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COURT OF APPEALS

STATE OF NEW YORK

JAMES L. MELCHER,

Appellant,

-against-

No. 24

GREENBERG TRAURIG, LLP, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
February 13, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 24, Melcher v.
2 Greenberg Traurig.

3 Counselor, do you want any rebuttal time?

4 MR. POTTER: Yes, two minutes, if I may,
5 Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.
7 Go ahead.

8 MR. POTTER: Your Honor, there's really no
9 dispute that the statute of limitations for a
10 liability created by a statute doesn't apply to a
11 statute that merely codifies a liability that exists
12 in common law. Now, we know from the Amalfitano case
13 - - -

14 JUDGE SMITH: When did this one get
15 codified?

16 MR. POTTER: Pardon me?

17 JUDGE SMITH: When did this particular
18 common-law liability get codified?

19 MR. POTTER: It was codified in 1275 at the
20 First Statute of Westminster.

21 JUDGE SMITH: Do British statutes count, or
22 are we talking about New York statutes?

23 MR. POTTER: Well, that's - - - that's our
24 second point, Your Honor. British statutes do not
25 apply. We know that from the Bogardus case.

1 CHIEF JUDGE LIPPMAN: Where did the British
2 statute come from?

3 MR. POTTER: That was the First Statute of
4 - - - of Westminster in 1275. In Amalfitano, this
5 court traced back the history of Section 487 directly
6 back to - - - to the First Statute of Westminster in
7 1275.

8 Now, in answer to Judge Smith's question,
9 the liability created by statute only applies to New
10 York statutes, because in Bogardus, the Court of
11 Chancery - - -

12 CHIEF JUDGE LIPPMAN: Where did the New
13 York statute come from?

14 MR. POTTER: 1787 with the Jones and - - -

15 CHIEF JUDGE LIPPMAN: What was it based on
16 - - -

17 MR. POTTER: That - - -

18 CHIEF JUDGE LIPPMAN: - - - in your mind?

19 MR. POTTER: That was based on the
20 codification of the law that was observed in the
21 colonies. We know that because it was part of the
22 Jones and Varick revision.

23 JUDGE GRAFFEO: So did the colonies
24 recognize this kind of cause of action before the
25 statute was enacted?

1 MR. POTTER: Yes, we certainly believe that
2 to be - - -

3 JUDGE SMITH: For civil damages?

4 MR. POTTER: We certainly believe that to
5 be the case.

6 JUDGE SMITH: Can you cite a case?

7 MR. POTTER: We can't cite a case. And
8 Your Honor, believe me, I looked; in the archives,
9 there are virtually no cases back to colonial New
10 York. So what you have to rely on instead are the
11 commentators. And what the commentators provided
12 with respect to the English law was that there was,
13 in fact, a civil remedy, going back all the way to
14 the reign of John, which ended in 1216.

15 CHIEF JUDGE LIPPMAN: So Amalfitano is not
16 controlling here?

17 MR. POTTER: No, Amalfitano is not
18 controlling.

19 CHIEF JUDGE LIPPMAN: Why?

20 MR. POTTER: Amalfitano never had to
21 address the issue of whether there was a common-law
22 predecessor to the First Statute - - -

23 CHIEF JUDGE LIPPMAN: In New York?

24 MR. POTTER: - - - of Westminster.

25 CHIEF JUDGE LIPPMAN: Oh, yes, okay.

1 MR. POTTER: Or even there. I mean, what -
2 - - what Amalfitano did was it determined that fraud
3 is different than deceit. And it did that by - - -
4 by ably noting that there is a criminal component to
5 the deceit statute. And there was also a criminal
6 component to the common law all the way back to 1216,
7 back to the reign of John. As Blackstone and as
8 Pollock & Maitland, you know, very - - - very ably
9 note, there was liability to the party wronged, the
10 attorney had to answer to the king, and the attorney
11 could be put in jail.

12 CHIEF JUDGE LIPPMAN: But we don't have to
13 go back that far to determine this - - - the issues
14 in this case?

15 MR. POTTER: I don't think you have to,
16 Your Honor, because our point is that this statute
17 only applies to a liability created by New York law.
18 This - - -

19 JUDGE GRAFFEO: So all this means what for
20 the statute of limitations?

21 MR. POTTER: The statute of limit - - -
22 well, what it means is 214(2), the three-year - - -
23 the three-year statute for a liability created by
24 statute, does not exist.

