SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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MICHAEL D. COHEN

Plaintiff,

- v -

TRUMP ORGANIZATION LLC,

Defendant.

INDEX NO. 651377/2019

MOTION DATE 04/17/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 20

were read on this motion to DISMISS.

This case presents questions about whether and to what extent an oral agreement may be enforced under New York law. Michael D. Cohen ("Plaintiff" or "Cohen") claims he had an oral agreement with the Trump Organization LLC ("Defendant" or "Trump Organization") to pay his legal expenses for civil, criminal, and investigatory matters arising out of his employment and his ill-defined role as a "fixer." Cohen claims the Trump Organization paid his legal fees for a time under the agreement but then stopped "only after it became clear that Mr. Cohen would cooperate in ongoing investigations into his work for the Trump Organization and its principals, directors, and officers."

Cohen asserts claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) a declaratory judgment setting forth the scope of his rights under the "indemnification agreement," and (4) promissory estoppel. In response, the Trump Organization moves to dismiss Cohen's Complaint on the grounds that no agreement existed;

that even if it did, it is void because it was not in writing; and that Cohen's other claims are either duplicative of his contract claim or fail to state viable causes of action.

For the reasons set forth more fully below, the Trump Organization's motion to dismiss Cohen's claim for breach of contract is granted in part and denied in part. Assuming Cohen's factual allegations are true, which the Court must do for purposes of this motion, the oral agreement is enforceable to the extent it covers legal proceedings and investigations that were pending in July 2017 when the agreement allegedly was made. It is not enforceable, however, with respect to legal proceedings and investigations that began after the agreement was reached.[1] In addition, Cohen's claim for reimbursement of his criminal fines and penalties is dismissed for the independent reason that such an agreement – whether oral or in writing – would be void as against public policy.

Separately, Cohen's claim for breach of the implied covenant of good faith and fair dealing is dismissed as duplicative of his breach of contract claim, while his claims for declaratory relief and promissory estoppel survive, but only to a limited extent.

BACKGROUND

The following statement of facts is based on the factual allegations in Cohen's Complaint and Affidavit, which are taken to be true solely for purposes of this motion to dismiss. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017).

[1] To be enforceable, such an agreement would have to be confirmed by the Trump Organization in writing, or by audio recording, or by the testimony of Trump Organization witnesses. *See* N.Y. Gen. Oblig. Law §5-701. If discovery unearths legally sufficient evidence of an agreement covering post-July 2017 proceedings, Cohen can seek leave to amend his Complaint. *See infra* at Part A(2)(b).

Cohen's Role in the Trump Organization

Cohen joined the Trump Organization in 2006 as Executive Vice President and Special Counsel, and during his tenure there became known as Donald J. Trump's "fixer." (Complaint ("Compl.") ¶¶10-11) (NYSCEF Doc. No. 1). When Mr. Trump ran for President of the United States in 2016, that role continued on the campaign. In addition to his work for the Trump Organization, Cohen began advising candidate Trump and making appearances on his behalf on the campaign trail. (*Id.* ¶14). Upon Mr. Trump's inauguration as President on January 20, 2017, Cohen resigned from the Trump Organization to serve full time as the President's personal attorney. (*Id.* ¶17).

On January 13, 2017 – a week before the inauguration – the U.S. Senate Select Committee on Intelligence (the "Senate Intelligence Committee") announced its investigation into alleged interference by the Russian government into the 2016 United States presidential election, including any possible coordination with the Trump Campaign. (*Id.* ¶20). Then, on January 25, the U.S. House of Representatives Permanent Select Committee on Intelligence (the "House Intelligence Committee") announced a similar investigation. (*Id.* ¶21). A few months later, on May 17, the U.S. Department of Justice launched its own investigation, led by Special Counsel Robert S. Mueller III (the "Special Counsel"), into potential coordination between the Trump Campaign and the Russian government, potential obstruction of justice by President Trump, and related matters. (*Id.* ¶22).

By the end of May, Cohen had emerged as a person of interest in these federal investigations. (*Id.* ¶23). That month, he had received a subpoena issued by the House Intelligence Committee as part of its investigation. (*Id.* ¶24). Cohen retained the law firm McDermott Will & Emery LLP ("McDermott"), to represent him in connection with the

investigations. (*Id.* ¶23). He did so "on the recommendation of Jay Sekulow, an attorney for President Donald J. Trump . . . , and with the support of Mr. Trump and members of the Trump Organization, who encouraged [him] to cooperate with the Investigations." (Affidavit of Michael D. Cohen ("Aff.") ¶8) (NYSCEF Doc. No. 12).

The Alleged Agreement

In July 2017, faced with these ongoing investigations, and in consideration of Cohen's cooperation in a joint defense, Cohen and the Trump Organization allegedly reached an oral agreement "under which the Organization agreed to indemnify [Cohen] and, separately, to pay for all of [his] attorneys' fees and costs in connection with [his] representation and defense in the Investigations and other matters arising from [his] work with and on behalf of the Organization and its principals, directors, and officers." (*Id*. ¶2) (internal definitions omitted). In reliance on the Trump Organization's promise, Cohen "engaged counsel to represent him in the Investigations and other matters." (Compl. ¶27). For convenience, this alleged arrangement will be referred to herein as the "Agreement."

On July 24, 2017, Stephen M. Ryan (Cohen's counsel at McDermott) emailed Alan Garten, Defendant's Executive Vice President and Chief Legal Officer:

> Pursuant to our oral agreement that your client will indemnify my client for this matter, please find enclosed our firm's statement for services rendered on behalf of Mr. Michael D. Cohen regarding a congressional investigation.

