Melcher v Greenberg Traurig, LLP & Leslie D. Corwin
2011 NY Slip Op 34074(U)
November 9, 2011
Supreme Court, New York County
Docket Number: 650188/07
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 650188/2007
MELCHER, JAMES L.
vs
GREENBERG TRAURIG LLP
Sequence Number : 003
DISMISS ACTION

PART 54

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 37, 38, 39
Answering Affidavits — Exhibits _____ | No(s). 44, 45, 60
Replying Affidavits _____ | No(s). 51, 52

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/9/11

JUSTICE SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54
----------X
JAMES L. MELCHER,

Plaintiff,

-against-

Index No. 650188/07
Decision & Order

GREENBERG TRAURIG, LLP &
LESLIE D. CORWIN,

Defendants.
----------X
KORNREICH, SHIRLEY WERNER J:

In this action, plaintiff, James Melcher, seeks treble damages for defendants' alleged violation of section 487(1) of the Judiciary Law in the separate action of *Melcher v Apollo Med. Fund Mgt. L.L.C. and Brandon Fradd* (Sup Ct, NY County, Index No. 604047/2003) (Apollo Action). Defendants now move to dismiss the instant action as time-barred.

Factual Allegations

Melcher and Brandon Fradd were members and managers of Apollo Management L.L.C. (Apollo), a company allegedly formed to be the general partner of the hedge fund Apollo Medical Partners, L.P. A dispute arose between Melcher and Fradd over Melcher's contractual right to Apollo's profits under Apollo's Operating Agreement. On December 17, 2003, Melcher allegedly informed Fradd that he was prepared to sue to enforce his contractual rights. Melcher claims that the next day, he saw for the first time a "purported 'May 21, 1998 amendment'" to the Operating Agreement (Amendment), which "Fradd asserted drastically cut [Melcher's] share of the profits of the company." First Amended Complaint, Reardon Aff., Ex. D, ¶¶ 19, 58. Melcher commenced the Apollo Action on December 29, 2003, seeking to recover his membership share of profits under Apollo's Operating Agreement. Fradd and Apollo relied upon

the purported Amendment to refute Melcher's claims in the Apollo Action. Defendants, Greenberg Traurig, LLP (GT) and Leslie Corwin (Corwin), a GT partner, represented Apollo and Fradd in the Apollo Action.

In the instant action, Melcher claims that the Amendment was a back-dated forgery prepared by Fradd. Melcher claims that GT and Corwin engaged in deceit and consented to Fradd's deceit, using the allegedly manufactured evidence in the Apollo Action. Specifically, the pleading alleges that, on January 27, 2004, Melcher, Corwin and Fradd met to discuss the Apollo Action. At that meeting, Corwin allegedly stated that he had "personally confirmed the authenticity of the [Amendment] with the lawyer for [Apollo] who had drafted it." First Amended Complaint, ¶ 22 [emphasis in original]. At this meeting, Melcher claims that his attorney requested production of the original Amendment for forensic testing, to determine when it was created. *Id.*, ¶ 30. Also on January 27th, Fradd was served with the summons and complaint in the Apollo Action. According to Melcher, the next day, Fradd claims to have "'accidentally' burned the original of the 'amendment' on the stove in his apartment, supposedly 'while making tea,'" rendering it untestable. *Id.*, ¶¶ 33, 57.

In February 2004, GT and Corwin moved to dismiss the Apollo Action, based upon a purported copy of the Amendment, which had pre-dated the burning, as documentary evidence. *Id.*, ¶ 43. According to Melcher, GT and Corwin's motion to dismiss failed to disclose that the Amendment had been burned, even though, at the time of the motion, Melcher's motion to obtain the original Amendment for forensic chemical testing was before the court. Melcher claims that, on February 23, 2004, Corwin "misleadingly represented to the Supreme Court that the original of the 'amendment' was safely in his custody 'in escrow' and would remain so during the

pendency of the motion to obtain the original," even though GT and Corwin knew that Fradd had recently burned the document. *Id.*, ¶¶ 46-48. The court dismissed two of the seven causes of action in the Apollo Action (fraud and conversion) and otherwise denied the motion to dismiss. *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 2004 NY Slip Op 30147(U), 2004 WL 5400353 (Sup Ct, NY County, Sept. 10, 2004, Cahn, J., index No. 604047/2003), *affd* 25 AD3d 482 (1st Dept 2006).