25 JUDGE SMITH: Suppose we were to disagree

1 with you on that, why - - - why is it a problem?
2 Because assuming you've got a specific misrepresent -
3 - - a new misrepresentation, as far as I can tell, in
4 December 2005, which is within the three years, why
5 are we worrying about whether the three-year statute
6 for liability - - -

7 MR. POTTER: Well, there's - - - one, we
8 could go on that ground, Your Honor, certainly, but
9 the real issue, what prolonged this case for five
10 years, was the misrepresentation that this contract
11 amendment is a genuine contract amendment and that it
12 was drafted in 1998.

13 CHIEF JUDGE LIPPMAN: Yeah, but I think
14 Judge Smith's point is, from your perspective, you
15 win either way, right? Either you're advocating it's
16 at six year, and then you win. And if it's a three
17 year, if the date is December 2005, no problem,
18 right?

19 MR. POTTER: That would be the equitable
20 estoppel, absolutely.

21 JUDGE SMITH: Well, why does it have to be
22 equitable estoppel? Why isn't it a wrong in itself?

23 MR. POTTER: Well, there were multiple
24 wrongs.

25 JUDGE SMITH: Because you don't get as much

1 damages?

2 MR. POTTER: Well, there are multiple
3 wrongs. The first wrong occurred - - -

4 CHIEF JUDGE LIPPMAN: Well, why isn't it
5 within the three years? The December 2005 would be
6 within the three years, right?

7 MR. POTTER: No question about it.

8 CHIEF JUDGE LIPPMAN: So why isn't that the
9 end of the story?

10 MR. POTTER: That should be - - -

11 CHIEF JUDGE LIPPMAN: Why do we have to go
12 to equitable estoppel?

13 MR. POTTER: That should be the end of the
14 story, but - - -

15 CHIEF JUDGE LIPPMAN: But what's the answer
16 to Judge Smith's question? Why - - - why do we have
17 to go to equitable estoppel?

18 MR. POTTER: We want to go back to the
19 first time that this wrongful document was knowingly
20 put forth before the court, because that's when the
21 damages - - -

22 JUDGE SMITH: So you want - - -

23 MR. POTTER: - - - certainly started.

24 JUDGE SMITH: You want more than three
25 years' worth of attorneys' fees?

1 MR. POTTER: We certainly want - - -
2 absolutely, Your Honor, because it was very
3 expensive.

4 JUDGE GRAFFEO: So you want to go back to
5 what, February 2004?

6 MR. POTTER: February 2004 when that
7 document was submitted to the court purporting to be
8 genuine. And certainly - - -

9 JUDGE GRAFFEO: And not when the two
10 depositions - - -

11 MR. POTTER: Correct. I mean, there were
12 misrepresentations associated with the depositions.
13 That's when the clock started ticking, because the
14 statute of limitations was tolled up to the point of
15 the two depositions. Because remember, from the
16 attorney's perspective - - -

17 JUDGE SMITH: Tolled by equitable estoppel,
18 you're saying?

19 MR. POTTER: Tolled by equitable estoppel
20 and also by the discovery rule. I think the court
21 could apply a discovery rule in this case. It would
22 be a common-law doctrine that this court applies.
23 But that would be very appropriate because this is so
24 akin to - - - to fraud, other than the - - - the fact
25 of - - - of the reliance issue.

1 JUDGE GRAFFEO: Do you need Beckwith's
2 deposition or - - -

3 MR. POTTER: Certainly, I think we - - -

4 JUDGE GRAFFEO: - - - did you have enough
5 under the discovery rule to know under Governale's
6 deposition?

7 MR. POTTER: I think we needed the Beckwith
8 deposition, because what was said in '04, in an
9 affidavit that Brandon Fradd submitted, he said - - -
10 you know, very early on it was Mr. Beckwith who
11 prepared and handled the documents for Apollo
12 Management. He said, Mr. Beckwith is unavailable and
13 outside the jurisdiction of the court; I've tried to
14 reach Mr. Beckwith; my attorneys tried to reach Mr.
15 Beckwith, but to no avail.

