SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

GALIL IMPORTING CORP.,

Decision and Order

Plaintiff,

MOTION SEQUENCE: 01
INDEX NO.:600035/2016

-against-

HADIKLAIM DATE GROWERS COOPERATIVE LTD,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Support	2
Affidavit in Opposition	3
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Reply Memorandum of Law	5

In an action to recover damages for, *inter alia*, breach of contract, the Defendant moves for an order pursuant to CPLR 3211(a)(7) dismissing the complaint.

Background

According to the complaint, in 1988, Galil Importing Corp. ("Plaintiff") and Hadiklaim Date Growers Cooperative Ltd ("Defendant") entered into an "oral agreement pursuant to which the parties agreed that [Plaintiff] was to be the exclusive distributor of the 'King Solomon' line

of Kosher dates" and that the "relationship would continue from year-to-year and was to be terminable by either party at any time upon reasonable notice" (Complaint at ¶ 6).[1] It is undisputed that the parties "had an amicable and productive business relationship" for "nearly 27 years" (Memorandum of Law in Support at p 1; Complaint at ¶ 7).

In 2014, Defendant hired a new sales manager. Notwithstanding this change of personnel, Defendant "assured [Plaintiff] that the relationship between the two companies would remain the same" (Complaint at ¶ 11).

In an email dated June 11, 2015, the Defendant wrote to the Plaintiff:

> Hope this email will find you both well and ready for the new season.
>
> At this time of the year we would like to start making our plans for the coming season in general and more specific of the 1st part of the season.
>
> As it seems now Crop 2015 is about to be the same in quantity with some increase. Still not sure about sizing and quality nevertheless season seems to be similar to 2014.
>
> * * *
>
> By end of next week, we should seat down and have all our estimated QTY's and prices for the coming season (Ex. "A" to Affidavit in Opposition).

The following month, in an e-mail dated July 8, 2015, the Defendant again wrote to the Plaintiff:

> Please send your estimate annual program, so we can put you on our crop program.

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[1] The Plaintiff is an importer and distributor of kosher food products. Defendant is a grower of Israeli dates.

Also, it would help to get the 1st few containers of the beginning of the season, so we can prepare our shelves and get it on time to you.

* * *

Please note that for the date products (date's spread, pitted pressed, Haroset and Silan) **I'll need to know your needs by the end of the week**, since we are packing everything those days, beside what I'll need to keep for you.

We can't get SHMITA products and dates, when we are using crop 2014 (like for the date products), or new season Medjoul from ARDOM area, that consider to be outside ISRAEL borders according to the BADAZ.

I'll need to get your annual plan ASAP, if I want to secure for you dates for SHMITA from Ardom only (Ex. "B" to Affidavit in Opposition) (emphasis in original).

On July 21, 2015, Plaintiff placed an order with Defendant (Ex. "C" to Affidavit in Opposition). This order was filled by the Defendant.

On August 21, 2015, Plaintiff placed another order with the Defendant for a portion of its 2015 order. According to the Plaintiff, the price of this order, and cost to Plaintiff, was $137,085. Along with that purchase order was the following e-mail from Plaintiff to Defendant:

Attached herewith our 1 full container order to be shipped anytime its ready.

Regarding the medjoul tray, we have only Bedatz kasharut, is there anyway to be kosher for pesach as well?

As always, we are requesting the outside cartons to have stickers on it for our warehouse purposes. Black and white is file like 2" x 4" label, written the ff:

Galil logo
Item number (bold)
Description
Pack/size

Please confirm and email me you sales order (Ex. "D" to Affidavit in Opposition).

Defendant responded to the Plaintiff's order on August 25, 2015 with the following e-mail:

> We are planning to ship this container on Sep. 24th, but we will try to make it 1 week earlier for Sep. 17th. Both products will be requested BADAZ for PASSOVER.
>
> Liat[2] - please note all the special requests for the labeling in the mail below (Ex. "E" to Affidavit in Opposition).

Later that same day (August 25), Defendant e-mailed Plaintiff saying:

> Following our recent conversation I can't confirm at this point this order and your annual plan (Ex. "F" to Affidavit in Opposition).

On September 6, 2015, Defendant e-mailed Plaintiff:

> Since our last phone call last week I haven't heard from you.
>
> The current situation is as follows:
>
> a. There is still your open balance account of about 45,000 USD that up till now we didn't get any info from you. We simply can not understand why we don't get that simple request.
>
> b. As well, up till now we understand that you would like to split your annual order for the 1st time in many years between Hadiklaim and our competition.
>
> Mainly due to those 2 reasons, we have decided to focus our work this year with someone else. Therefore, after the last container of Halawi that we have sent you last

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[2] The e-mail copied other employees of the Defendant and instructed one of them in particular, Liat, to note Plaintiff's "special requests" for labeling when filling the order.

week, we can't confirm the rest of your program.