According to Melcher, defendants then engaged in a "deceptive cover-up," with the intent to deceive the Supreme Court and Melcher by preventing them from learning that Fradd had burned the original Amendment in order to frustrate forensic testing and to obtain the dismissal of the Apollo Action based upon the forged, back-dated Amendment. *Id.*, ¶¶ 57-59. The alleged cover-up was based upon two facts known by defendants to be false: that Lowenthal Landau Fischer & Bring, PC, the law firm which supposedly prepared the Amendment, had gone out of business[1]; and that James Beckwith, a retired Vermont lawyer who supposedly prepared and handled documents regarding Apollo, refused to return any of defendants' phone calls or provide evidence regarding the Amendment. *Id.*, ¶¶ 60-62 (citing Fradd's March 12, 2004 affidavit).

Melcher alleges that on March 15, 2004, the court in the Apollo Action ordered that the Amendment be disclosed to Melcher. On March 18, 2004, Corwin sent Melcher the "original" Amendment, which consisted of "the scorched remnant of the original that remained after [Fradd's] burning thereof." *Id.*, ¶ 81. Melcher claims that this was the first time he learned of the burning and that he transmitted the document to a forensic chemist. In a report dated April

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[1] According to Melcher, defendants drafted an affidavit for Fradd in the Apollo Action, stating that Lowenthal Landau Fischer & Bring, PC "has gone out of business with some of its attorneys joining the firm Wolf, Block, Schorr & Solis-Cohen." *Id.*, ¶ 62.

13, 2004, Melcher's forensic chemist concluded that the burning of the document rendered "'any analytical technique that measures the changes to ball pen ink by exposure to environmental conditions over time, useless.'" *Id.*, ¶ 84; Reardon Aff., Ex. G. In the same report, the forensic chemist determined that the burning "was not 'accidental.'" First Amended Complaint, ¶ 86.

On April 14, 2004, the court granted Melcher's application to inspect Fradd's apartment, where the burning took place, and to expedite Fradd's deposition. At his deposition on April 21, 2004, Fradd allegedly testified that he did not recall all of the material facts regarding the burning. In a May 19, 2004 affidavit, allegedly drafted by defendants, Fradd claimed that the Amendment was authentic and renewed his false claims that the attorney who drafted the document was unavailable and that the law firm had gone out of business. In this affidavit, Fradd stated, "I have tried to contact Mr. Beckwith, and my attorneys have tried to contact Mr. Beckwith, but to no avail." *Id.*, ¶ 90. Melcher claims that defendants knew from a February 2004 telephone interview with Beckwith that he did not draft the Amendment. In fact, Melcher claims that a February 7, 2006 e-mail confirms Beckwith called GT the same day that he received a Federal Express letter from Corwin. *Id.*, ¶¶ 72-73. Beckwith also allegedly testified that he had delegated Apollo's drafting work to another Apollo lawyer, Jack Governale.

Depositions in the Apollo Action commenced in the fall of 2005. Melcher claims that the deposition of Governale in December of 2005 revealed that Governale had represented Apollo continuously from 1998. and that the law firm files regarding Apollo had not been disrupted, but had been in Governale's continuous custody. In his December 2005 affidavit and January 2006 affirmation submitted to the First Department, Corwin allegedly represented that Beckwith was "unavailable to talk and has resisted all prior attempts to do so" (*id.*, ¶¶ 100, 106), even though,

as discussed above, Corwin had communicated with Beckwith as early as February 2004. *Id.*, ¶¶ 66-77.

After Governale's deposition, Melcher obtained the billing records of Apollo's law firm for the period February 1 to December 31, 1998, the time when the Amendment was allegedly prepared. According to Melcher, in a decision and order dated August 15, 2006 in the Apollo Action, Judge Beverly Cohen determined that "[t]he bill from Wolf Block gives descriptions of other documents prepared during the invoice period. It does not show preparation of this amendment." *Id.*, ¶ 104.

