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

ORAL ARGUMENT REQUESTED

MICHAEL D. COHEN,	:	Index No. 651377/2019
Plaintiff,	:	Hon. Joel M. Cohen
-against-	:	IAS Part 3
TRUMP ORGANIZATION LLC,	:	
Defendant.	:	Motion Seq. No. 001

MEMORANDUM OF LAW IN SUPPORT OF THE DEFENDANT TRUMP ORGANIZATION LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Defendant Trump Organization LLC ("Defendant" or "Trump Org.") moves, pursuant to CPLR 3211(a)(5) and 3211(a)(7), to dismiss all causes of action asserted against it in the Complaint (the "Complaint") of Plaintiff Michael D. Cohen ("Plaintiff").[1]

PRELIMINARY STATEMENT

Plaintiff Michael D. Cohen is a nine-time convicted felon. He pled guilty to an eight-count criminal information filed by federal prosecutors in New York, and one count of making false statements filed by federal prosecutors in Washington, D.C. At his sentencing, United States District Judge William H. Pauley III found that Plaintiff had engaged in a "veritable smorgasbord of fraudulent conduct" that "involved deception" and was "motivated by personal greed and ambition." *See* Sentencing Tr. at 31:10-15, *United States v. Cohen*, No. 18 Cr. 602 (WHP) (S.D.N.Y. Dec. 12, 2018), ECF No. 31 ("*Cohen* Sentencing Tr.").[2]

In the hopes of securing a payday as he enters federal prison to serve a three-year sentence, Plaintiff now sues Trump Org. alleging that it breached a phantom "agreement" to indemnify him for any and all legal fees and costs incurred by him, without limitation. Plaintiff claims Trump Org. must pay $1.9 million in legal fees he incurred during the federal investigations of Plaintiff's personal crimes of greed. In addition, Plaintiff claims that it is Trump Org.'s responsibility to indemnify him for an additional $1.9 million in costs, including the $100,000 criminal fine that was imposed as part of his guilty plea; the $1,393,858 in restitution he owes the IRS as a result of his personal tax evasion; and the $500,000 he agreed to

[1] A copy of the Complaint is annexed to the Affirmation of Marc L. Mukasey (the "Mukasey Aff.") as Ex. 1.

[2] This Court is permitted to take judicial notice of court records on a motion to dismiss. *See Alliance Network, LLC v. Sidley Austin LLP,* 43 Misc.3d 848, 852 n.1 (Sup. Ct. N.Y. County 2014).

forfeit in connection with his guilty plea. In essence, Plaintiff alleges that a fictitious "contract" bound Trump Org. to write him a blank check to cover every conceivable expense *ad infinitum*—unlimited as to duration, scope, amount or condition—in connection with his legal woes. Incredibly, this even includes, according to the Complaint, paying his back taxes.

Plaintiff's assertions are meritless and the Complaint must be dismissed. The first cause of action, for breach of contract, must be dismissed because Plaintiff fails to allege the essential elements of a valid contract, as none exists. The Complaint does not identify any written contract between the parties, let alone produce for the Court's inspection, any contract or other written agreement between the parties concerning *any* indemnification obligation by the Trump Org., much less one that would sweep within its ambit Plaintiff's personal crimes of greed and/or the legal fees he incurred seeking to mitigate the impact of those crimes.

To the extent Plaintiff claims his alleged contract with Trump Org. was oral, the Complaint contains no facts about the speakers, the time, the location, or the terms of any oral agreement, because there was none. And, in any event, an alleged oral contract of indefinite term is barred by the Statute of Frauds. At bottom, Plaintiff makes only conclusory allegations of an agreement to indemnify him—one apparently of indefinite term, unlimited scope, and without supporting consideration or mutual assent. His vague and indefinite allegations of an "agreement" fall short of meeting the required elements of a contract. Thus, Plaintiff cannot state a claim for breach of contract and the first cause of action must be dismissed.

Plaintiff's second cause of action, for breach of the implied covenant of good faith and fair dealing, must also be dismissed because it is entirely derivative of, and dependent on, the existence of a valid and enforceable agreement, which does not exist.

Plaintiff's third cause of action, for declaratory judgment, should be dismissed because it

is duplicative of his breach of contract claim, and Plaintiff has an adequate alternative remedy under his contract claim.