As a company that looks long term we must utilize our capabilities and build a market with clients that we are sure are with us 100%.

This decision was taken mutually with Hadiklaim management (Ex. "G" to Affidavit in Opposition).

Thereafter, the Defendant reached a new exclusive arrangement with Devik International, Ltd. ("Devik"), which was followed by Plaintiff's commencement of the instant action and the filing of a complaint which asserts causes of action for breach of contract, promissory estoppel, breach of the covenant of good faith and fair dealing, and tortious interference with business relations.

Defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(7).

For the reasons that follow, the motion is granted in part and denied in part.

The Court's Determination

In determining a motion to dismiss under CPLR 3211(a)(7), the complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

First Cause of Action

The claim for breach of contract in the first cause of action, which seeks damages as a result of the breach, is dismissed, but only to the extent provided herein.

In the first cause of action, the Plaintiff alleges that it entered into an agreement with the Defendant to be the exclusive distributor of "King Solomon" dates and that Defendant would act as Plaintiff's supplier for dates and other date products; that Defendant accepted Plaintiff's order for the 2015 season; and that Defendant breached the agreement by refusing to fulfill Plaintiff's order, purporting to terminate the agreement without reasonable notice, and selling "King Solomon" products to Devik and other customers. Plaintiff further alleges that it has performed its obligations under the agreement and that it has sustained damages from Defendant's breach in purporting to terminate the agreement without reasonable notice, including the inability to "find a suitable alternative with the requisite [Kosher] certifications needed for its customers"[3] (Complaint at ¶¶ 22-27).

The Defendant argues that the first cause of action fails to state a claim pursuant to CPLR 3211(a)(7) because the parties' oral agreement is unenforceable under the Statute of Frauds enunciated in General Obligations Law ("GOL") § 5–701(a)(1) and Uniform Commercial Code ("UCC") § 2-201.

Contrary to Defendant's contention, the oral agreement is not unenforceable under GOL 5–701(a)(1), which requires a signed writing for an agreement which "by its terms is not to be performed within one year from the making thereof." Notwithstanding that the agreement called for performance for an indefinite duration, the agreement could be performed or terminated within one year and, thus, was not barred by GOL 5-701 (a)(1) (*see North Shore Bottling Co. v C. Schmidt and Sons, Inc.*, 22 NY2d 171 [1968] [oral distribution contract was not unenforceable under GOL 5–701(a)(1) as defendant-supplier could expressly terminate the contract by

[3] According to the Plaintiff, the Defendant is the only supplier which has the proper certifications for products subject to "Shmita" religious laws.

discontinuing all sales][4]; 61 NYJur2d Statute of Frauds § 29 ["Where no time is fixed by the parties for performance of an agreement, and there is nothing in the agreement itself to show that it cannot be performed within a year, the agreement is not one which cannot be performed within a year under the statute of frauds"]).

With respect to the UCC's Statute of Frauds' provision, the parties' oral agreement falls within the purview of UCC 2-201,[5] which requires a signed writing for a contract for the sale of goods of $500 or more. Furthermore, contrary to the Plaintiff's contention, the doctrine of partial performance of the agreement does not render the agreement enforceable (*see Sands v Feldman*, 243 AD2d 294 [1st Dept 1997]). Where, as here, the cause of action "is pleaded as one at law, and seeks only money damages, without any specific prayer for equitable relief, the plaintiff cannot rely on the doctrine of part performance to defeat the statute of frauds defense" (*Zito v County of Suffolk*, 106 AD3d 814 [2d Dept 2013]; *see also Sparks Associates, LLC v North Hills Holding Co. II, LLC*, 94 AD3d 864 [2d Dept 2012] [part performance may be sufficient in some circumstances to overcome the Statute of Frauds, "but only in an action for specific

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[4] According to the Court of Appeals in *North Shore Bottling Co.*,"the agreement asserted by the plaintiff does not fall within the ban of the Statute of Frauds. Although the parties may have expected the agreement to last over a long period, they contemplated its possible termination by action -- unquestionably within the defendant's power to take at any time -- discontinuing its beer sales in the New York area. That being so, the agreement did not, by its terms, 'of necessity extend beyond one year from the time of its making'" (*North Shore Bottling Co. v C. Schmidt and Sons, Inc.*, 22 NY2d at 176-177, *supra*).

