

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF SUFFOLK : TRIAL TERM PART 48
3 -----X

Jonathan Troffa, Jos. M. Troffa Landscape
And Mason Supply, Inc.,

4 Plaintiff,

5 -against- INDEX NO:
6 609510/2016

7 Joseph M. Troffa, Laura J. Troffa, Jos. M.
8 Troffa Materials Corporation, Nimt
9 Enterprises, Llc, L.J.T. Development
Enterprises, Inc., Jos. M. Troffa Landscape
And Mason Suply, Inc.,

10 Defendant.
11 -----X

Central Islip, New York
12 January 12, 2023

13 **B E F O R E:** HON. JERRY GARGUILO,
14 SUPREME COURT JUSTICE

15 **A P P E A R A N C E S:**

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17 Attorney for the Plaintiff
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BY: LINDA U. MARGOLIN, ESQ.

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BY: FRANKLIN C. MC ROBERTS, ESQ.

22
23 **R E P O R T E D B Y:**

24 REBECCA WOOD
25 Senior Court Reporter

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1 THE COURT OFFICER: All rise.
2 Come to order.

3 THE CLERK: Supreme Court, State
4 of New York, County of Suffolk, Part 48 is now
5 in session. The Honorable Jerry Gargulio
6 presiding.

7 THE COURT: Good morning,
8 everybody. Please be seated. Thank you.

9 THE CLERK: This is on for oral
10 arguments: Jonathan Troffa, et al. versus
11 Joseph M. Troffa, et al., Index number 609510
12 of 2016. Counsels, your appearance for the
13 record.

14 MS. MARGOLIN: For plaintiff,
15 Linda Margolin; Margolin Besunder, LLP,
16 3750 Express Drive South, Islandia, New York.

17 THE COURT: Good morning,
18 Ms. Margolin.

19 MS. MARGOLIN: Good morning.

20 MR. MC ROBERTS: For defendants,
21 Franklin McRoberts, Farrell Fritz, PC. Thank
22 you.

23 THE COURT: Good morning.

24 MR. MC ROBERTS: Good morning.

25 THE COURT: So, Mr. McRoberts,

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1 it's your motion. I just had to throw out a
2 few questions. Let them circulate in your mind
3 in connection with your presentation this
4 morning.

5 MR. MC ROBERTS: Okay.

6 THE COURT: These are some
7 observations and, if I'm right, I'm right. If
8 I'm mistaken and need to be corrected, you'll
9 both tell me.

10 Although the plaintiff argues
11 that the corporate opportunity occurred in 2013
12 when Joseph closed on the Compost Yard, he does
13 not submit any supporting case law whereas the
14 defendants do cite a few cases on point which
15 support their contention that the corporate
16 opportunity occurred in 2006 at the execution
17 of the contract of sale.

18 Secondly, if the sales contract
19 of 2006 was cancelled, why did the defendants'
20 lawyer keep \$10,000 down payment, which was
21 reflected in the closing statement?

22 Three, although Joseph states he
23 paid one half of the rents over the years,
24 where is Joseph's admissible proof that he did
25 so? Why did Joseph take full credit for rental

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1 payments at closing? Why does Joseph abandon
2 his argument that he was the sole leasee on the
3 Compost Yard in this motion? With regard to
4 successive summary judgment motions, the
5 defendants are justified because this Court
6 allowed for the renewal in the prior order
7 since defendants failed to state, in their
8 notice of motion, that the statute of
9 limitations was a basis for the motion as well
10 as the comments made by the Appellate Division
11 in its decision of March 3, 2015.

12 A few other things. Is this a
13 successive summary judgment motion? Correct me
14 if I'm wrong, the Appellate Division did not
15 send this case back here because of the statute
16 of limitations issue. Can this be considered a
17 motion to renew?

18 And lastly -- no, that's it.
19 These are questions that come to the Court's
20 mind. You have the floor, sir.

21 MR. MC ROBERTS: Thank you, Your
22 Honor. May I argue at the podium; is that
23 okay?

24 THE COURT: Make your record. You
25 can sit up; you can sit, stand, you can come to

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1 the podium; whatever you wish.

2 MR. MC ROBERTS: Thank you. Your
3 Honor, it's a treat to be able to argue this
4 motion and I want thank the Court for allowing
5 it.