16 So the concern was after the Governale
17 deposition, Governale says, you know, I - - - I don't
18 know who prepared this document. Beckwith is the guy
19 who was really responsible for this client. So
20 really, I don't think an attorney could sue the
21 defendant attorney in this case and accuse him of an
22 intentional deception on the court till he was able
23 to depose Mr. Beckwith. Beckwith then said, no, I -
24 - - I didn't draft this. But most importantly, what
25 Beckwith said was - - - he acknowledged he was

1 contacted in '04. So at that point, the plaintiff
2 knew that the representation that had started in '04,
3 that there's this man Beckwith who can authenticate
4 the document, knew that was absolutely - - -

5 JUDGE SMITH: Hadn't you kind of lost your
6 trust in this attorney - - - this attorney's
7 representation well before the Beckwith deposition?

8 MR. POTTER: Well, you're referring to the
9 burning, Your Honor, the failure to disclose to - - -

10 JUDGE SMITH: Yeah.

11 MR. POTTER: - - - the court that there was
12 a burning.

13 JUDGE SMITH: Yeah, I mean, but of course
14 that - - - and he said the document's in my
15 possession. Because that may have been literally
16 true; what's left of the document was in his
17 possession. That - - - but - - - but then by - - -
18 by late '06, didn't you have a - - - a specific - - -
19 a clear - - - a specific misrepresentation?

20 MR. POTTER: By late '06, we knew that this
21 document could not be authenticated by Mr. Governale,
22 but we were still concerned about Beckwith.

23 But with respect to the burning, that's
24 substantially different than putting forth - - -
25 knowingly putting forth a bad document, because

1 remember, with a burned document, you can still offer
2 it in evidence under the best evidence rule. You can
3 still provide an excuse for the burning, and you can
4 authenticate the document through other means. So
5 there wasn't enough, at that stage, to accuse the
6 lawyer of knowingly submitting a bad document to the
7 court.

8 CHIEF JUDGE LIPPMAN: Thank you, counselor.
9 Counselor?

10 MR. REARDON: Good afternoon.

11 CHIEF JUDGE LIPPMAN: Good afternoon.

12 MR. REARDON: May it please the court. Roy
13 Reardon for the respondents.

14 First, let me try and deal with Amalfitano
15 because - - -

16 CHIEF JUDGE LIPPMAN: Go ahead.

17 MR. REARDON: - - - with all due respect, I
18 don't mean to be haughty or cynical, but I think the
19 opinion of this court was clear; it was in response
20 to a question, not the specific question of the
21 statute of limitations, mind you, but a relevant
22 question. This - - - this statute was derived from a
23 statute.

24 CHIEF JUDGE LIPPMAN: What about the New
25 York law, though? What about - - -

1 MR. REARDON: The New York law - - -

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MR. REARDON: - - - Your Honor, I wish I
4 could tell you with more specifics than your own
5 opinion has done, quite frankly - - - I know you
6 didn't par - - - partake in the opinion, but the
7 opinion takes and traces the history very logically,
8 from its origin in the thirteenth century all the way
9 down to today.

10 CHIEF JUDGE LIPPMAN: So you're saying the
11 New York law is based on the English criminal law,
12 period?

13 MR. REARDON: Absolutely. And it has a
14 criminal aspect to it.

15 JUDGE SMITH: Was there ever a common-law
16 cause of action for this sort of thing?

17 MR. REARDON: I don't know one that gave
18 the relief of not only civil remedy but made it
19 criminal. That was very unique, and it's still there
20 today. I mean, it - - - there's nothing like it out
21 there. This statute frightens me. There's nothing
22 like it out there. Attorneys are made targets. But
23 - - - but that's a story for - - -

24 JUDGE SMITH: Assume - - -

25 MR. REARDON: - - - another day, perhaps.

1 JUDGE SMITH: Assume you're right then.
2 Assume you - - - assume you persuade us you've got a
3 three-year statute, how come - - - I mean, I subtract
4 seven from five - - - five from seven, I get two; I
5 don't get three. There was a misrepresentation in
6 2005. Why are we talking about it?

7 MR. REARDON: The misrepresentation you're
8 talking about, I'm assuming, is the Governale
9 deposition which revealed that there was, in fact, a
10 statement made by the lawyer to the effect that
11 Governale was - - - was involved in the preparation
12 of the document.