[5] Section 2-201(1) of the UCC provides, in relevant part:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

Contrary to the Plaintiff's contention, UCC 2-201"has been held to apply to distributorship agreements which necessarily involve the purchase of more than $500 of goods" (*United Beer Distributing Co., Inc. v Hiram Walker (N.Y.) Inc.*, 163 AD2d 79 [1st Dept 1990]).

performance"]; *Stainless Broadcasting Co. v Clear Channel Broadcasting Licenses, L.P.*, 58 AD3d 1010 [3d Dept 2009]; *Farash v Sykes Datatronics, Inc.*, 90 AD2d 965 [4th Dept 1982] ["equitable claim of part performance cannot be applied in an action at law" and, thus, even if plaintiff could prove that an oral agreement had been reached, the Statute of Frauds would render the agreement void because claim was an action at law]; *Mihalko v Blood*, 86 AD2d 723 [3d Dept 1982] ["cannot apply the equitable defense of part performance since the dismissed causes of action seek money damages rather than specific performance of the oral contract"]; *Rice v Dylan*, 39 AD2d 809 [3d Dept 1972]; AmJur Statute of Frauds § 296 ["doctrine of part performance is purely an equitable doctrine, unrecognized at law, and accordingly will not sustain an action at law based on a contract within the Statute of Frauds. Thus, the part performance exception to the Statute of Frauds is inapplicable in a suit where only money damages are sought"]).

Dismissal of the first cause of action pursuant to UCC 2-201 is circumscribed, however, by the "Merchant's Exception" espoused in UCC 2-201(2), whereby a letter of confirmation sent by one merchant and received by another merchant serves to satisfy the writing requirement as to both the sender and the receiver.[6] According to the Plaintiff, an order was placed with the Defendant on August 21, 2015. Along with the purchase order was an e-mail from the Plaintiff detailing packaging requirements and other specifics as to the order (Ex. "D" to Affidavit in Opposition). That same day, the Defendant confirmed the order Plaintiff made for the delivery of dates with a cost of $137,085 (*see* discussion *supra* at pp 3-4).

Viewing the evidence in light most favorable to the Plaintiff, the first cause of action, which seeks damages based upon Defendant's alleged breach of an oral agreement, is dismissed pursuant to UCC 2-201, except to the extent that the Merchant's Exception may apply to the sale

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[6] Section 2-201(2) of the UCC provides: "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received" (*see* fn 5 *supra* for express language of UCC 2-201[1]).

of dates contemplated in the August 21, 2015 emails between the Plaintiff and the Defendant.

Second Cause of Action

The branch of the motion seeking dismissal of the breach of contract claim asserted in the second cause of action is denied.

Plaintiff's second cause of action, also a claim for breach of contract, seeks the remedy of specific performance inasmuch as it is alleged that there is no adequate remedy at law in that an "exclusive distributorship in the United States for [Defendant's] products offers a unique opportunity for [Plaintiff] which cannot be replicated." Plaintiff requests an order that Defendant "specifically perform the agreement and supply product to [Plaintiff] on an exclusive basis in accordance with the parties' agreement" (Complaint at ¶¶ 28-33).

According to the Defendant, the breach of contract claim set forth in the second cause of action also fails to state a claim pursuant to CPLR 3211(a)(7) because the oral agreement violates the Statute of Frauds codified at GOL 5–701(a)(1) and the UCC 2-201.

As noted (*see* discussion *supra* at pp 6-7), the oral agreement is not unenforceable under GOL 5–701(a)(1) inasmuch as the agreement could be performed or terminated within one year (*see North Shore Bottling Co. v C. Schmidt and Sons, Inc.*, 22 NY2d at 171, *supra*).

Moreover, the factual allegations and possible applicability of the part performance exception to the UCC 2-201 Statute of Frauds defense, requires denial of the motion with respect

to the second cause of action.[7] In this regard, the Plaintiff has alleged that it substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that it is within defendant's power to perform, and that there was no adequate remedy at law (*see E & D Group, LLC v Vialet*, 134 AD3d 981 [2d Dept 2015]).

Third Cause of Action

In the third cause of action, Plaintiff asserts a claim for promissory estoppel. According to the complaint: the Defendant made a clear and unambiguous promise to fulfill Plaintiff's order placed for the 2015 season; Plaintiff reasonably relied on that promise; Plaintiff's reliance on Defendant's promise was foreseeable; Plaintiff did not seek alternative suppliers for product and took orders from its own customers for the product; as a result of Plaintiff's reliance upon Defendant's promise, Plaintiff "suffered unconscionable injury when [Defendant] refused, in August 2015, to supply [Plaintiff] with product" (Complaint at ¶¶ 34-39).