6 Your Honor poses some very
7 specific questions and I'm going to try to
8 answer them as I argue this motion, but before
9 I do, I'd sort of like to lay out what I think
10 is the framework for the motion.

11 On any statute of limitations
12 dismissal motion, the Court has to answer three
13 questions. The first is, what's the applicable
14 statute of limitations? The second is, what is
15 the accrual date? And the third is: Whether
16 there are any exceptions or tolls to the
17 statute of limitations. I'm the movant. I'm
18 the defendant. I bear the burden of proof on
19 the first two questions. My adversary is the
20 plaintiff, nonmovant. She bears the burden of
21 proof on the third question.

22 First question, what's the
23 statute of limitations? That question has
24 already been answered for this Court --

25 THE COURT: By the Appellate

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1 Division.

2 MR. MC ROBERTS: -- by the
3 Appellate Division. It's a six-year statute of
4 limitation under CPLR 213, Subsection 7. So
5 you have a six-year statute of limitations.

6 The second question is: What is
7 the accrual date? That is an issue that, as
8 Your Honor alluded to, has never been briefed
9 before in this Court or in the Appellate
10 Division. This is the first time the Court has
11 been ever asked to consider the question, what
12 is the accrual date. As Your Honor alluded to,
13 we cited a number of cases that hoped that
14 where you have a claim for misappropriation of
15 corporate opportunity involving land, it is the
16 contract of sale, not the closing date, on
17 which the claim accrues.

18 We cited two decisions from two
19 of Your Honor's colleagues on the commercial
20 bench in New York County. Justice Crane from
21 2022 in the Rosenblum versus Rosenblum case and
22 decision from Justice Masley in 2020. And the
23 quote from the Rosenblum case, it could not be
24 more on point. This is a direct quote. The
25 signing of the contract, not the closing, is

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1 the usurpation of the corporate opportunity.
2 And there's also a bankruptcy court decision
3 from 2021. So you have a number of authorities
4 all holding it's the signing of the contract of
5 sale. And that makes sense, right? Because
6 the contract of sale creates a legal right. It
7 creates a legal right to enforce the contract.
8 It makes the purchaser a contract vendee
9 entitled to assert a lien. If the closing
10 doesn't occur, he doesn't get his down payment
11 back. So that's the operative event. No
12 dispute that the contract was signed on
13 December 7, 2006. There's no dispute about
14 that. And my adversary, as Your Honor alluded
15 to, doesn't cite any case law at all for her
16 alternative theory that the closing in 2013 is
17 the date of accrual of this cause of action, no
18 case law whatsoever. And she ignores all our
19 case law. That in and of itself fails to raise
20 a triable issue of fact.

21 Her argument about accrual isn't
22 based on any case law. It's based on two
23 challenges to the contract of sale itself. Her
24 first challenge to the contract of sale is
25 that, according to her, and again this is only

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1 according to Linda Margolin; there's no
2 affidavit from anybody who actually has any
3 personal knowledge. There's no affidavit from
4 anybody who takes this position, but according
5 to Linda Margolin, our version of the contract
6 of sale is incomplete because it did not have,
7 at the end of it, three pages; a meets and
8 bounds description, a survey and a document
9 called rider to mortgage. Just on their face,
10 there's nothing to indicate that those three
11 documents are part of the contract of sale.
12 They just happen to be at the end of a copy of
13 a copy of a contract of sale Ms. Margolin
14 subpoenaed from Joe's closing lawyer, Cohen and
15 Warren. So even pretending, for the sake of
16 argument, that those three pages were a part of
17 the contract of sale, that raised an immaterial
18 issue of fact because the material issue is
19 when did Joseph Troffa sign the contract. And
20 both versions of the contract in the record on
21 my moving papers and on Linda's opposition
22 papers both show, crystal clear, Joseph signed
23 the contract on December 7, 2006. No dispute,
24 that's the date of accrual of the fourth cause
25 of action bought derivatively for

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1 misappropriation of corporate opportunity.

2 So the second challenge Ms.
3 Margolin has to the second contract of sale is,
4 according to her and only her, the contract was
5 cancelled at some unknown point in time. And,
6 again, that's not based on any evidence in the
7 record. It is based on her supposition in a
8 lawyer affirmation.