Plaintiff's fourth cause of action, for promissory estoppel, must be dismissed because Plaintiff does not sufficiently allege a clear and certain promise and reasonable reliance. This claim also fails because it cannot be used to circumvent the Statute of Frauds and merely duplicates Plaintiff's deficient contract claim.

For all of these reasons, Plaintiff's Complaint should be dismissed in its entirety and with prejudice.

STATEMENT OF FACTS

Plaintiff worked for Trump Org. from approximately 2006 to January 2017. Complaint, ¶¶ 10, 17. After Plaintiff's employment with Trump Org. ended, he became embroiled in a series of investigations and lawsuits. Complaint ¶¶ 20-24, 33, 36, 37.

On August 21, 2018, Plaintiff pled guilty in the United States District Court for the Southern District of New York to an eight-count criminal information. Complaint ¶ 53, *see* 18 Cr. 602 (WHP).

On November 29, 2018, Plaintiff pled guilty in the United States District Court for the Southern District of New York to an additional one-count criminal information charging him with making false statements to Congress. Complaint ¶ 54, *see* 18 Cr. 850 (ALC).

On December 12, 2018, Judge Pauley sentenced Plaintiff on both cases, to a term of 36 months' imprisonment, to be followed by a three-year term of supervised release. Plaintiff was also ordered to pay a $100,000 fine, $1,393,858 in restitution (i.e., "back taxes") to the IRS, and $500,000 in forfeiture. *Cohen* Sentencing Tr. at 36:2-15.

On or about March 7, 2019, Plaintiff filed this action. He now alleges that in July 2017,

six months after his employment terminated, Trump Org. agreed to indemnify him and pay for all of his attorneys' fees and costs related to any and all investigations or lawsuits in which he had incurred, or might in the future incur, fees and costs. *Id.* at ¶¶ 1, 26, 51, 72.

ARGUMENT

Under CPLR 3211(a)(7), a court must grant a motion to dismiss when the complaint fails to state a cause of action. *Askin v. Dep't of Educ. Of City of N.Y.,* 110 A.D.3d 621, 622 (1st Dep't 2013). And, under CPLR 3211(a)(5), a court must grant a motion to dismiss where a cause of action is barred by the Statute of Frauds. *See Bayside Health Club, Inc. v. Weidel,* 170 A.D.2d 474 (2d Dep't 1991).

In considering a motion to dismiss under CPLR 3211(a)(7), "the court must accept all of the allegations in the complaint as true, and, draw[] all inferences from those allegations in the light most favorable to the plaintiff." *MatlinPatterson ATA Holdings LLC v. Federal Express Corp.*, 87 A.D.3d 836, 839 (1st Dep't 2011); *Benn v. Benn,* 82 A.D.3d 548, 548 (1st Dep't 2011) (applying motion to dismiss standard to CPLR 3211(a)(5)). "However, bare legal conclusions are not presumed to be true and are not accorded every favorable inference." *Kupersmith v. Winged Foot Golf Club, Inc.*, 38 A.D.3d 847, 848 (2d Dep't 2007); *see also Delran v. Prada USA Corp.*, 23 A.D.3d 308, 308 (1st Dep't 2005) ("factual allegations that do not set forth a viable cause of action, or that consist of bare legal conclusions" are not presumed true or given every favorable inference).

A court should not hesitate to dismiss a cause of action that contains vague, conclusory, or unsubstantiated allegations, or that fails to allege required elements. *See All the Way E. Fourth St. Block Ass'n v. Ryan-NENA Cmty. Health Ctr.,* 30 A.D.3d 182, 182 (1st Dep't 2006) (affirming dismissal of complaint on "grounds of vague, conclusory and unsubstantiated

allegations"); *Fowler v. Am. Lawyer Media,* 306 A.D.2d 113 (1st Dep't 2003) (affirming dismissal).

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT

To state a claim for breach of contract under New York law, Plaintiff must plead: (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). At a minimum, CPLR 3013 requires that a complaint "…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." *Id., see also Sidney Janis Ltd. v. deKooning,* 33 A.D.2d 555, 556 (1st Dep't 1969) (dismissing claim that failed to meet CPLR 3013's notice pleading requirement with leave to replead).