Aff., Ex. A (NYSCEF Doc. No. 13). A few months later, on October 25, Mr. Garten wrote back to Mr. Ryan, informing him that "[a] wire was sent to your firms [sic] account for $136,460.99 this afternoon (representing ½ the current outstanding balance that has been billed)," and noting that "[t]he other ½ will be wired in the next few days." Aff., Ex. B (NYSCEF Doc. No. 14). Garten's correspondence did not confirm or reference any oral agreement.

At first, the two sides cooperated in a joint defense "with respect to the Investigations and other matters." (Compl. ¶26). Between August and December 2017, Congress pressed on its their investigations concerning Cohen and others in the President's orbit. High-profile associates of the President testified before Congress. Several former advisors were indicted or pleaded guilty on various charges. And Cohen himself was called to testify before the Senate Intelligence Committee. (*Id.* ¶30).

In December 2017, the Trump Organization confirmed that it would continue to indemnify Cohen and pay his attorneys' fees and expenses in connection with the Investigations, including the outstanding amounts owed to McDermott. (*Id.* ¶31). Through May 2018, Defendant allegedly paid all or part of McDermott's then-billed fees for representing Cohen. (*Id.* ¶32). All told, Defendant allegedly "secured the payment of over $1.7 million of [Cohen's] attorneys' fees and costs incurred in connection with the Investigations and other matters, through direct payments, obtaining funding from the Trump Campaign, and/or securing credits from McDermott." (*Id.*). As late as June 2018, Cohen says he received assurances from the Trump Organization that it would continue to indemnify him and pay his legal expenses in connection with the Investigations. (*Id.*). The Complaint does not plead these confirmations and assurances as separate agreements with separate consideration.

The Matters at Issue

By this time, Cohen was the subject of additional investigations and lawsuits relating to his work for the Trump Organization. The various legal actions which proliferated around Cohen and Mr. Trump are grouped in the pleadings into three distinct categories.

(1) "The Investigations." Defined as "the congressional investigations and the Mueller Investigation," (Pl.'s Mem. of Law at 3; Aff. ¶2), this category includes, at a minimum, the

investigations undertaken by the House and Senate Intelligence Committees in addition to the Special Counsel's investigation.

(2) "Matters." The Complaint lists eleven matters for which, "[b]etween June 2018 and the present, Mr. Cohen has incurred and continues to incur legal fees." (Compl. ¶50). These are, collectively, the "Matters." They include the Investigations, above, and a number of other civil and criminal matters that commenced after the agreement was allegedly formed in July 2017: *Clifford v. Trump*, 2:2018-cv-02217 (March 16, 2018); In the Matter of Search Warrants Executed on April 9, 2018, 1:2018-mj-03161 (April 13, 2018); *Clifford v. Davidson*, SC 129384 (Los Angeles Super. Ct.) 2:2018-cv-0502 (C.D. Cal.) (June 7, 2018); *Underwood v. Trump*, 451130/2018 (Sup. Ct. N.Y. Cty.) (June 14, 2018); *United States v. Cohen*, 1:2018-cr-00602 (Aug. 21, 2018); *United States v. Cohen*, 1:2018-cr-00850 (Nov. 29, 2018).

(3) "Other Matters." In addition, the pleadings are rife with references to "other matters." Cohen alleges that the Trump Organization agreed to indemnify him and pay for his attorneys' fees and costs in connection with "the Investigation and other matters." (*See* Aff. ¶2; Pl.'s Mem. of Law at 5). These "other matters" presumably include, at a minimum, the specific Matters described above. (Compl. ¶50). Beyond those, however, this catchall category also encompasses any other "potential related matters," relating back to Cohen's services on behalf of Mr. Trump and the Trump Organization. (Pl.'s Mem. of Law at 12; *see* Compl. ¶¶27, 32, 48).

An important temporal distinction emerges out of this litany. Some of the matters existed at the time the parties formed their agreement in July 2017 ("Pending Matters"), and some did not ("Future Matters"). As discussed below, the distinction between these two categories – which may raise issues of fact as to individual investigations and proceedings (*see* n.4, *infra*) – is critical to the question of whether the Agreement is enforceable.

The End of the Parties' Arrangement

Cohen's arrangement with the Trump Organization broke down in or around June 2018. That month, Cohen had begun "telling friends and family that he was willing to cooperate with the Special Counsel" as well as with federal prosecutors in connection with a separate investigation in the Southern District of New York. (*Id.* ¶42). President Trump began distancing himself from Cohen around the same time, stating publicly that Cohen was "not my lawyer anymore," and suggesting Cohen was, among other unflattering things, a "Rat." (*Id.* ¶¶43, 46). The President's advisors followed suit, disparaging Cohen as a "pathological liar" on national television. (*Id.* ¶¶44-45). Then, the Trump Organization allegedly "ceased to pay McDermott's invoices, without notice or justification." (*Id.* ¶47). Consequently, McDermott withdrew from representing Cohen, leaving a total of $1,037,868.87 in unpaid fees allegedly owed by Defendant for McDermott's services to Cohen. (*Id.* ¶48). Cohen was then forced to retain additional counsel to represent him in the Investigations and "other matters" covered by the parties' Agreement. (*Id.* ¶49).

On August 21, 2018, Cohen pled guilty to eight criminal charges, including campaign finance violations, tax evasion, and bank fraud, in the Southern District of New York. (*Id.* ¶53). Additionally, on November 29, Cohen pled guilty to lying to Congress. (*Id.* ¶54). Cohen was sentenced to prison on December 12, 2018 and ordered to pay fines and other amounts. (*Id.* ¶55).

In January 2019, Cohen wrote to the Trump Organization requesting reimbursement pursuant to the Agreement. (*Id.* ¶56). The Trump Organization did not respond to that request, nor did it pay any of the amounts requested. (*Id.* ¶57).