9 There are three reasons why that
10 argument fails to raise an issue of fact. Well
11 there's four, because Your Honor alluded to a
12 forth and I'll talk about the forth first.
13 There's no dispute that there was a \$10,000
14 down payment that was delivered around the time
15 of the execution of the contract of sale.
16 That's in the record both in our moving papers
17 and in our reply papers. And in our reply
18 papers, with have the down payment that was
19 deposited into the lawyer's escrow account. It
20 shows that it was deposited into the lawyer's
21 escrow account. At closing, there is no
22 dispute that that \$10,000 down payment
23 delivered way back in 2006 was credited towards
24 the purchase price.

25 Three other reasons why there is

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1 no triable issue of fact, the contract of sale
2 was allegedly cancelled or rendered null and
3 void. The first is that, again, it's not
4 espoused by anybody of personal knowledge.
5 It's only in a lawyer affirmation. And well
6 settled rule of law, a lawyer affirmation that
7 doesn't profess to have personal knowledge
8 lacks any evidentiary force or probative value
9 whatsoever.

10 The second reason is Ms.
11 Margolin's theory that the contract of sale was
12 cancelled, it's not even asserted as an
13 affirmative factual statement. It is asserted
14 as a form of conjecture or surmise. If you
15 look at her affirmation, Paragraph 30, it
16 says -- this is what she says, it is thus fare
17 to conclude that the 2006 contract never
18 closed, dot, dot, dot and was cancelled. It's
19 fair to conclude. There is no affirmative
20 representation that it actually was cancelled.
21 That is a classic form of surprise or
22 conjecture or speculation that is insufficient
23 to raise a triable issue of fact. The third
24 reason there's no triable issue of fact this
25 contract was cancelled is that it refuted by

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1 evidence in the record that Linda attached to
2 her own opposition papers. Exhibit 4 to her
3 affirmation in opposition was the subpoena
4 response she received from Cohen and Warren.
5 Joseph's closing lawyer, Page 13 of that
6 document production. It is Bates stamped Cohen
7 and Warren 13. It is the real estate transfer
8 tax form that was signed by the two sellers,
9 the Schreibers and Joseph, at the closing.
10 It's dated the date of the closing and that
11 real estate transfer tax form is referred to by
12 name in the closing statement that's also in
13 the record. If you looked at that transfer tax
14 form, it says on it, in unmistakably clear
15 language that the sale was done pursuant to
16 contract of sale date December 7, 2006. So
17 that real estate transfer tax form, which was
18 filed with the government, says the sale was
19 done pursuant to the contract of sale that
20 Linda Margolin guesses might have been
21 cancelled. There's no triable issue of fact
22 that was the operative contract right up until
23 the closing and Joseph says that in his reply
24 affidavit. There is no witness to refute what
25 he says, so there's no triable issue of fact

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1 there. That's my presentation on accrual.

2 Contract of sale, that's the accrual date. No
3 triable issue of fact.

4 The third question that I
5 mentioned at the beginning of my presentation
6 is whether there is some kind of toll or
7 exception to the statute of limitations.

8 Unlike the first two questions, applicable
9 statute and accrual, this is Linda's burden.
10 This is not my burden. I don't have to prove
11 that equitable estoppel does not apply. She
12 has to raise a triable issue of fact that it
13 does apply. It is her burden. And there are
14 five reasons why she failed to raise an issue a
15 fact as to equitable estoppel.

16 The first reason is that
17 equitable estoppel is a pleading requirement
18 and we argued about this a little bit with Your
19 Honor before. It is a pleading requirement.
20 It has to be affirmatively pled. And I have a
21 Court of Appeals case called Florio versus Cook
22 which says exactly that. The cite is
23 48 N.Y.2d 792 (1979). This decision, by the
24 way, affirmed summary judgment. It was not a
25 3211 motion; it was a 3212 motion. The Court

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1 affirms summary judgment dismissing the
2 compliant and the Court said, this is a quote,
3 Plaintiffs contention that the Statute of
4 Limitations was tolled by application by the
5 doctrine of equitable estoppel must be
6 rejected, as neither fraud nor fraudulent
7 concealment was pleaded. The Second Department
8 in Reiner versus Jaeger said the same thing,
9 50 A.D.3d 761, it's a Second Department case
10 from 2008. This is a quote, "Because the
11 complaint itself does not refer to or even
12 raise any facts alleging conduct to which the
13 doctrine would be applicable, the plaintiff
14 cannot raise it in opposition to defendant's
15 motion." So that's reason number one.
16 Equitable estoppel is a pleading requirement
17 and my adversary did not plead it.