The elements of a claim for promissory estoppel are: 1) a clear and unambiguous promise; 2) reasonable and foreseeable reliance by the party to whom the promise is made; and 3) injury sustained in reliance on that promise (*Williams v Eason*, 49 AD3d 866 [2d Dept 2008]).

At bar, the Plaintiff has alleged each of these elements, which at this pre-answer stage, must be taken as true with all inferences being viewed in favor of the Plaintiff (*see Rogers v Town of Islip*, 230 AD2d 727 [2d Dept 1996] [although plaintiffs will be required, at trial, to

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[7] The Plaintiff alleges in the complaint that the Defendant sent e-mails: on June 11, 2014 stating that it would like to start making plans for the coming season; on July 8, 2015, asking Plaintiff to send its estimated needs for the season; and in August 2015 confirming an order Plaintiff made for $137,085 for the delivery of dates. Moreover, the Defendant filled an order placed by Plaintiff in July 2015. Viewing this complaint in a light most favorable to the nonmoving party, these e-mails constitute indicia of an oral agreement between the parties sufficient to avoid the Statute of Frauds. The court further notes Defendant's preliminary statement wherein it stated that "[f]or 27 years, [Defendant] and [Plaintiff] had an amicable and productive business relationship. Each year, [Plaintiff] would order particular amounts of dates and date products from [Defendant], and each year, [Defendant] would fulfill those orders and ship the products to [Plaintiff]" (Memorandum of Law in Support at p 1).

prove the specific details of each of the elements of promissory estoppel, no such detailed showing is required to survive a motion to dismiss pursuant to CPLR 3211]).[8]

Fourth Cause of Action

In the fourth cause of action, the Plaintiff alleges that at the time the parties entered into the agreement, Plaintiff intended and was led to believe that it was to be the exclusive distributor of the "King Solomon" brand of dates in the Untied States and that Defendant breached the covenant of good faith and fair dealing implicit in the agreement by not providing Plaintiff with reasonable notice that it would no longer be the exclusive distributor of the "King Solomon" brand of dates (Complaint at ¶¶ 41-43).

Every contract contains an implied covenant of good faith and fair dealing (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 68 [1978]). The "covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 513–514 [2d Dept 1999]).

Nevertheless, a "cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2d Dept 2008]). Here, the fourth cause of action is "intrinsically tied" to the first cause of action and must be dismissed (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319–320 [1995]; *Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d at 712,

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[8] "Ordinarily, quasi-contract claims are not permitted when the breach of contract claim is barred by the Statute of Frauds" (*Brand X Editions, Ltd. v Wool*, 42 Misc3d 1207[A] [Sup Ct New York County 2014] citing *Clark–Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). However, inasmuch as a portion of the breach of contract claim set forth in the second cause of action is viable at this pleading stage, the promissory estoppel claim also survives (*see Venetis v Sone*, 81 AD3d 503 [1st Dept 2011] ["Because the statute of frauds does not bar the breach of contract claims, plaintiff's promissory estoppel claim also survives, despite plaintiff's failure to plead unconscionable injury"]).

supra; *Barker v Tim Warner Cable, Inc.*, 83 AD3d 750 [2d Dept 2011] [cause of action for breach of implied covenant of good faith and fair dealing was dismissed as duplicative of breach of contract claim which had been also dismissed, on CPLR 3211(a)(7) grounds]; *126 Newton St., LLC v Engineering Servs. Assocs., P.C.*, 42 Misc3d 1227[A] [Sup Ct Queens County 2014] [plaintiff's claim for breach of the implied covenant of good faith and fair dealing was dismissed as duplicative of breach of contract claim, which had also been dismissed]; *Piller v Marsam Realty 13th Avenue, LLC*, 41 Misc3d 1217[A] [Sup Ct Kings County 2013]).

Fifth Cause of Action

In the fifth cause of action, Plaintiff asserts a claim for tortious interference with business relations. According to the Plaintiff, the Defendant "intentionally and maliciously spoke to [Plaintiff's] customers and told them that [Plaintff] will no longer be selling any date products"; that these "statements were intended solely to interfere with plaintiff's business relationships with its customers just so those customers would purchase products from Devik instead of [Plaintiff]"; Defendant's acts "were malicious, and it used unlawful means to induce [Plaintiff's] customers to refrain from purchasing goods from [Plaintiff], including trade disparagement and false and fraudulent representations"; and that because of Defendant's "intentional, malicious, wanton and reckless" actions, "taken in complete disregard for" Plaintiff's rights, Defendant is liable for both compensatory and punitive damages.