Cohen commenced this action on March 7, 2019. The Trump Organization moved to dismiss the Complaint on the ground that the Agreement was not properly pleaded and is barred by the Statute of Frauds, and that the remaining claims failed to state any legally viable claims for relief. (CPLR 3211(a)(5) and (a)(7)).

LEGAL ANALYSIS

In assessing a motion to dismiss, the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *Nomura*, 30 N.Y.3d at 582; *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't 1996).

The Court will consider the allegations in the Complaint together with the allegations made in Cohen's Affidavit, (NYSCEF Doc. No. 12), which he submitted as part of his opposition to Defendant's motion to dismiss. "[A]ffidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635–36 (1976). Like facts in the Complaint, "facts submitted by the plaintiff in opposition to a motion to dismiss are also accepted as true." *Ray v. Ray*, 108 A.D.3d 449, 452 (1st Dep't 2013).

A. Breach of Contract (First Cause of Action)

Under New York law, a breach of contract claim requires: (1) the existence of a contract; (2) plaintiff's performance under the contract; (3) defendant's breach of the contract; and (4)

resulting damages. *See Noise in the Attic Productions v. London Records*, 10 A.D.3d 303, 307 (1st Dep't 2004).

Cohen's breach of contract claim raises two issues here: (1) whether the Complaint sufficiently alleges that there was an Agreement between the parties and, if so, (2) whether such an Agreement is enforceable under New York law.

1. The Existence of the Agreement

As alleged in the Complaint and Affidavit, the Agreement is pleaded sufficiently to survive a motion to dismiss. "A test of the sufficiency of the pleading is whether it gives notice of the transactions relied on and the material elements of a cause of action." *Duross Co. v. Evans*, 22 A.D.2d 573, 573 (1st Dep't 1965) (citing CPLR 3013 ("Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.")).

In his Affidavit, Cohen sets forth the parameters of the deal he allegedly struck with the Trump Organization. "Around July 2017, the Trump Organization LLC, by and through its General Counsel, Alan G. Garten, entered into an oral agreement with [Cohen], through [his] counsel Stephen M. Ryan at McDermott Will & Emery LLP, under which the Organization agreed to indemnify [Cohen] and, separately, to pay for all of [his] attorneys' fees and costs in connection with [his] representation and defense in the Investigations and other matters arising from [his] work with and on behalf of the Organization and its principals, directors, and officers." (Aff. ¶2) (internal definitions omitted).

Cohen thus describes what type of agreement is being alleged, when it was entered into, with whom it was entered, and the agreement's terms and scope. These and other alleged facts

contained in the Complaint and Affidavit give the Defendant sufficient notice as to the facts on which Cohen's claim is founded, and the material elements of the claim. *Duross Co. v. Evans*, 22 A.D.2d at 573; *compare with Razzak v Juno, Inc.*, No. 656428/2017, 2019 WL 316719, at *8 (Sup. Ct. N.Y. Cty. Jan. 24, 2019) (dismissing breach of contract claim for failing to "allege when, where, how, and with whom any purported oral agreement was entered"). That is all that is required at this stage of the case.

At oral argument, Defendant's counsel suggested that Cohen's allegations are not "plausible" and that accepting them would require one to "suspend disbelief." Oral Arg. Tr. at 20-21. But those are jury arguments, not arguments to dismiss the case out of hand. *See Taylor v. Lehr Const. Corp.*, 57 A.D.3d 214, 215 (1st Dep't 2008) ("Issues of credibility are for the jury[.]"); *Gonzalez v. Gonzalez*, 262 A.D.2d 281, 282 (2d Dep't 1999) ("In determining a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and . . . [t]he question of credibility is irrelevant, and should not be considered."). Moreover, the notion that a company might agree to indemnify a corporate employee broadly for legal fees arising out of matters related to his or her employment is hardly implausible. Indeed, it is quite common. *See, e.g.*, *Crossroads ABL LLC v. Canaras Capital Mgmt., LLC*, 105 A.D.3d 645, 646 (1st Dep't 2013) (finding that corporate "indemnification provision is . . . extremely broad, applying to 'any and all claims, demands, actions, suits or proceedings'"). Whether there *was* such an agreement in this case, of course, is not a question to be decided on a motion to dismiss.

2. <u>The Enforceability of the Agreement</u>

The next question is whether the Agreement is enforceable under New York law, which requires that certain types of contracts must be in writing.

The Statute of Frauds, codified in N.Y. General Obligations Law §5-701, "is designed to protect the parties and preserve the integrity of contractual agreements." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 476 (2013). "Under the Statute of Frauds, to be enforceable, certain types of agreements cannot be oral; they must be in writing." *Dorfman v. Reffkin*, 144 A.D.3d 10, 15 (1st Dep't 2016). This requirement "is meant to guard against the peril of perjury[,] to prevent the enforcement of unfounded fraudulent claims"; "[i]n short, the purpose of the Statute of Frauds is simply to prevent a party from being held responsible, by oral, and perhaps false, testimony, for a contract that the party claims never to have made." *Rabizadeh*, 22 N.Y.3d at 476.

The Trump Organization contends that the Agreement is unenforceable under General Obligations Law §5-701(a)(1) because it "is not to be performed within one year from the making thereof. . . ." The section, together with §5-701(a), provides in full that:

> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime.

Id.

"[C]ourts have generally been reluctant to give too broad an interpretation to this provision of the Statute and instead have limited it to those contracts only which by their very terms have *absolutely no possibility in fact and law of full performance within one year*." *D&N Boening, Inc. v. Kirsch Beverage*, 63 N.Y.2d 449 (1984) (emphasis added); *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 366 (1998) ("As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not

act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame.") (internal quotation marks omitted).

If an alleged agreement is found to fall within the scope of §5-701(a)(1) (or any other subsection of §5-701(a)), it is void "unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith [here, the Trump Organization], or by his lawful agent. . . ."