18 Reason number two: To raise an
19 issue of fact on equitable estoppel, the
20 plaintiff has to present evidence, has an
21 affirmative evidentiary burden to present
22 evidence of an affirmative act of misconduct or
23 misrepresentation that occurred within the
24 limitations period and prevented the plaintiff
25 from timely commencing an action. That's the

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1 Second Department's decision in Sayville versus
2 City of New York from just five months go where
3 the Court reversed a lower court for finding an
4 issue of fact on equitable estoppel where the
5 plaintiff did not submit evidence, did not make
6 an evidentiary showing that it was somehow
7 mislead into timely bringing a lawsuit.

8 There's another Second Department
9 case that also reverses a lower court for doing
10 exactly the same thing. It's Board of Managers
11 versus 210th Place, 185 A.D.3d 890, Second
12 Department, 2020. There is no factual or
13 evidentiary showing by either Jonathan for
14 Ms. Margolin here. All they do is reattach
15 some old affidavits which say, in effect, this
16 is the estoppel theory, my dad told me the
17 corporation was going to acquire the Compost
18 Yard. He acquired it himself in his own name
19 and he concealed that from me or didn't
20 disclose it to me. That's the alleged
21 misrepresentation. That's not enough to show
22 equitable estoppel. There's no affirmative
23 showing of some kind of representation or
24 misrepresentation that mislead Jonathan into
25 timely bringing an action.

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1 And this sort of bleeds into the
2 third reason why there's no triable issue of
3 fact about equitable estoppel. Equitable
4 estoppel does not apply where the
5 misrepresentation or concealment underlying the
6 estoppel claim is the same act that forms the
7 basis of the underlying substantive cause of
8 action. That's me paraphrasing Kaufman versus
9 Cohen, which I was amazed to see, Your Honor
10 cited in the very first written decision Your
11 Honor issued in this case, which was exactly
12 six years old today.

13 Kaufman versus Cohen happened to
14 be a Peter Mahler case and it also happened to
15 be a misappropriation of corporate opportunity
16 case. And there's a quote from it that's just
17 so good I have to read it. This is the First
18 Department in Kaufman versus Cohen. This is a
19 quote, In the present case, it is the very same
20 wrongful conduct - Cohen's misrepresentation
21 and intentional concealment concerning the
22 opportunity to acquire an interest in the
23 Falchi building - which forms the basis of both
24 the estoppel argument and the underlying claims
25 for fraud and breach of fiduciary duty.

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1 Accordingly, we find that plaintiffs may not
2 avail themselves of the doctrine here. That's
3 exactly what you have here. The alleged tort,
4 concealment of taking of the Compost Yard by
5 Joseph personally, that's also the factual
6 basis for the alleged estoppel. You can't do
7 that. That's insufficient to raise a triable
8 issue of fact.

9 Forth reason and I'm sorry this
10 is kind of laborious. There's just so many
11 reasons why equitable estoppel doesn't apply.
12 Failure to disclose is insufficient to raise a
13 triable issue of fact under the doctrine of
14 equitable estoppel and the case I have for that
15 is a case my adversary cites in their own
16 opposition brief. It's Corsello versus
17 Verizon, 18 N.Y.3d 777 (2012). This is a
18 quote, in cases where the alleged concealment
19 consisted of nothing but the defendants'
20 failure to disclose the wrongs they had
21 committed, we have held the defendants are not
22 estopped from pleading a statute of limitations
23 defense.

24 Fifth and final reason there's no
25 triable issue of fact about estoppel is, it is

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1 my adversary's affirmative burden to show in
2 opposition to our motion that Jonathan
3 exercised due diligence in timely commencing a
4 lawsuit, once he's put on notice, that he may
5 have been deceived. That's Simcuski versus
6 Saeli; it's Zumpano versus Quinn and it's a
7 couple of Second Department cases that I
8 briefed in a letter I sent Your Honor two days
9 ago.