In order to set forth a claim for tortious interference with business relations, a plaintiff must allege: 1) the existence of a business relation with a third party; 2) that the defendant, having knowledge of such relationship, intentionally interfered with it; 3) that the defendant either acted with the sole purpose of harming the plaintiff or by means that were dishonest, unfair, improper or wrongful; and 4) a resulting injury to the plaintiff's business relationship (*Guard–Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]; *Qosina Corp. v C&N Packaging, Inc.*, 96 AD3d 1032 [2d Dept 2012]; *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 476 [2d Dept 2009]; *Caprer v Nussbaum*, 36

AD3d 176, 204 [2d Dept 2006]). "'Wrongful means' include 'fraudulent representations, threats, or a violation of a duty of fidelity owed to the plaintiff by reason of a confidential relationship between the parties'" (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575 [2d Dept 2008] [citations omitted]).

At bar, the wrongful conduct, according to the complaint, is that Defendant, "in an attempt to destroy [Plaintiff's] reputation and further harm its business," is "disparaging [Plaintiff's] reputation in the Kosher food industry" having told Plaintiff's customers, at a Kosher food trade show held in December 2015, that Plaintiff is no longer distributing any date products (Complaint at ¶ 21).

The Defendant argues that the fifth cause of action does not state a cognizable claim for tortious interference with business relations because the Plaintiff has "failed to identify a specific third party that [Defendant] allegedly interfered with"; there are "no allegations that [Defendant] knew about this phantom third-party relationship, let alone intentionally interfered with it, nor could there have been any injury to said relationship"; and that Defendant's purported statement that Plaintff will not be selling any date products "does not rise to the level of a 'crime or independent tort' that would justify a tortious interference claim" (Memorandum of Law in Support at p 10).

On a motion to dismiss for failure to state a cause of action, courts may consider affidavits submitted in opposition to such a motion to cure any defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]; *AAA Viza, Inc. v Business Payment Sys., LLC*, 38 AD3d 802 [2d Dept 2007] [in opposition to motion to dismiss, a plaintiff may submit affidavits to remedy any defect in the complaint in order to preserve inartfully pleaded, but potentially meritorious claims, and the affidavit will be given its most favorable intendment]; *Components Direct v European American Bank & Trust Co.*, 175 AD2d 227 [2d Dept 1991] ["Any deficiency on the face of the complaint as to lack of details in pleading the facts and circumstances relied upon may be cured by affidavit submitted by the plaintiff, resort to which is proper for the

limited purpose of sustaining a pleading against a motion to dismiss under CPLR 3211(a) (7)"]).

Here, the Plaintff stated in his affidavit in opposition that Defendant "has been maliciously disparaging [Plaintiff's] reputation in the Kosher food industry by falsely telling [Plaintff's] customers that [Plaintiff] is no longer distributing any date products, in an attempt to further cripple [Plaintiff's] business, without justification", and that these comments were made in December 2015 at a Kosher food trade show held in New York City to two of the Plaintiff's customers, namely, Product 2000 and Mountain Fruit (Affidavit in Opposition at ¶ 23).

Absent from both the complaint and Plaintiff's affidavit is any mention that Plaintiff's business relationship with third parties (including Product 2000 or Mountain Fruit) has been damaged by Defendant's purported statement that Plaintff is no longer distributing date products. Plaintiff's mere contention that it has "sustained damages and continues to sustain damages" as a result of Defendant's tortious interference with Plaintff's business relations, with no factual basis to support these damages, is insufficient to state a cause of action for tortious interference with contractual relations (*S.A.E. Motor Parts Co., Inc. v Tenenbaum*, 226 AD2d 518 [2d Dept 1996]; *M.J. & K. Co. v Matthew Bender & Co., Inc.*, 220 AD2d 488 [2d Dept 1995]; *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & McRae*, 243 AD2d 168 [1st Dept 1998]; *Cambridge Assocs. v Inland Vale Farm Co.*, 116 AD2d 684 [2d Dept 1986]).

Conclusion

Based on the foregoing, it is hereby

Ordered that the Defendant's motion is granted, but only to the following extent: the first, fourth and fifth causes of action are dismissed, but only to the extent provided herein; and the

motion is, in all other respects, denied.

This constitutes the decision and order of the court.

Dated: January 12, 2017

Hon. Vito M. DeStefano, J.S.C.