There is sufficient tangible evidence that a contract has been made if, *inter alia*: (i) there is admissible "electronic communication (including, without limitation, the recording of a telephone call or the tangible written text produced by computer retrieval) . . . sufficient to indicate that in such communication a contract was made between the parties"; (ii) "[t]he party against whom enforcement is sought admits in its pleading, testimony or otherwise in court that a contract was made"; or (iii) "[t]here is a note, memorandum or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker." *Id*. §5-701(b)(3). Email communications can satisfy the "writing" requirement. *See Sassoon v. CDx Diagnostics*, 172 A.D.3d 617 (1st Dep't May 28, 2019); *Naldi v. Grunberg*, 80 A.D.3d 1, 13 (1st Dep't 2010).

The "writing" need not be a communication between the parties to the contract. It can be an *internal* communication by the party against whom enforcement is sought (here, the Trump Organization). *See Int'l Trading & Sales, Inc. v. Philipp Bros.*, 99 A.D.2d 983, 984 (1st Dep't 1984) ("If defendant has such a note or memorandum even though it be internal, that could satisfy the Statute of Frauds."); *Scura Partners Securities LLC v Universal Stainless & Alloy Products, Inc.*, No. 653308/11, 2013 WL 1127733, at *6 (Sup. Ct. N.Y. Cty. Mar. 06, 2013) (permitting discovery to satisfy Statute of Frauds because the defendant "may have internal e-

mails and memorandums which would confirm the existence of the agreement, and these documents are 'peculiarly within the knowledge' of [the defendant].").

With those standards in mind, the Court will now address whether and to what extent the agreement alleged by Cohen is enforceable.

a. An Oral Agreement to Pay Legal Fees for Pending *and* Future Matters is Void

Cohen's principal argument is that the Agreement is enforceable because it *could have been* completed within one year from the date the agreement was reached in July 2017. (*See* Pl.'s Mem. of Law at 11-12 ("Mr. Cohen's involvement in congressional investigations could have ended in a matter of weeks or months, and the Organization could have met its obligations under the Indemnification Agreement well within a year.")). As discussed below, that is correct with respect to Pending Matters that were underway in July 2017 – for example, the House and Senate Intelligence Committees' respective investigations – but not with respect to Future Matters that arose only after the agreement was made.

i. Pending Matters

An agreement limited to indemnifying Cohen and paying his legal expenses with respect to Pending Matters could be performed within a year and would not be barred by the Statute of Frauds. The fact that certain Pending Matters – the Investigations, for example – in fact went on for longer than a year is immaterial for purposes of the Statute of Frauds. *See Freedman v. Chem. Const. Corp.*, 43 N.Y.2d 260, 265 (1977) (holding that §5-701(a)(1) did not apply despite the fact that "it took over three years for [the plaintiff's] own performance"); Oral Arg. Tr. at 32-33 (Defendant's counsel acknowledging that an agreement limited to matters existing at the time of the Agreement would not be barred by the Statute of Frauds). The Statute "does not apply to an agreement which appears by its terms to be *capable of performance* within the year; nor to

cases in which the performance of the agreement depends upon a contingency which may or may not happen within the year." *North Shore Bottling Co. v. C. Schmidt & Sons, Inc.*, 22 N.Y.2d 171, 176 (1968) (emphasis added).

Defendant's assertion that "[a] contract of indefinite duration is inherently incapable of performance within one year" goes too far. (*See* Def.'s Mem. of Law at 8) (NYSCEF Doc. No. 9). A contract of indefinite duration *may* be void under the Statute of Frauds, but not solely because of its indefinite duration. For example, oral at-will employment contracts, which are indefinite as to duration, are enforceable because either party can terminate the contract within one year without breaching its terms. *Cron*, 91 N.Y.2d at 367. "If the terms of the contract . . . include[ ] an event which might end the contractual relationship of the parties within a year, defendant's possible liability beyond that time would not bring the contract within the statute." *Martocci v. Greater New York Brewery*, 301 N.Y. 57, 62 (1950); *Cron*, 91 N.Y.2d at 370.

In sum, an agreement limited to paying Cohen's current and future legal bills with respect to Pending Matters could be fully performed within a year. Accordingly, such an agreement, standing alone, would not be barred by the Statute of Frauds.

ii. <u>Future Matters</u>

The Agreement in this case was not limited to Pending Matters, however. Instead, Cohen pleads an "agree[ment] to indemnify me and, separately, to pay for all of my attorneys' fees and costs in connection with my representation and defense in the Investigations *and other matters arising from my work with and on behalf of the Organization and its principals, directors, and officers*." (Aff. ¶2) (emphasis added). Cohen thus asserts that the oral agreement encompassed an open-ended obligation to pay Cohen's legal bills for matters which did not yet exist at the time the agreement was reached (*i.e.,* the Future Matters).

The Agreement as to Future Matters is void under the Statute of Frauds because it could not by its terms be performed within one year. Indeed, it could not *ever* be fully performed because the Trump Organization's obligations under such an agreement would be triggered by any new action or investigation occurring at any time in the future. The only way to terminate this open-ended obligation within one year would be to breach it. But "[t]he possibility of such wrongful termination is not, of course, the same as the possibility of performance within the statutory period." *Zupan v. Blumberg*, 2 N.Y.2d 547, 552 (1957).