After several delays, Beckwith was deposed on June 11, 2007. According to the First Amended Complaint, Beckwith testified that: Fradd called Beckwith "within the last few years," indicating that Corwin "was going to reach out and talk to [Beckwith] about some documents"; Beckwith indicated to Fradd that he "would take the call from Mr. Corwin" and did take a call from Corwin concerning the Apollo Action; Beckwith indicated his "willing[ness] to speak with them"; and Beckwith was never asked to prepare an affidavit. *Id.*, ¶¶ 70-71. Melcher claims that Beckwith's testimony belies Corwin's sworn statements that Beckwith was unavailable and had resisted prior attempts at contact. *Id.*, ¶¶ 116, 67-77.

Melcher commenced the instant action, two weeks later, on June 25, 2007.[2]

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[2] After an eleven day bifurcated jury trial in May 2009, the jury in the Apollo Action returned a mixed verdict requiring a trial on damages. *See Melcher v Apollo Med. Fund Mgt. L.L.C.*, 2009 WL 5722527 (Sup Ct, NY County, Aug. 31, 2009). The jury's verdict included a verdict in favor of Melcher on his third cause of action for breach of fiduciary duty. Thereafter, Melcher moved for, among other things, judgment as a matter of law on his sixth cause of action for an order to prohibit indemnification of Fradd by Apollo, and Apollo and Fradd moved to set aside the jury's verdict on the claim for breach of fiduciary duty. The court granted Melcher's motion for judgment on his sixth cause of action, and denied the defendants' motion, awarding Melcher damages on the third cause of action. *Id.* The First Department affirmed. *Melcher v*

Legal Analysis

Defendants argue that Melcher's complaint is time-barred by the three-year statute of limitations applicable to section 487 of the Judiciary Law. Melcher counters that the statute of limitations is six years. In the alternative, Melcher argues that his cause of action did not accrue until the conclusion of the Apollo Action or during the continuing violations perpetrated by defendants. Additionally, he argues that defendants should be equitably estopped from asserting the statute of limitations defense.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. *Benn v Benn*, 82 AD3d 548, 548 (1st Dept 2011). Once defendant has met his burden, the burden shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable. *Williams v New York City Health and Hosps. Corp.*, 84 AD3d 1358, 1359 (2d Dept 2011). "In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. Further, plaintiff's submissions in response to the motion must be given their most favorable intendment." *Benn*, 82 AD3d at 548 [internal quotation marks and citations omitted].

The statute of limitations under section 487 of the Judiciary Law was analyzed in *Connolly v Napoli Kaiser & Bern, LLP* (2009 WL 2350275, 2009 NY Misc LEXIS 6302 [Sup Ct, NY County 2009], *affd* 81 AD3d 530 [1st Dept 2011]), where the court applied a three-year statute of limitations. In *Connolly*, the court reasoned as follows:

Apollo Med. Fund Mgt. L.L.C., 84 AD3d 547 (1st Dept 2011). On October 25, 2011, the Court of Appeals granted defendants' motion for leave to appeal. *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 2011 WL 5041648, 2011 NY LEXIS 3154 (2011).

> To the extent the First Department has held that a Judiciary Law §487 claim is governed by the six-year statute of limitations applicable to a common law fraud claim, as opposed to the three-year period for actions upon a statute imposing a penalty or forfeiture, *see New York Transit Authority v. Morris J. Eisen, P.C.*, 276 AD2d 78 (1st Dept 2000) and *Guardian Life Insurance Co, v. Handel*, 190 AD2d 57 (1st Dept 1993), those cases have been implicitly overruled by the Court of Appeals recent decision in *Amalfitano v. Rosenberg, supra*. *Amalfitano* examines the history of the statute going back to the thirteenth century in England, and concludes that Judiciary Law "section 487 is not a codification of a common-law cause of action for fraud. Rather, section 487 is a unique statute of ancient origin in the criminal law of England." The Court of Appeals explains that "section 487 descends from the first Statute of Westminster, which was adopted by the Parliament summoned by King Edward I of England in 1275."
>
> In view of the holding in *Amalfitano* that Judiciary Law §487 does not derive from common-law fraud, the underlying basis for the First Department's application of the six-year limitations period for fraud to Judiciary Law §487, is no longer good law. Rather, extending by implication the holding in *Amalfitano* to the statute of limitations issue, leads to the conclusion that section 487 is governed by the three-year period for actions created by statute imposing a penalty or forfeiture. CPLR 214(2).