10 Due diligence is an affirmative
11 element of equitable estoppel that my adversary
12 has to demonstrate. We don't have to
13 demonstrate lack of due diligence. My
14 adversary failed to even address it, failed to
15 even address that element of equitable estoppel
16 in her papers. And the Second Department holds
17 that multi-year delays in suing us -- you've
18 been put on notice you may have been defrauded.
19 That's too late. That's lack of due diligence
20 as a matter of law. That's Calamari versus
21 Panos and it's Marshall versus Duryea.

22 Here Jonathan admits in an
23 affidavit he files that red flags went up in or
24 around 2013 when he discovered, in the
25 corporation's files, documents referring to the

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1 lease purchase contract for the Compost Yard.
2 There is no effort to even demonstrate due
3 diligence. There's no representation, when I
4 saw this, I asked my dad, what's going on here?
5 What's happening with the Compost Yard? Can
6 you explain to me what you're doing? Why is
7 this document in our file? No showing
8 whatsoever. That fails to show due diligence
9 as a matter of law.

10 So those are the three questions
11 that I raised at the beginning of the argument.
12 Now I'd like to respond to a couple of things
13 Your Honor asked. Your Honor asked a couple of
14 questions about the successive motion rule.
15 Successive motion rule does not bar this motion
16 for a number of different reasons.

17 The first is: In Your Honor's
18 prior decision, Your Honor declined to reach
19 the merits of our statute of limitations
20 motion. The Court said that we did not give
21 notice in our notice of motion that we were
22 moving to dismiss based on statute of
23 limitations. And for that reason Your Honor
24 declined to reach the merits of Statute of
25 Limitations. But in your decision, Your Honor

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1 explicitly granted leave to renew. That's what
2 this motion is.

3 Your Honor asked if this is a
4 renewal motion. I think whether this falls
5 within the framework of CPLR 2221, the answer
6 is no. This is based on a lot of different
7 material that was not in on the prior motion
8 and we don't have to show the reargument
9 standard because Your Honor didn't reach the
10 merits, explicitly declined to reach the
11 merits.

12 This is also not an impermissible
13 successive motion because we had a premotion
14 conference with Your Honor and Your Honor
15 granted us permission to make this motion. We
16 requested it and Your Honor granted it. The
17 third reason why this is not an impermissible
18 successive motion is because Courts have
19 discretion. The Appellate Division affirms all
20 the time and occasionally reverses denial of
21 motions under the so-called successive motion
22 rule where the motion is substantively valid,
23 where it furthers the interest of justice and
24 where consideration of the motions would
25 relieve an undue burden on the courts.

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1 Your Honor knows better than
2 anybody the burden this case has put on the
3 Court. We have been dealing with this case for
4 many, many years and the showing we've made is
5 so strong. There is no triable issue of fact
6 either on what the statute of limitation is,
7 what the accrual date is or on equitable
8 estoppel.

9 Let's see. Your Honor asked a
10 question about why Joseph abandoned the
11 argument that he's entitled to a credit for
12 payments he made towards the Compost Yard. We
13 didn't abandon that argument. Your Honor ruled
14 on the prior motion that the lease agreement
15 from 1998 was inadmissible and the Court
16 couldn't consider it under the best evidence
17 rule and held that against my client. The fact
18 is, the age of this case is the the reason why
19 we don't have a signed copy of that lease
20 anymore. It's precisely why the statute of
21 limitations exists, because evidence
22 disappears.

23 There is no dispute that there
24 was a signed lease agreement because Linda
25 relies on it heavily, heavily in her own

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1 papers. It is the cornerstone of this argument
2 that rent payments were credited towards the
3 purchase price and it's an opportunity that was
4 stolen from the corporation. So we didn't
5 abandon that argument but, Your Honor has ruled
6 that it can't consider that lease. And that
7 has hurt my client, but it also demonstrates
8 why the Court should apply the statute of
9 limitations here. So if Your Honor has any
10 questions, I can answer them; I'd be happy to.