Cases involving open-ended agreements to pay sales commissions are instructive. The typical fact pattern in those cases involves an agreement by an employer to give an employee a share of future sales generated by customers whom the employee procured. Courts have held that because this kind of promise impermissibly "extends indefinitely, dependent solely on the acts of a third party and beyond the control of the defendant, [it] is within the statute and must be in writing." *Apostolos v. R.D.T. Brokerage Corp.*, 159 A.D.2d 62, 64–65 (1st Dep't 1990). In *Apostolos*, the court voided a portion of an oral sales commission agreement that would have obligated the defendant to "pay plaintiff one half of any commissions it received on renewals of [insurance] policies that had originally been placed through defendant by plaintiff." *Id.* at 63. Because "[t]here was no allegation that defendant could decline to accept these renewals nor any allegation that defendant was only liable for commissions for renewals that were made during the pendency of the agreement," this portion of the agreement "was within the statute of frauds and, in the absence of a writing, was unenforceable." *Id.* at 65; *see Agee v. Read Q Sys., Inc.*, 70 A.D.2d 805, 805 (1st Dep't 1979) (voiding oral agreement for sales commissions where "performance of the agreement was dependent upon a third party rather than upon the parties to the alleged oral contract"). Similarly, the alleged Agreement to cover Cohen's legal expenses for

all "other matters" would continue indefinitely, dependent on the actions of third-parties such as prosecutors, law enforcement agencies, aggrieved private litigants, and an unknowable number of others.

Cases involving open-ended distributorship agreements further illustrate the point. In *D&N Boening, Inc. v. Kirsch Beverage*, 63 N.Y.2d 449 (1984), the Court of Appeals voided under the Statute of Frauds an oral distributorship arrangement that "provided for no expiration and there was no contemplation of any completion or final discharge." *Id.* at 458. By contrast, in *North Shore Bottling*, the Court held that the indefinite distributorship arrangement there "f[ell] outside the bar of the Statute of Frauds." 22 N.Y.2d at 179. Although the oral agreement in *North Shore Bottling* set no fixed end date, and "the parties may have expected the agreement to last over a long period," the agreement *could have* terminated within one year if the defendant chose to "discontinu[e] its beer sales in the New York area." *Id.* at 176-77. Had that occurred within a year, the parties' contractual obligations would have then terminated without a breach. *Compare Nakamura v. Fujii*, 253 A.D.2d 387, 389 (1st Dep't 1998) (upholding oral agreement to pay student's college tuition even though "[n]othing in the oral agreement at issue sets the duration of [a party's] obligation to pay," because "it cannot be said that the agreement could not be performed within one year, notwithstanding its duration in fact"), *with McCoy v. Edison Price*, 186 A.D.2d 442, 443 (1st Dep't 1992) ("Where the alleged oral agreement only may be terminated within one year upon a breach thereof or non-performance, it is not exempt from the Statute of Frauds.").

Cohen's rationale for enforcing the Agreement with respect to Future Matters (including the amorphous "other matters") is not persuasive. He argues, correctly, that "[t]he determination of whether an oral agreement can possibly be performed within one year . . . look[s] forward

from the day the parties entered into the agreement." (Pl.'s Mem. of Law at 11). But to determine whether subsequent matters come under the agreement alleged in this case, the parties must look backwards to work out whether those matters are "potential[ly] related" to Cohen's employment. (*Id.* at 12). This calculation cannot be done at the time of contract formation in this case because Future Matters by definition are matters that the parties did not know about at the time, such as the "[c]riminal case against [Cohen] related to his alleged misleading congressional investigators." (Compl. ¶50). Therefore, "look[ing] forward from the day the parties entered into the agreement," the agreement as to Future Matters was incapable of performance within one year.

Accordingly, an Agreement obligating the Trump Organization to pay Cohen's legal bills for Future Matters, standing alone, would be unenforceable. Because the Agreement covers both Pending *and* Future Matters, it cannot by its terms be performed within one year and is unenforceable unless it is supported by tangible evidence of the type required by the Statute of Frauds.

* * * *

The Court will next consider whether the correspondence between Cohen's lawyer and the Trump Organization is sufficient to create an enforceable *written* agreement under the Statute of Frauds; if not, whether the Trump Organization's payment of Cohen's initial legal bills is sufficient to create an enforceable agreement to pay his remaining bills; and if not, whether the Agreement can be severed so that Cohen's claims are limited to the portion of the Agreement relating to indemnification for Pending Matters.

b. Cohen Does Not Allege the Required "Writing" To Satisfy the Statute of Frauds

Although the Statute gives wide latitude in terms of the type and form of the required "writing," Cohen's allegations do not meet the test. The allegations focus on correspondence between Cohen's counsel (McDermott) and the Trump Organization's general counsel (Mr. Garten). The first email from McDermott to Mr. Garten does reference an "oral agreement," but only to "indemnify [Cohen] *for this matter*," *i.e.*, "a congressional investigation." Aff., Ex. A (emphasis added). Moreover, this email was not signed or otherwise endorsed by Mr. Garten or the Trump Organization. Therefore, the McDermott email, in and of itself, cannot constitute the written "note or memorandum" required under the Statute of Frauds. *See D'Esposito v. Gusrae, Kaplan & Bruno PLLC*, 44 A.D.3d 512, 513 (1st Dep't 2007) ("In the absence of any writing 'subscribed by the party to be charged therewith,' the documents offered by plaintiff were insufficient to overcome the mandate of General Obligations Law §5–701(a)(1).").