2009 WL 2350275, *4 n 5, 2009 NY Misc LEXIS 6302, *9-10 n 5. This court agrees with the reasoning of *Connolly*. *Amalfitano* is controlling and implicitly overrules First Department decisions that pre-date it. The three-year statute of limitations applies to actions brought pursuant to Judiciary Law §487. *Amalfitano v Rosenberg*, 12 NY3d 8 (2009); *Lefkowitz v Appelbaum*, 258 AD2d 563 (2d Dept 1999); *Kuske v Gellert & Cutler*, 247 AD2d 448 (2d Dept), *lv denied* 91 NY2d 814 (1998); *Jorgensen v Silverman*, 224 AD2d 665 (2d Dept 1996).

The more troubling question is when Melcher's claim accrued. "A cause of action accrues, for the purpose of measuring the period of limitations, 'when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court.'"

Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214, 221 (1996). "[A]n action to recover for a liability created or imposed by statute is 'required to be instituted according to the language of the statute generating the liability.'" *Id.* Here, section 487(1) of the Judiciary Law applies when an attorney "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

Melcher knew of defendants' alleged deceit concerning Fradd's destruction of the Amendment more than three years before commencing this action. Apollo and Fradd moved to dismiss the Apollo Action "based on a photocopy of the 'amendment' made before the burning." First Amended Complaint, ¶ 43. Melcher concedes that, at the time of the motion, his's motion to obtain the original Amendment for forensic chemical testing was before the court, "setting forth facts indicating that the 'amendment' was in reality a forged, back-dated document." *Id.*, ¶ 44. Melcher's attorney submitted a "Supplemental Affirmation" in opposition to the motion, dated May 11, 2004 (Supplemental Affirmation). Reardon Aff., Ex. G. The Supplemental Affirmation referred to Fradd's "story about the incineration" of the Amendment and his "absence of recollection of events that had occurred less than 90 days previously," as "incredible" (*id.*, ¶ 4) and an "unbelievable incineration story" (*id.*, ¶ 10). Melcher's counsel stated:

> The story Fradd told at his deposition, and his lack of recollection of supposedly very recent events, are consistent with someone who tried to cook the document to alter the inks it contained, screwed up the process and went too far, and then invented a story about "making tea" and "accidentally" incinerating and scorching it.
>
> Defendants' motion to dismiss is based [*sic*] the similarly incredible contention of the fact that plaintiff "orally agreed" with Mr. Fradd to drastically cut plaintiff's share of the profits, and that

> Mr. Fradd recorded this "oral agreement" in the "May 21, 1998" amendment, but did not get around to showing it to plaintiff until December 2003.

Id., ¶¶ 9-10.

The Supplemental Affirmation attaches several letters as exhibits, including a March 20, 2004 letter sent by Melcher's counsel to Judge Cahn in the Apollo Action. The letter states that, "[o]n behalf of plaintiff, I must regretfully bring to the attention of the Court, the defendants' *concealment of material facts*, and *misleading representations*, in connection with plaintiff's recent motion for production of an original document ... ." Supplemental Affirmation, Ex. N [emphasis added]. The letter acknowledges that Melcher learned, on March 18, 2004, that Fradd "completely destroyed the original first page of the two-page document," that *GT and Corwin* initially withheld the fact that the original had been destroyed, that *GT and Corwin* allegedly misled Melcher about hiring their own ink-testing expert, and that *GT and Corwin* allegedly concealed from this expert that the Amendment had been burned, giving the expert a photocopy of the destroyed first page. [emphasis added] *Id.* The letter concludes by stating that, "[a]s to the matter of defendants' counsel's statements and omissions to the Court, we respectfully leave that to the Court's consideration." *Id.*

The Supplemental Affirmation also attaches the report of Melcher's ink-testing expert, dated April 13, 2004. Melcher's expert concluded that "the presence of melted polymer material and the alignment of the discoloration with the signature suggests something other than chance or accident." *Id.* Melcher claims that, the following day, the court in the Apollo Action granted his application to inspect Fradd's apartment "where the burning took place." First Amended Complaint, ¶ 87. Taken together, this evidence makes a prima facie showing that Melcher knew

of GT and Corwin's alleged concealment and deceit, concerning the burning of the Amendment and defendants' effort to thwart document production, by May 11, 2004. If this were the sum total of Melcher's allegations, the court would have no trouble concluding that his claim is time-barred, as it accrued more than three years before Melcher commenced this action on June 25, 2007.