11 THE COURT: So the bottom line,
12 articulate the relief you seek.

13 MR. MC ROBERTS: The relief we
14 seek is dismissal in full under CPLR 3212 of
15 the forth cause of action brought derivatively
16 for misappropriation of corporate opportunity.
17 We think the claim is time-barred in its
18 entirety because it accrued in
19 December 7, 2006. But alternatively -- and I
20 don't think I even need to get to the
21 alternative -- if the Court concludes that
22 there's an issue of fact as to accrual, which I
23 don't think there is, the Court should be
24 dismiss it in part insofar as it alleges
25 damages based on rent payments that occurred

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1 more than six years before the filing of the
2 lawsuit on June 27, 2016.

3 THE COURT: Thank you for your
4 presentation.

5 MR. MC ROBERTS: Thank you.

6 THE COURT: Ms. Margolin, the
7 floor is yours.

8 MS. MARGOLIN: Can I do from
9 here, I have a lot of papers?

10 THE COURT: You can do whatever
11 you wish. You can sit; you can stand.

12 MS. MARGOLIN: All right. I'm
13 going to do my best. First of all, I wanted to
14 point out a factual error. In defendant's
15 papers and in Mr. McRoberts' presentation just
16 now, he stated that one of the real estate
17 transfer tax forms was signed by Joseph as well
18 as by the two sellers. That is incorrect.
19 Joseph's signature does not appear on either
20 the TP-584 or EA-5217.

21 It is true that one of those
22 documents reflects a contract date of 2006.
23 The first time that plaintiff had an
24 opportunity to see that document was after the
25 Appellate Division reversed Your Honor, found

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1 the statute of limitations was six years and
2 our subpoenas for that file were ultimately
3 enforced and we got to see Cohen and Warren
4 file.

5 So I can't do any better than I
6 did in my affirmation in terms of speculating,
7 and I agree it's speculation, about the
8 cancelation of the 2006 contract. I will say
9 that plaintiff has not proven that Mr. Strauss,
10 the seller's attorney, continued to retain
11 those files over a period of seven years
12 because although they show the funds were paid
13 to Mr. Strauss, there's no affidavit from
14 Mr. Strauss saying yes, that's the money that
15 was applied to the contract. But I'm going to
16 leave that aside for you because I think that's
17 the least important part of what's at issue in
18 this motion.

19 I think it would be helpful to
20 understand exactly what the wrong is that
21 Joseph Troffa did to the corporation when he
22 closed on this property in March of 2013. He
23 not only acquired the asset, the real estate,
24 that the corporation was entitled to purchase,
25 but he also took credit for all of the rental

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1 payments that the corporation had made and he
2 didn't give that money back to the corporation.

3 So on a purchase price that
4 amounted to, according to the other document,
5 the EA-5217 and the closing statement, of
6 \$390,000, Joseph handed over 10 percent of that
7 amount, \$39,000, at closing and perhaps the
8 \$10,000 payment that Mr. Strauss was holding.
9 And the rest of the funds that were used to
10 acquire that property were paid by the
11 corporation.

12 So it is not only acquiring the
13 real estate as a corporate opportunity, but
14 it's also taking credit for all of the funds
15 that were paid by the corporation and not
16 repaying the corporation. That wrong to the
17 corporation didn't accrue until the date of the
18 closing because there is no way that you could
19 look at any of the documentation that's been
20 put forth by defendants, and I'll address that
21 in a moment, to say that those documents
22 indicated that when Joseph took title
23 personally, he would take credit for all the
24 money that the corporation had paid in rent.

25 So it's a two-part wrong that

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1 occurred, so we don't think that the accrual
2 date is the date of the contract in 2006. We
3 think the accrual date is the date when Joseph
4 wronged this wrong to fruition by not only
5 taking title to the property, but by taking
6 credit for all the monies that the corporation
7 had paid in rent. He didn't have to do that.
8 He could have taken title personally and given
9 that money back to the corporation. He could
10 have done that, but he didn't do that. Still
11 as of today, he has not repaid those moneys to
12 the corporation. So the statute of limitations
13 has not run on that. The statute of
14 limitations was clearly wide open on that wrong
15 when the action was brought in 2016.