A. Plaintiff Failed to Plead the Existence of a Valid Contract

To meet the first element—entry into a valid contract—the Complaint must allege an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. 22 N.Y. Jur. 2d, Contracts § 9. Plaintiff "must set forth the terms of the agreement upon which liability is predicated *by making specific reference to the relevant portions of the contract, or by attaching a copy of the contract to the complaint.*" *Villacorta v. Saks Inc.,* 32 Misc. 3d 1203(A), 932 N.Y.S.2d 764 (Sup. Ct. N.Y. County 2011) (emphasis added); *see, e.g.*, *Sheridan v. Trustees of Columbia Univ. in City of N.Y.,* 296 A.D.2d 314, 315 (1st Dep't 2002) (motion to dismiss breach of contract cause of action granted where plaintiff failed to "allege the essential terms of the note or the agreement in nonconclusory language, or plaintiff's performance of his obligations thereunder"); *Rosenbaum v. Premier Sydell, Ltd.,* 240 A.D.2d 556, 557 (2d Dep't 1997)

(affirming dismissal of complaint where plaintiff failed to allege specific terms of contract).

A complaint that is "vague, indefinite, and uncertain" does not meet the standard for alleging an enforceable agreement, as "the full intention of the parties cannot be ascertained with a reasonable degree of certainty." *Vanguard Military Equip. Corp. v. Schulein,* 266 A.D. 912, 912 (1st Dep't 1943); *see also Razzak v. Juno, Inc.,* 2019 WL 316719, at *8 (Sup. Ct. N.Y. County Jan. 24, 2019) (motion to dismiss granted where plaintiff did not "refer to any specific written agreement nor allege when, where, how, and with whom any purported oral agreement was entered."); *Caniglia v. Chicago Tribune-New York News Syndicate, Inc.,* 204 A.D.2d 233, 234 (1st Dep't 1994) (dismissing breach of contract claim, without leave to replead, as too indefinite).

For example, in *Matter of Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995), plaintiff alleged a breach of contract based on defendant's alleged failure to fulfill a promise to bring individuals to the United States from India and provide them with a graduate education. According to the First Department, the claim was properly dismissed because the plaintiff failed to allege "in nonconclusory language, as required, the essential terms of the parties' purported contract upon which liability is predicated, whether the alleged agreement was, in fact, written or oral, and the amount of financial support which [the defendant or others] were required to provide or the length of time during which the support had to be provided before their contractual obligations concluded." *Id.* (internal citations omitted).

Plaintiff's breach of contract claim suffers from the same legal insufficiency as *Matter of Sud*. There is no specificity about the alleged contract that Plaintiff claims Trump Org. breached. Rather, Plaintiff asserts, in conclusory fashion, that there was "a contractual agreement between the Trump Organization and Mr. Cohen, pursuant to which the Trump Organization agreed to

indemnify Mr. Cohen and to pay attorneys' fees and costs incurred by Mr. Cohen in connection with various matters arising from Mr. Cohen's work with and on behalf of the Organization and its principles, directors, and officers." Complaint ¶ 1. The only information alleged in the Complaint about the claimed contract is the conclusory assertion that the parties supposedly entered into it "in or around July 2017." Complaint ¶ 26. But fatally absent from the Complaint are any allegations about the terms of the agreement. That is, the Complaint does not quote a single "specific provision [] of the contract upon which liability is predicated." *Caniglia*, 204 A.D.2d at 234. The Complaint contains no allegations about what matters the agreement covered, what amounts Trump Org. agreed to pay, the timing or schedule for the supposed payments, to whom Trump Org. agreed to make payments, for how long Trump Org. agreed to make payments, or the consideration supporting the alleged agreement. Nor does the Complaint contain any allegation of whether the agreement was oral or in writing or who allegedly made the agreement on behalf of Trump Org. In short, the Complaint is fatally vague, indefinite and uncertain about the terms of the alleged agreement.

Given Plaintiff's failure to adequately allege the existence of an enforceable agreement, Plaintiff's claim for breach of contract fails to state a claim and must be dismissed.