None of the case law cited by Melcher supports the conclusion that a claim under section 487 of the Judiciary Law does not accrue until the conclusion of the underlying action. Nor does the rule on continuous wrongs extend the accrual date of Melcher's claims for statute of limitations purposes. A "'continuing wrong' ... is 'deemed to have accrued on the date of the last wrongful act.'" *Harvey v Metropolitan Life Ins. Co.*, 34 AD3d 364, 364 (1st Dept 2006). However, "[c]haracterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as 'a single series of interlocking events' does not postpone accrual of claims based on individual wrongful acts." *Singleton v City of New York*, 632 F2d 185, 192 (2d Cir 1980). Here, Melcher affirmatively argues that defendants' alleged deceit was not "discrete, isolated acts, but was rather an on-going scheme directed to [the] ultimate purpose" of winning the underlying Apollo Action. Melcher Opp. Memorandum of Law, at 16. Melcher's "continuous wrong" argument is based upon his assertion that defendants: defrauded their own forensic ink-expert in 2007, by concealing that the Amendment had been burned by Fradd, and substituting a photocopy for the destroyed first page; and continued to "to stand on the forged 'amendment'" in the Apollo Action, at a time when they were able to learn from Governale that the Amendment never existed. *Id.* at 16-17; First Amended Complaint, ¶¶ 33, 37-42. Ultimately, the deceit claimed by Melcher hearkens back to Melcher's Supplemental

Affirmation, which evidences Melcher's knowledge of GT and Corwin's alleged concealment and deceit by May 11, 2004, notwithstanding any separate, subsequent wrongful acts committed by defendants. Therefore, the continuing wrongs theory cannot be used to extend the accrual of Melcher's claim.

However, "[i]t is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Simcuski v Saeli*, 44 NY2d 442, 448-49 (1978); *Matter of Drysdale v City of New York*, 182 AD2d 566 (1st Dept 1992). "For the doctrine to apply, a plaintiff may not rely on the same act that forms the basis for the claim--the later fraudulent misrepresentation must be for the purpose of concealing the former tort." *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 (2007) [citation omitted]. There must be "some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient." *Id.* at 492 [internal quotation marks and citation omitted].

According to the First Amended Complaint, *after* GT and Corwin's initial wrongdoing in concealing the burning of the Amendment and frustrating Melcher's attempts to authenticate it, GT and Corwin engaged in further conduct – in the form of Corwin's own sworn affidavits and affidavits prepared for Fradd, which were submitted to the court in the Apollo Action – designed to prevent Melcher from discovering that the Amendment was a fabrication. First Amended Complaint, ¶¶ 55, 60-79, 90, 96, 100, 106. Defendants repeatedly claimed that Beckwith, a retired Vermont lawyer, could authenticate the Amendment, but that he was "unavailable" and had "resisted" their efforts to communicate, even though defendants knew that the Amendment never existed and that Apollo's lawyers, Beckwith and Governale, had no knowledge of it. *Id.*

It was not until Governale's deposition, in December 2005, that Melcher claims to have learned that the law firm files regarding Apollo had not been disrupted, "but rather had been in Mr. Governale's continuous custody, and that Mr. Governale had represented Apollo Management continuously from 1998." *Id.*, ¶ 98. Also in December 2005 and again in January 2006, Corwin allegedly personally swore that Beckwith "has ... been unavailable to talk and has resisted all prior attempts to do so." *Id.*, ¶¶ 100, 106. It was only *after* Governale's deposition that Melcher obtained, by subpoena, the law firm billing and time records for Apollo's law firm, for the period February 1 - December 31, 1998, which showed no evidence of the May 21, 1998 Amendment. *Id.*, ¶¶ 103-104. According to Melcher, an order issued by Judge Cohen confirmed that the law firm bills gave "descriptions of other documents prepared during the invoice period," but "does not show preparation of this amendment." *Id.*, ¶ 104.

