit Q, at 6-7. The law of the case precludes this agreement. In People v Evans (94 NY2d 499 [2000]), the Court of Appeals observed that "the

law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case." 94 NY2d at 504. The Court characterized the doctrine as "a judicially crafted policy that 'expresses the practice of courts generally to refuse to reopen what has been decided, [and] not a limit to their power'" and one that "is necessarily 'amorphous' in that it 'directs a court's discretion,' but does not restrict its authority." Id. at 503 [internal citations omitted]. Defendants nonetheless argue that this court should exercise its discretion to ignore the law of the case doctrine in this action. The grounds upon which they would have the court do so are: 1) that Judge Castel "sua sponte employed the intent issue as the basis for his statement that the court did not have adequate information to reach a conclusion as to the validity of the release"; and 2) that "there is overwhelming uncontradicted evidence of plaintiff's knowledge of its alleged damages and its intent at the time Maddaloni signed the ORJ Agreement." See Defendants' Reply Memorandum, at 24. Both of defendants' proposed justifications consist of no more than conclusory statements. This court thus respects the law of the case and adopts Judge Castel's finding that the release is too vague to bar plaintiff's claims. Accordingly, the court rejects defendants' final dismissal argument.

It is unnecessary for the court to consider defendants' extensive procedural reply arguments directed at the sufficiency and admissibility of Louis Maddaloni's Affidavit in Opposition and whether or not that affidavit contradicts Maddaloni's Rule 19-A Statement of Uncontested Facts, because those are credibility issues for trial.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants Rolex Watch U.S.A., Inc., Allen Brill and Lawrence Mazzeo for summary judgment dismissing the remaining fourth and fifth causes of action in the third amended complaint is denied.

Dated: February 17, 2006

ENTER:

J.S.C.