13 CHIEF JUDGE LIPPMAN: Right. Why isn't
14 that the controlling date, counsel?

15 MR. REARDON: Because there's a cause of
16 action here, one single cause of action. The one
17 single cause of action is under Section 487(1). What
18 it says, basically, and what the statute requires,
19 there was a deceit here. Counsel referred to it in
20 his brief in this court, in Amalfitano, where he was
21 pro bono, in effect, as an omission, not - - - not
22 just a deceit, but an omission, which is exactly what
23 happened on March 20th, 2004, before Judge Cahn where
24 the witness is asked by the judge - - -

25 JUDGE SMITH: But in December - - - on

1 December 28th - - - I guess December 28, '06, your
2 client is saying, "James Beckwith has unfortunately
3 been able (sic) to talk and has resisted all prior
4 attempts to do so." And on this record, we have to
5 take that as a knowingly false statement, correct?

6 MR. REARDON: Why do you - - - forgive me
7 for asking you a question; I know that's improper.

8 JUDGE SMITH: Go ahead.

9 MR. REARDON: I know it's a pleading, but
10 there's also, when we have demonstrated, as the court
11 ultimately found that we had an absolutely valid
12 statute of limitations defense, does not the
13 plaintiff have to come forward with more and - - -
14 more - - -

15 JUDGE SMITH: Wait, wait, wait, wait, wait,
16 I'm - - - I'm not sure we're communicating. I've got
17 - - - your client made a statement in December of
18 2005, fewer than three years before the case began,
19 on this record. I think I can assume it's a false
20 statement, can't I?

21 MR. REARDON: Your Honor, where - - - where
22 does that - - -

23 JUDGE SMITH: How about a yes or no to that
24 one?

25 MR. REARDON: Where does that - - -

1 JUDGE SMITH: How about - - - I mean, can I
2 or can't I?

3 MR. REARDON: I don't know.

4 JUDGE SMITH: Okay.

5 MR. REARDON: I don't know. You tell where
6 the - - - if I knew where the record came from, if
7 you told me who said what - - -

8 JUDGE SMITH: I'm reading from page 77 of
9 the record, the - - - Mr. Corwin's affidavit of
10 December 28, 2005. "James Beckwith has unfortunately
11 been unavailable to talk and has resisted all prior
12 attempts to do so." Do you remember that one?

13 MR. REARDON: Yes.

14 JUDGE SMITH: Okay. And on this record, I
15 have to assume that's false, that he wasn't telling
16 the truth.

17 MR. REARDON: And my - - - my problem, Your
18 Honor, is understanding why you have to say it's
19 false.

20 JUDGE SMITH: Isn't - - - well, he's - - -
21 he's got considerable evidence that he didn't try
22 very hard to get him on the phone.

23 MR. REARDON: Who's he?

24 JUDGE SMITH: That Beckwith - - -

25 MR. REARDON: Yes.

1 JUDGE SMITH: - - - would have happily
2 talked to him.

3 MR. REARDON: That's true; that's Corwin.

4 JUDGE SMITH: Yeah.

5 MR. REARDON: Yes. But my question, Your
6 Honor, is, what you're relying upon when you see that
7 and read it and take it as faith, is something which
8 counsel put in a pleading, signed by him, not
9 verified by anybody, which I - - - my clients have
10 denied.

11 JUDGE SMITH: Wait a minute. You - - - so
12 you're denying - - - you're denying - - - you're not
13 denying that Corwin said it?

14 MR. REARDON: No, but - - - but that's - -
15 -

16 JUDGE SMITH: You're asserting that in fact
17 Corwin did try to get Beckwith on the phone and - - -
18 and Beckwith resisted?

19 MR. REARDON: Absolutely.

20 JUDGE SMITH: Okay.

21 MR. REARDON: I would support that - - -

22 JUDGE SMITH: But - - - but let's assume
23 that we can't give you summary judgment on that issue
24 on this record, why isn't he within the statute?

25 MR. REARDON: He isn't in the statute

1 because that document - - - number one, that document
2 is not the document that is - - - we are relying upon
3 to get ourselves out of this case. What we are
4 relying upon is the representation that the deceit
5 that took place on March 20th - - -

6 JUDGE SMITH: Well, why is - - -

7 MR. REARDON: - - - 2004 - - -

8 JUDGE SMITH: But why isn't - - - why isn't
9 the December 28th representation a continuation of
10 the same course of conduct?