B. Plaintiff's Breach of Contract Claim is Barred by the Statute of Frauds

Even if Plaintiff had adequately alleged the existence of a valid agreement (which he has not), that agreement would be unenforceable under New York's Statute of Frauds.

The purpose of the Statute of Frauds is "to prevent perjured testimony or casual oral statements from fraudulently imposing a contract on a party that did not, in fact, enter into a binding agreement." *Gural v. Drasner*, 114 A.D.3d 25, 31 (3d Dep't 2013). In other words, "[t]he statute of frauds is designed to protect the parties and preserve the integrity of contractual

agreements." *William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh,* 22 N.Y.3d 470, 476 (2013). *See also* 73 Am Jur. 2d, Statute of Frauds § 403 ("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"). To comply with the Statute of Frauds, "a writing must identify the parties, describe the subject matter, state the essential terms of an agreement, and be signed by the party to be charged." *Urgo v. Patel*, 297 A.D.2d 376, 377 (2d Dep't 2002).

General Obligations Law § 5-701(a)(1) provides that an agreement is void if, "[b]y its terms, [it] is not to be performed within one year from the making thereof" unless it is "in writing, and subscribed by the party to be charged therewith." Agreements not capable of full performance within one year are properly dismissed under the Statute of Frauds. *See, e.g.*, *Matter of Sud*, 211 A.D.2d at 424 ("dismissal warranted where agreement to bring individuals to the U.S. and "provide them with a graduate level education could not, by its terms, be fully performed within one year.") (internal citations omitted).

A contract of indefinite duration is inherently incapable of performance within one year. *D & N Boening, Inc. v. Kirsch Beverage,* 63 N.Y.2d 449, 456 (1984) ("dismissal warranted on Statute of Frauds defense where "the oral agreement between the parties called for performance of an indefinite duration and could only be terminated within one year by its breach during that period"); *see, e.g., Sabharwal v. Eminax, LLC,* 305 A.D.2d 336, 336 (1st Dep't 2003) ("motion to dismiss properly granted since the oral agreement relied upon by plaintiff, as alleged, called for performance of indefinite duration . . ."); *McCoy v. Edison Price,* 186 A.D.2d 442, 443 (1st Dep't 1992) ("The agreement, by its terms, was to last for as long as the defendant remained in business, and thus was incapable of performance within one year, rendering it voidable absent a

writing signed by the party to be charged or his duly authorized agent.") (citations omitted). *See also Grayson v. Ressler & Ressler,* 271 F. Supp. 3d 501 (S.D.N.Y. 2017) (alleged oral agreement imposing obligations "having indefinite durations" considered "incapable of performance within a year … within the ambit of the Statute of Frauds"); *Komlossy v. Faruqi & Faruqi, LLP,* 714 Fed. Appx. 11, 13 (2d Cir. 2017) (oral agreement requiring employer to pay employee fees on an indefinite basis held unenforceable under the Statute of Frauds where the agreement had "no time limitation").

For example, in *D & N Boening, Inc.,* defendant assumed an oral agreement with plaintiff for the distribution of "Yoo-Hoo" beverages "for as long as [plaintiff] satisfactorily distributed the product, exerted their best efforts and acted in good faith." *Id.* at 451. After defendant terminated the agreement, plaintiff sued for breach of contract. *Id.* at 453. The First Department held that the agreement was one incapable of performance within one year and, therefore, void under the Statute of Frauds. *Id.* at 457. The Court of Appeals affirmed, finding that "[a]ccording to its terms, the agreement required defendants to continue plaintiff's subdistributorship indefinitely. It provided for no expiration and there was no contemplation of any completion or final discharge." *Id.* at 458.

This case illustrates perfectly why the Statute of Frauds is necessary: a convicted liar, on his way to prison, suddenly alleges a self-serving "agreement" whereby his former employer purportedly agreed to not only pay any and all of his legal fees, but also pay all of the underlying fines, restitution, and forfeiture resulting from his personal guilty pleas. According to the Complaint, this includes *paying Plaintiff's back taxes to the IRS.* Complaint ¶ 61. Worse, the alleged agreement has no end date; according to Plaintiff it continues as long as costs and fees are incurred. *See, e.g.*, *id.* ¶ 1 (Plaintiff "continues to incur attorneys' fees and costs in

connection with various ongoing investigations and litigation"); *id.* ¶ 51 ("Attorneys' fees and costs subject to the Trump Organization's indemnification agreement continue to accrue"); *id.* ¶ 72 ("the Trump Organization is liable for all attorneys' fees and costs and other amounts that Mr. Cohen may incur in the future in connection with the Matters under the indemnification agreement, applicable corporate governance document, and/or on any other basis"). In other words, Plaintiff alleges that the Trump Org. is contractually obligated to indemnify Plaintiff for an indefinite duration.