Nor does Mr. Garten's response to McDermott satisfy the writing requirement. It is a "well-established rule that in a contract action a memorandum sufficient to meet the requirements of the Statute of Frauds must contain expressly or by reasonable implication all the material terms of the agreement." *Morris Cohon & Co. v. Russell*, 23 N.Y.2d 569, 575 (1969); *Stulsaft v. Mercer Tube & Mfg. Co.*, 288 N.Y. 255, 258 (1942) ("To satisfy the statute of frauds, the writing must contain all the material terms of the agreement."); *see also Dorman v. Cohen*, 66 A.D.2d 411, 414 (1st Dep't 1979) ("If instead of proving the existence of the contract, the memorandum . . . evidenced a different contract in terms and conditions from that which the parties entered into, it fails to comply with the statute."). Mr. Garten's email falls short of that standard. He did not acknowledge in his communications any agreement to pay Cohen's legal bills, let alone one broad enough to extend beyond "this matter" to an unlimited number of civil,

criminal, investigatory, and "other" matters that arose after the agreement supposedly was made. Because "the writing itself is plainly insufficient on its face," "it cannot be used to satisfy the Statute of Frauds." *Ashkenazi v. Kelly*, 157 A.D.2d 578, 579 (1st Dep't 1990).

c. The Trump Organization's Partial Performance of the Alleged Agreement Does Not Satisfy the Statute of Frauds

Next, the fact that the Trump Organization paid some of McDermott's bills at the outset does not satisfy the Statute of Frauds. Although "partial performance" can satisfy the Statute of Frauds for certain types of real estate-related agreements under N.Y. Gen. Oblig. L. §5-703, it does not apply to N.Y. Gen. Oblig. L. §5-701(a)(1), which is the only provision upon which Defendant relies. *See Castellotti v. Free*, 138 A.D.3d 198 (1st Dep't 2016) ("[T]he partial performance exception applies only to the Statute of Frauds provision in §5–703, and has not been extended to §5–701."); *Abyssinian Dev. Corp. v. Bistricer*, 133 A.D.3d 435, 436 (1st Dep't 2015) ("Nor is there an exception under General Obligations Law §5–701 for part performance.").

d. The Agreement Can Be Severed So That It Can Be Enforced In Part

"As a general rule, if part of an entire contract is void under the Statute of Frauds, the whole contract is void." *Apostolos v. R.D.T. Brokerage Corp.*, 159 A.D.2d 62, 65 (1st Dep't 1990). "However, where an oral agreement is a severable one, *i.e.*, susceptible of division and apportionment, having two or more parts not necessarily dependent upon each other, that part which, if standing alone, is not required to be in writing, may be enforced, provided such apportionment of the agreement may be accomplished without doing violence to its terms or making a new contract for the parties." *Id.* at 65-66; *see also U.K. Cable Ventures, Inc. v. Bell Atl. Investments*, 232 A.D.2d 294, 294–95 (1st Dep't 1996) (holding "the alleged oral contract in issue . . . is severable into two parts") (citing *Apostolos*, 159 A.D.2d at 65-66)); *Castellotti v.*

Free, 138 A.D.3d 198, 202 (1st Dep't 2016) (citing *Apostolos*'s rule of severability but finding that severance was not appropriate with respect to the agreement at issue). .

In *Apostolos*, the insurance brokerage agreement at issue comprised two parts: (1) an agreement to pay the plaintiff half of any commissions the defendant received on new policies procured by the plaintiff, and (2) an agreement to pay the plaintiff half of any commissions the defendant received as a result of *renewals* on old policies. 159 A.D.2d at 63. As noted above, the court invalidated the second prong of the agreement under the Statute of Frauds because "[t]here was no allegation that defendant could decline to accept these renewals nor any allegation that defendant was only liable for commissions for renewals that were made during the pendency of the agreement." *Id.* at 65. By contrast, the first prong was "terminable at will as to the earning of commissions on original policies," and thus "was not within the statute." *Id.* at 65. The court then found that the agreement was "easily divisible" into two separate parts because "whether or not a particular policy was renewed would constitute a completely separate and distinct transaction" from the commissions on original policies. *Id.* at 66. Accordingly, the court "f[ound] that the contract should be severed and plaintiff permitted to proceed on the part of the action" not barred by the Statute of Frauds. *Id.*

Similarly in *U.K. Cable*, the court confronted a two-part oral agreement "under which defendant [ ] was to help plaintiffs obtain cable television franchises in England and then finance the construction and operation of those cable systems over the long term, assuming the franchises were granted." 232 A.D.2d at 294 (internal quotation marks omitted). The court found this agreement was "severable into two parts." *Id.* "The first part, that defendants would assist plaintiffs in the application process, was fully performable, and in fact was performed, within one year, and is therefore outside the Statute of Frauds"; "[h]owever, the second part of

the alleged oral agreement, that defendants would finance a 'multi-year build-out' of the cable systems as well as the costs of operating them 'over the long term,' by its very terms, is not capable of full performance within one year, and is therefore barred by the Statute of Frauds." *Id.* at 294-95.

By contrast, in *Castellotti*, the court declined to sever an oral agreement, and instead held that the entire agreement was voided. The court reasoned that the two provisions at issue there were "intertwined with and dependent on" each other, and "both supported by the same consideration." 138 A.D.3d at 203.

The Court finds that, consistent with *Apostolos* and *U.K. Cable*, it is appropriate to sever the Agreement so as to permit enforcement of the alleged oral agreement to pay Cohen's legal fees and costs for the Pending Matters. Far from "doing violence" to the terms of the agreement, severance reflects the delineation evident in Cohen's allegations – allegations which, in turn, indicate that the two portions of the agreement are "separate and distinct." Throughout Cohen's pleadings and filings, the Investigations are consistently demarcated from the "other matters." (*See* Compl. ¶26; Aff. ¶2; Pl.'s Mem. of Law at 5). Cohen's allegations also indicate that it was the pending Investigations, specifically, which spurred the parties to form the agreement in the first place. "The Trump Organization's agreement to pay the Fees and Costs was consistent with the Organization's efforts to coordinate a response to the Investigations"; Cohen then retained McDermott "to represent [him] in connection with the Investigations . . . with the support of Mr. Trump and members of the Trump Organization, who encouraged [him] to cooperate with the Investigations." (Aff. ¶¶6, 8).[2]

[2] Cohen is entitled to discovery to determine with there is sufficient evidence to support enforceability of an agreement to pay legal fees with respect to Future Matters. *See WPP Grp.*

e. Cohen Cannot Be Indemnified for Criminal Fines and Penalties

Cohen's Complaint purports to seek indemnification for the "approximately $1.9 million" in criminal fines and forfeitures assessed against Plaintiff "as part of his criminal sentence." (Compl. ¶61). Such an agreement (whether oral or written) would be unenforceable as a matter of public policy. *Elican Holdings, Inc. v. Hudson Oil Ref. Corp.*, 96 A.D.2d 792, 793 (1st Dep't 1983) ("To the extent that fines or similar penalties were imposed, civil or criminal, public policy considerations preclude either indemnification or contribution for the consequences of the illegal acts."). To the extent that any claim in the Complaint seeks such relief, it is dismissed even if there was an agreement to provide such indemnification.