11 MR. REARDON: But Your Honor, you - - - you
12 can't have - - - that's just more evidence; that's
13 not the - - - the creation of a different cause of
14 action than the one suit - - -

15 JUDGE SMITH: Why not? Why not? If you
16 tell - - - if you tell three lies and one is within
17 the statute, why can't I sue you on the last one?

18 MR. REARDON: Perhaps it is, Your Honor, if
19 you state that. Perhaps it is.

20 JUDGE SMITH: You're saying they don't
21 plead it that way, basically.

22 MR. REARDON: They don't plead it that - -
23 - and they plead one cause of action, Your Honor.
24 That's all. That's all I'm defending here.

25 JUDGE SMITH: And he doesn't plead it as a

1 continuing wrong, or it can't be read as a continuing
2 wrong?

3 MR. REARDON: He makes an argument to that
4 effect, but it doesn't fly, with all - - -

5 JUDGE SMITH: Why not?

6 MR. REARDON: - - - due respect.

7 JUDGE SMITH: What's wrong with calling it
8 a continuing wrong?

9 MR. REARDON: The - - - the case law
10 doesn't support it, Your Honor.

11 JUDGE SMITH: Which case? Which is the
12 best case for - - -

13 MR. REARDON: I don't have a case to cite
14 to Your Honor on that one. It's in the briefs,
15 though. It was an issue that he raised that the
16 motion court flat out denied.

17 JUDGE GRAFFEO: Why does the March 20th,
18 2004 letter clearly reveal the - - - the basis for
19 the deceit - - -

20 MR. REARDON: Okay.

21 JUDGE GRAFFEO: - - - in the case?

22 MR. REARDON: The judge looks down at Mr.
23 Corwin - - -

24 JUDGE GRAFFEO: I guess my question is why
25 don't we need one or both of the subsequent

1 depositions?

2 MR. REARDON: Well, the depo - - - to begin
3 with - - - let me back up on the two depositions,
4 Governale and Beckwith. Both of those men we
5 identified to the plaintiff, the first one at a
6 meeting on January 27th, 2004. The lawyers are
7 there, and we say the lawyer - - - the lawyer says -
8 - - the lawyer who is involved in this is Mr.
9 Governale, he's got it; I've satisfied myself that
10 it's a legitimate document. That's what he basically
11 said. That's Governale. So Governale is out there.
12 Now, Governale - - - that's in '04.

13 In '05, they depose Governale, and
14 Governale says, no, basically, no, that isn't what
15 happened; that isn't the way it is. I wasn't - - - I
16 didn't do it. I can't find it. I can't find a bill
17 for it. He says - - -

18 JUDGE GRAFFEO: There's no time records,
19 right?

20 MR. REARDON: No time records.

21 JUDGE GRAFFEO: Um-hum.

22 MR. REARDON: Governale, at that point, is
23 out of the picture. And - - - but must they - - -

24 JUDGE GRAFFEO: But how do they know that
25 Beckwith didn't - - - at that point in time - - -

1 MR. REARDON: They don't - - - they don't
2 know - - -

3 JUDGE GRAFFEO: - - - how do they know that
4 Beckwith didn't prepare the document or have it?

5 MR. REARDON: Other than this - - - they
6 don't. They don't - - - they don't, and they - - -
7 they're not even sure today. And if you read
8 Beckwith - - - and I don't invite you to do that,
9 because it's long - - - if you read Beckwith, you get
10 the quite clear picture that it's not ice cold. He's
11 not confirming that I remember I - - - I didn't do
12 it. He just is not remembering. He's out of the - -
13 -

14 JUDGE SMITH: He does say I was - - - I
15 would have been happy to talk to the guy.

16 MR. REARDON: Absolutely.

17 JUDGE SMITH: Which does contra - - - does
18 seem contrary to he "has been unavailable to talk and
19 has resisted all prior attempts to do so".

20 MR. REARDON: I come back, Your Honor, when
21 Your Honor quotes things like that, that's what Mr.
22 Jannuzzo says he said.

23 JUDGE SMITH: You mean - - - you mean this
24 is not from your client's affidavit? He misquoted
25 it?

1 MR. REARDON: I - - - I don't know what
2 you're reading from when you read to me, Your Honor.
3 If you tell me what it is, I'll confirm - - -

4 JUDGE SMITH: I'm reading - - -

5 MR. REARDON: - - - whatever my client said
6 as being as true.

7 JUDGE SMITH: - - - from page 77 of the
8 record on appeal, which he says - - - maybe - - - he
9 says he's quoting from an affidavit of Defendant
10 Corwin dated December 28th, 2005.