Any agreement of indefinite duration is, as a matter of law, incapable of being performed within one year and, therefore, subject to the Statute of Frauds. As the court explained in *D & N Boening, Inc.,* where there is "no provision under the terms of the agreement for it to come to an end," where there is "no option to cancel, and there [i]s no specified time or event which automatically would cause the agreement to terminate," the agreement is incapable of being performed within one year and must be in writing. *Id.* at 458. Because Plaintiff has pled that his alleged agreement with Trump Org. is for an indefinite duration, the Court must dismiss Plaintiff's first cause of action for breach of contract.

II. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF THE IMPLIED CONVENANT OF GOOD FAITH AND FAIR DEALING

There can be no breach of the covenant of good faith that is implied in every contract unless there is, first, a *contract*. *Cusack v. Greenberg Traurig, LLP*, 109 A.D.3d 747, 748 (1st Dep't 2013) (a claim for breach of a duty of good faith fails absent an underlying contract). Even assuming a valid agreement existed, as this Court recently held in *Gaviria v. El-Tawil*, 2019 WL 103724, at *3 (Sup. Ct. N.Y. County Jan. 4, 2019), a party cannot assert a claim for breach of the covenant of good faith and fair dealing by alleging the same breach as a concurrent claim for breach of contract. *Id.*, (internal citation omitted); *see also Superior Officers Council*

Health & Welfare Fund v. Empire HealthChoices Ass'n, Inc., 85 A.D.3d 680, 682 (1st Dep't 2011) (breach of covenant claim "was redundant since it is intrinsically tied to the damages sought under the contract claim"); *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); *Glatt v. Mariner Farmers, Inc.*, 66 A.D.3d 440, 441 (1st Dep't 2009) (breach of covenant claim dismissed as duplicative of the deficient and dismissed contract claim).

Moreover, as this Court held in *Gaviria*, a claim "for breach of the implied covenant of good faith and fair dealing cannot stand as a substitute for [a] failed breach of contract claim." 2019 WL 103724, at *3, *citing Smile Train, Inc., v. Ferris Consulting Corp.*, 117 A.D.3d 629, 630 (1st Dep't 2014) (internal citation omitted).

Plaintiff's claim for breach of the implied covenant of good faith and fair dealing rests on the exact facts and seeks identical damages as his breach of contract claim. Both claims rely exclusively on the alleged breach of the supposed indemnification agreement and seek "incidental, actual, consequential, and compensatory damages." Complaint ¶¶ 63, 69.

Accordingly, Plaintiff's second cause of action for breach of the covenant of good faith and fair dealing should be dismissed.

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR DECLARATORY JUDGMENT

"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 v. Capitol Records,* 137 A.D.2d 50, 54 (1st Dep't 1998) (internal

citation omitted); *see also Wells Fargo Bank, N.A. v. GSRE II, Ltd.,* 92 A.D.3d 535 (1st Dep't 2012) (dismissal of declaratory relief claim was proper where plaintiff alleged a breach of contract cause of action).

Here, under the guise of a declaratory judgment cause of action, Plaintiff asks this Court for relief duplicative of the relief he seeks under his breach of contract claim—payment for Plaintiff's prior and future legal fees under the amorphous indemnity agreement. Not only is Plaintiff's declaratory relief action improper because his breach of contract cause of action provides an adequate remedy, but it is also improper because, as discussed above, Plaintiff has failed to allege a valid, enforceable contract.

Thus, Plaintiff's third cause of action for declaratory judgment should be dismissed.

IV. THE COMPLAINT FAILS TO STATE A CLAIM FOR 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*, 87 A.D.3d at 841-42 (citations omitted).