* * * *

In sum, Defendant's motion to dismiss the First Cause of Action is: (i) granted with respect to Future Matters *and* with respect to Cohen's claim for reimbursement of criminal fines and penalties; and (ii) **denied** with respect to the alleged agreement to pay Cohen's legal fees and costs in connection with the Pending Matters.[3]

USA, Inc. v. Interpublic Grp. of Cos., 228 A.D.2d 296, 297 (1st Dep't 1996). Defendant's suggestion that such discovery should be squelched at the outset because it would be an inappropriate "fishing expedition" is not persuasive. As noted above, the "writing" required by the Statute of Frauds could be embodied in internal Trump Organization documents to which Cohen never had access or to communications between the parties that Cohen can no longer access. Moreover, the Statute of Frauds can be satisfied if Defendant (or its agents) "admits in its pleading, testimony, or otherwise in court that a contract was made." N.Y. Gen. Oblig. Law § 5-701(b)(3)(c). In view of the email correspondence between Cohen's counsel and Mr. Garten, as well as the Trump Organization's subsequent payment of more than $1.7 million of Cohen's legal bills, it is not unreasonable to seek discovery with respect to the Trump Organization's payment or non-payment of Cohen's legal bills.

[3] The Court notes that the precise contents of these two categories – which matters are covered, which are not – may come into clearer focus once discovery commences. The question whether a particular matter is a Future Matter, or rather a continuation of a Pending Matter, for example, cannot be answered in the abstract. Those are factual disputes which will be resolved as this litigation progresses.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing (Second Cause of Action)

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance," which "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). This covenant runs parallel to a contract, and "encompass[es] any promises which a reasonable person in the position of the promisee would be justified in understanding were included" in the contract. *Id.*

Cohen's implied covenant claim is duplicative of his contract claim and must be dismissed on that basis. *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010) ("The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach-of-contract claim, as both claims arise from the same facts and seek identical damages for each alleged breach[.]") (citations omitted); *Bostany v. Trump Org. LLC*, 73 A.D.3d 479, 481 (1st Dep't 2010) (affirming dismissal of implied covenant claim "on the ground of redundancy" because the claim was "intrinsically tied to the damages allegedly resulting from a breach of the contract").

The claim that Defendant's "failure to pay attorneys' fees and costs . . . destroyed [Cohen's] right to receive the fruits of the contract" is another way of saying that Defendant breached its contractual obligation to pay attorneys' fees and costs. (*See* Compl. ¶68). Under the Agreement, those legal expenses *were* the fruits of the contract. Though worded differently, Cohen's implied covenant claim relies on the same facts as the contract claim. (*Compare id. with id.* ¶62 ("fail[ure] to pay Mr. Cohen's attorneys' fees and costs . . . breached the indemnification agreement.")). Cohen also fails to identify any distinct damages he suffered as a

result of Defendant's allegedly tortious conduct, aside from the conclusory assertion that he "suffered damages, including, without limitation, incidental, actual, consequential, and compensatory damages." (*Id.* ¶69).

Therefore, Defendant's motion to dismiss the Second Cause of Action is granted.

C. Declaratory Judgment (Third Cause of Action)

As a general matter, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 54 (1st Dep't 1988); *Singer Asset Fin. Co., LLC v. Melvin*, 33 A.D.3d 355, 358 (1st Dep't 2006) ("[P]laintiff may not seek a declaratory judgment when other remedies are available, such as a breach of contract action.").

However, a declaratory judgment claim can survive a motion to dismiss if it seeks relief that is distinct from the relief sought under the contract claim. So, for example, courts have declined to dismiss declaratory judgment claims when they seek prospective relief, as distinct from the retrospective relief sought by the contract claims. *See Home Equity Mortg. Trust Series 2006-1 v DLJ Mortg. Capital, Inc.*, No. 156016/2012, 2013 WL 5691995, at *7 (Sup. Ct. N.Y. Cty. Oct. 9, 2013) (denying motion to dismiss declaratory judgment claim which "[b]y contrast [to contract claim] . . . contemplate[d] *prospective* action") (emphasis in original); *Karaszek v Blonsky*, No. 2660-07, 2008 WL 2490068, at *4 (Sup. Ct. Nassau Cty. May 30, 2008) ("With respect to the cause of action for a declaratory judgment, the relief sought . . . is based upon the future of the defendant Nicole Blonsky's career based on her contract . . . . This is distinctly different from the cause of action for breach of the written contract[.]").

Here, Cohen's declaratory judgment claim consists of two separate forms of relief: (1) a declaration as to Defendant's obligations to pay Cohen's expenses "incurred . . . to date," and (2) a declaration that Defendant is liable for amounts Cohen "may incur in the future." (Compl. ¶72). At oral argument, Cohen's counsel conceded that the first part of this claim overlaps with the contract claim. The heart of Cohen's claim is "the prospective piece." (Oral Arg. Tr. at 41). That prospective relief would capture "additional attorneys' fees and costs to be incurred by [Cohen]," stemming from matters "that remain pending." (*Id.*). To the extent such prospective relief relates to the portions of the Agreement that survives this motion to dismiss (that is, relating to future payments with respect to Pending Matters), it is not duplicative of the claim for breach of contract.