11 MR. REARDON: Then he said it.

12 Your Honor, as - - - as the court knows,
13 there is a - - - a very tight rein on equitable
14 estoppel. The cases in which equitable estoppel has
15 been used are few and far between, and they're not
16 predicated on a lawyer's 188-paragraph, 44-page
17 complaint which no one verifies, nor did he. And
18 that's what we're - - - we're working with here, and
19 that's why this case should not go forward. We
20 established that the deceit that happened on May 20,
21 2004, in fact was a deceit that gave rise to the - -
22 - could give rise to an alleged claim under 487(1).

23 JUDGE GRAFFEO: And that's also why you
24 claim the discovery rule shouldn't be applied?

25 MR. REARDON: Yes.

1 JUDGE GRAFFEO: Because you - - - the
2 discovery rule - - - you don't need the - - - the
3 equitable estoppel to apply the discovery rule.

4 MR. REARDON: You wouldn't, Your Honor, if
5 you got multiple violations of 487(1), but nobody's
6 alleging that.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thank you.

9 MR. REARDON: Thank you.

10 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

11 MR. POTTER: Thank you, Your Honor. Very
12 quickly, on the equitable estoppel issue. This is
13 before the court on a motion to dismiss.

14 CHIEF JUDGE LIPPMAN: Equitable estoppel is
15 very rare, right?

16 MR. POTTER: It's - - - no question about
17 it, and this is a textbook case for its application.

18 Now, with respect to the allegation that
19 these are just - - -

20 CHIEF JUDGE LIPPMAN: Why is this so rare a
21 case that it's a textbook example?

22 MR. POTTER: Well, I - - - I think it's - -
23 - it's a very unusual circumstance that an attorney
24 would knowingly put forth a backdated document to
25 support a motion to dismiss. But on the issue of we

1 have a complaint, one, a motion to dismiss, the
2 allegations have to be accepted as true. But more
3 importantly, the complaint contained exhibits. And
4 the exhibits can be found in the New York County
5 record. The court can take judicial notice of that.
6 Exhibit 7 to the complaint is the December 28, '05
7 affidavit of Mr. Corwin, paragraph 23, where he says,
8 "And the attorney primarily responsible for Defendant
9 Apollo Management in the first half of 1998, James
10 Beckwith" - - - has been - - - "has unfortunately
11 been unavailable to talk to and has resisted all
12 prior attempts to do so". Then you look at Exhibit 9
13 to the complaint, which the court can take judicial
14 notice of. This is a letter of February 6, 2004,
15 from Mr. Corwin - - -

16 JUDGE SMITH: But you - - -

17 MR. POTTER: - - - to Mr. Beckwith.

18 JUDGE SMITH: You disavow relying on these
19 as the tort for which you're suing, or do you?

20 MR. POTTER: No, we - - - I mean, this - -
21 - this can also be the tort. I mean, this certainly
22 is a - - -

23 JUDGE SMITH: Because he says you didn't
24 plead it that way, that you pleaded it just as a
25 basis for equitable estoppel.

1 MR. POTTER: We - - - we set forth all the
2 facts before the court. On a motion to dismiss, the
3 court can search the - - - the complaint to determine
4 if there is a cause of action stated.

5 JUDGE SMITH: Taking - - - assuming that
6 the issue - - - I understand your point, but assuming
7 the issue is equitable estoppel, if it's equitable
8 estoppel, presumably, you became - - - you became
9 enlightened; at least at the time of the Beckwith
10 deposition, you knew what was going on.

11 MR. POTTER: Two weeks later we sued.

12 JUDGE SMITH: Two weeks later you sued. So
13 you - - - so you - - - the issue then is whether it
14 was reasonable for you to wait from Governale to
15 Beckwith.

16 MR. POTTER: Yes, Your Honor, for equitable
17 estoppel.

18 CHIEF JUDGE LIPPMAN: Okay.

19 MR. POTTER: Thank you, Your Honor.

20 Thank you all.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Melcher v. Greenberg Traurig, LLP, et al., No. 24, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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