As with Plaintiff's breach of contract claim, Plaintiff has not met his burden of alleging "a promise that is sufficiently clear and unambiguous." *Id.; see, e.g.*, *Randall's Is. Aquatic Leisure, LLC v. City of New York,* 92 A.D.3d 463, 464 (1st Dep't 2012) ("The promissory estoppel claim fails because the statement that "possible loans" were being "considered" is not an allegation of clear and unambiguous promises upon which plaintiffs could reasonably have relied."). Plaintiff fails to allege precisely what was promised to him and by whom it was promised. Plaintiff also makes no allegations whatsoever of reasonable reliance on the alleged promise. As a result, Plaintiff's conclusory allegations are insufficient to meet the elements of a promissory estoppel claim as a matter of law.

Furthermore, promissory estoppel, like a tort cause of action, is precluded when premised on a breach of a contractual duty unless a "legal duty independent of the contract – *i.e.*, one arising out of circumstances extraneous to, and not constituting elements of, the contract itself – has been violated." *MatlinPatterson*, 87 A.D.3d at 842-843 (quoting *Brown v. Brown*, 12 A.D.3d 176, 176 (1st Dep't 2004) (holding that "the tort claims were merely duplicative of the insufficiently pleaded breach of contract causes of action herein."); *see also Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D.3d 614, 615 (1st Dep't 2009) ("Plaintiffs promissory estoppel... [is] duplicative of his breach of contract claim, since he alleges no duty owed him by defendants independent of the contract.").

Plaintiff's promissory estoppel cause of action merely parrots his breach of contract cause of action. The only duty of Trump Org. alleged by Plaintiff is that arising from the impermissibly vague and indescribable indemnity agreement. Thus, Plaintiff's promissory estoppel claim fails for lack of an alleged duty independent of the supposed indemnity agreement.

Finally, Plaintiff cannot use his promissory estoppel claim to circumvent the requirement that the agreement must be in writing and signed by the party to be charged to satisfy the Statute of Frauds. As an equitable theory, promissory estoppel cannot be used to obtain the legal relief denied as a result of the Statute of Frauds. *Merex A.G. v. Fairchild Weston Sys., Inc.,* 29 F.3d 821 (2d Cir. 1994); *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."). Thus, an oral agreement shall not be enforced unless Plaintiff meets the high bar of alleging that it would be unconscionable to deny enforcement.

Steele v. Delverde S.R.L., 242 A.D.2d 414, 415 (1st Dep't 1997).

Ordinary breach of contract actions, like this one, do not meet the high bar of unconscionability. For example, in *Long Island Pen Corp. v. Shatsky Metal Stampling Co.,* 94 A.D.2d 788, 789 (2d Dep't 1983), plaintiffs' cause of action for promissory estoppel based on breach of an oral agreement by the defendants to sell their business to the plaintiffs was "not so egregious as to render unconscionable the assertion of the statute of frauds." Similarly, in *Melwani v. Jain,* 281 A.D.2d 276, 277 (1st Dep't 2001), where plaintiff alleged breach of an oral agreement that defendant would pay him lifetime royalties and royalties in perpetuity to his heirs, the promissory estoppel claim failed for failure to allege unconscionable injury.

Here, like *Long Island Pen Corp.* and *Melwani,* Plaintiff cannot elude the Statute of Frauds by a claim for promissory estoppel, as Plaintiff has failed to allege unconscionable injury. Instead, his alleged injuries—the expense of legal fees and costs—flow from the alleged breach of the oral agreement barred by the Statute of Frauds.

Thus, Plaintiff's promissory estoppel claim should be dismissed.

CONCLUSION

For the reasons set forth above and in the accompanying Mukasey Affirmation, Trump Org. requests that the Court (1) dismiss all causes of action asserted against it in the Complaint with prejudice, and (2) grant Defendant such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 15, 2019

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WORD COUNT CERTIFICATION

Pursuant to Rule 17 of subdivision (g) of section 202.70 of the Uniform Rules of the Supreme Court and County Court (Rules of Practice for the Commercial Division of the Supreme Court), I hereby certify that the total number of words in this memorandum of law, excluding the caption, table of contents, table of authorities and signature block is 4,328.

Dated: New York, New York
April 15, 2019

/s/ Marc L. Mukasey
Marc L. Mukasey