Therefore, Defendants' motion to dismiss the Third Cause of Action is denied with respect to prospective relief, and otherwise granted.

D. Promissory Estoppel (Fourth Cause of Action)

Finally, Cohen seeks to recover his legal fees with respect to Pending and Future Matters based on a quasi-contract claim of promissory estoppel. "The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." *MatlinPatterson ATA Holdings LLC v. Federal Express Corp.*, 87 A.D.3d 836, 841-842 (1st Dep't 2011).

Generally, Cohen may pursue both a contract and a quasi-contract theory of recovery at this stage of litigation, as alternative grounds for relief. "Where, as here, there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as contract." *Zuccarini v. Ziff-Davis Media, Inc.*, 306 A.D.2d 404, 405 (2d Dep't 2003); *Foster v. Kovner*, 44 A.D.3d 23, 29

(1st Dep't 2007) (sustaining unjust enrichment claim "as an alternative basis for relief in the event it is determined that there was no oral agreement").

To the extent it serves "as an alternative basis for relief in the event it is determined that there was no oral agreement" concerning the *Pending Matters*, Cohen's promissory estoppel claim is not dismissed. *See Foster*, 44 A.D.3d at 29. Cohen alleges that the Trump Organization's promise to pay Cohen's legal fees and costs in connection with the Pending Matters (specifically the Investigations) was clear and unambiguous and that he relied on that promise in retaining and maintaining counsel. And once Defendant allegedly reneged on that promise, Cohen was required to hire other counsel.

However, to the extent it serves as an alternative basis for recovery for the unenforceable agreement with respect to *Future Matters*, Cohen's promissory estoppel claim is dismissed. "If a contract is barred by the Statute of Frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from the reliance placed on the alleged promise." *Castellotti*, 138 A.D.3d at 204.

As the Court of Appeals has observed, "what is unfair is not always unconscionable." *In re Estate of Hennel*, 29 N.Y.3d 487, 494 (2017). Rather, an "unconscionable" injury is one "so strong and manifest as to shock the conscience." *Id.* at 494 (quoting *Christian v. Christian*, 42 N.Y.2d 63, 71 (1977)). As a result, "cases where the party attempting to avoid the Statute of Frauds will suffer unconscionable injury will be rare." *Id.* at 497. Otherwise, "the Statute of Frauds would be rendered a nullity." *Id.*; *Philo Smith & Co, Inc. v. USLIFE Corp.*, 554 F.2d 34, 36 (2d Cir. 1977) ("The strongly held public policy reflected in New York's Statute of Frauds

would be severely undermined if a party could be estopped from asserting it every time a court found some unfairness would otherwise result.") (cited approvingly by *Hennel*).[4]

Here, the injury Cohen purportedly suffered in reliance on Defendant's promise to indemnify him and pay his legal expenses for all "other matters" cannot be considered "unconscionable." Cohen alleges that, "[w]ere it not for his reliance on the Organization's promise to pay, [he] would have had to engage counsel with lower rates and less specialized experience and would not have incurred [certain] fees." (Pl.'s Mem. of Law at 19). As that statement implies, Cohen would have had to retain counsel in connection with the matters at issue regardless of the Trump Organization's promise to pay. Cohen was a named defendant in some of those matters, and directly implicated in others. (*See* Compl. ¶50).

Moreover, as alleged in the Complaint, Cohen retained McDermott "[b]y the end of May 2017," *before* the Agreement was formed. (*Id.* ¶23). Cohen's injury amounts to an obligation to pay for his own attorneys, and for any penalties assessed against him as a result of those matters. "At worst, this amounts to unfairness," not unconscionable injury. *See Eljm Consulting, LLC v Santoni S.P.A.*, No. 652431/2017, 2018 WL 1536632, at *8 (Sup. Ct. N.Y. Cty. Mar. 29, 2018) ("[A]llowing one sophisticated business entity to escape its alleged promises to another sophisticated business entity under application of the Statute of Frauds does not render a result so inequitable and egregious as to shock the conscience and confound the judgment of any person of common sense.") (internal quotation marks and citations omitted).

Accordingly, only a narrow sliver of Cohen's promissory estoppel claim remains. It is limited to the assertion that the Trump Organization has to pay his legal fees and costs with

[4] The Court of Appeals in *Hennel* expressly declined to adopt a more lenient standard espoused by the Restatement (Second) of Contracts, which "permits circumvention of the Statute of Frauds where mere 'injustice' not rising to the level of unconscionability would result." *Id.* at 494 n.3.

respect to the Pending Matters, and even then only if Cohen is not able to establish that there was a binding contract. Therefore, Defendant's motion to dismiss the Fourth Cause of Action is granted with respect to any alleged promise to pay legal fees for Future Matters but denied with respect to any alleged promise to pay legal fees for Pending Matters.

Therefore, it is:

ORDERED that Defendant's motion to dismiss the First Cause of Action (Breach of Contract) is Granted in part and Denied in part; it is further

ORDERED that Defendant's motion to dismiss the Second Cause of Action (Breach of the Implied Covenant of Good Faith and Fair Dealing) is Granted; it is further

ORDERED that Defendant's motion to dismiss the Third Cause of Action (Declaratory Judgment) is Granted in part and Denied in part; it is further

ORDERED that Defendant's motion to dismiss the Fourth Cause of Action (Promissory Estoppel) is Granted in part and Denied in part; and it is further

ORDERED that the parties are to appear for a preliminary conference on October 15, 2019 at 11 a.m.

This is the decision and order of the Court.

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8/28/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**