Melcher also claims that defendants knew that Beckwith was not "unavailable" and had not "resisted" efforts to communicate, but nevertheless continued to draft false affidavits for Fradd. *Id.*, ¶¶ 58-79. Although Beckwith was allegedly served with a deposition subpoena in Vermont in January 2006, his deposition was delayed until June 2007. *Id.*, ¶¶ 109-115. When he was finally deposed, Beckwith, the purported "draftsman" of the Amendment (*id.*, ¶ 60), allegedly testified that: Fradd called Beckwith "within the last few years," indicating that Corwin "was going to reach out and talk to [Beckwith] about some documents"; Beckwith indicated to Fradd that he "would take the call from Mr. Corwin," and in fact did take a call from Corwin concerning the Apollo Action; Beckwith indicated his "willing[ness] to speak with them"; and Beckwith was never asked to prepare an affidavit. *Id.*, ¶¶ 70-71. It was only after Beckwith's deposition, in June 2007, that Melcher could have discovered that GT and Corwin's statements

concerning Beckwith's lack of availability and resisting communication were untrue. According to Melcher, for years defendants actively used sworn statements to conceal Beckwith's availability. Beckwith also allegedly testified that he had delegated Apollo's drafting work to Governale in the spring of 1998 but, as discussed above, Governale had no knowledge of the Amendment. *Id.*, ¶ 76.

According to the First Amended Complaint, as recently as the date of trial, May 11, 2009, defendants' trial exhibit list in the Apollo Action continued to list the Amendment as "Exhibit B." *Id.*, ¶ 154. Tellingly, on that day, defendants allegedly moved orally, before Judge Mills, to:

> withdraw their client's sworn assertions that there had ever been a contract 'amendment,' to withdraw that portion of their First Affirmative Defense that expressly relied on the existence of such an 'amendment,' and to preclude plaintiff from introducing any evidence that [Fradd] had ever sworn there was an amendment, and to preclude plaintiff from offering any evidence that the 'amendment' was a back-dated forgery that [Fradd] intentionally tampered with to frustrate forensic chemical testing.

Id., ¶ 156. Judge Mills granted this oral application, but subsequently entered judgment for Melcher on his sixth cause of action. In entering judgment for Melcher, Judge Mills reasoned that "[t]he jury verdict found that Fradd had breached his fiduciary duty by diverting fees and investors ... It further found that Fradd's sworn assertion there was an 'oral modification' was false." *Id.*, ¶¶ 159-60; *see also Melcher v Apollo Med. Fund Mgt. L.L.C.*, 2009 WL 5722527, *2 (Sup Ct, NY County, Aug. 31, 2009).

Based upon these allegations, while Melcher knew about the burning of the Amendment, he likely did not know about defendants' alleged deceit concerning Apollo's law firm and/or the lawyer who purportedly drafted the Amendment, until Beckwith's deposition in June of 2007.

At the earliest, as a result of defendants' active deception, Melcher could not have known about defendants' deceit until after Governale was deposed in December of 2005 and Melcher had an opportunity to review the billing records of Apollo's law firm. Indeed, any query by Melcher would have been futile, as defendants assisted Fradd in concocting the story about Apollo's attorneys, and continued to rely upon the fabricated Amendment through the beginning of the trial in the Apollo Action, all "for the purpose of concealing the former tort." *Ross*, 8 NY3d at 491.

In sum, defendants are equitably estopped from asserting the statute of limitations defense. As a result, this action was timely commenced on June 25, 2007, only two weeks after Beckwith's deposition and approximately 18 months after Governale's deposition, in either case well within the three-year statute of limitations. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss denied.

Dated: November 9, 2011

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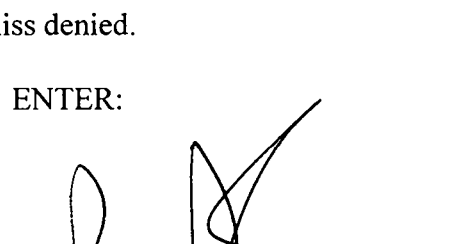

J.S.C.