16 Okay. Now the issue is: What is
17 it that John knew that would have caused him,
18 according to defendants, to undertake an
19 investigation, due diligence? And they say
20 that that date runs from 2006. Well, when did
21 Jonathan first see the 2006 contract?
22 According to his affidavit, he never saw it
23 until the Cohen and Warren file was available.
24 Joseph does not claim to have ever shown
25 Jonathan the contract and I beg to differ with

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1 counsel about whether or not we were relying on
2 the written version of the lease. We rely on a
3 version that Joseph told Jonathan, there was a
4 lease arrangement. He never told Jonathan
5 there was a written lease between the
6 corporation and the Schreibers. He said they
7 had an opportunity to lease the property.

8 So I start there and what I'm
9 referring to is Page 2 of Jonathan's affidavit
10 dated November 9, 2022. And he says, before I
11 commenced the lawsuit in 2016, I had never seen
12 either the unsigned lease or the 2006 contract
13 of sale or the versions of these documents that
14 are in the file produced by Cohen and Warren.
15 Joseph never showed any of these documents to
16 me.

17 So, what did he see? What did
18 his affidavit refer to? His affidavit where he
19 said he came across a document in 2013. The
20 document he came across was a letter signed by
21 Joseph Troffa dated May 3, 2004, and Your
22 Honor's decision actually discussed it, the
23 last decision rendered by this Court. It says,
24 sometime in 2013 Jonathan searched the
25 corporation's records and found a letter dated

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1 May 3, 2004, entitled Schreiber to Troffa lease
2 purchase 1.7 acres written by Joseph M. Troffa
3 Pres to Jim Weakler, which memorialized the
4 terms of the purchase agreement and shows that
5 the corporation planned to purchase the
6 property.

7 This would not have inspired
8 Jonathan to undertake an investigation about
9 wrongs by his father because this letter didn't
10 reveal any wrong. This letter revealed an
11 intention to have the corporation purchase the
12 property by taking credit for the rental
13 payments and that was not a wrong to the
14 corporation. So there was no prompt to
15 undertake due diligence.

16 There are several other things
17 that I would like to mention. One is that this
18 motion comes not in 2016 when the complaint was
19 filed, but late in 2022, six years later, and
20 yet defendants claim that the Court is
21 restricted to relying on the pleading. If that
22 is actually your position -- and I think that
23 is an incorrect statement of the legal
24 authority -- then we would ask for a leave to
25 amend the pleading to reflect the facts that

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1 we've learned in discovery.

2 But I will say to Your Honor that
3 there is a Court of Appeals case and in fact
4 it's one of the recent cases that -- excuse me,
5 I told you I had too much. It's one of the
6 recent cases that plaintiff offered as
7 additional authority. And it's actually not so
8 far apart in terms of the facts. This is the
9 case of Marshall against Duryea. In this case,
10 the plaintiff was refused access to a copy of
11 the stock transfer agreement and couldn't
12 determine whether the transfer violated the
13 shareholders agreement until she got it. She
14 got it in August of '86. And because there was
15 still one year of the statute of limitations
16 left open, at that point she was able to
17 determine and commence the action within the
18 one year remaining. So the Court said
19 equitable estoppel was not available to her.

20 On the other hand, another Court
21 of Appeals case cited by plaintiff as -- by
22 defendant as additional authority is the case
23 of Zumpano against Quinn. That case matters to
24 us because it says that where concealment
25 without active misrepresentation is claimed to

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1 have prevented the plaintiff from commencing a
2 timely action, the plaintiff must demonstrate
3 the fiduciary obligation which gave the
4 defendant an obligation to inform him or her of
5 facts underlying the claim. There can't be any
6 question that as a matter of law, Joseph owed
7 Jonathan a fiduciary obligation and there was
8 active concealment. This active concealment
9 not only ran through 2013, it continued after
10 this lawsuit was commenced.

11 That was one of the reasons that
12 we pointed out to Your Honor in our letter,
13 Joseph's affidavit opposing the order to show
14 cause in this case. At the very inception in
15 2016 where he put in an affidavit that said --
16 he said Jonathan's primary objective is to
17 establish the corporation's beneficial
18 ownership of six realty parcels and that
19 supposedly I told him that each of the parcels
20 was acquired for the benefit of the
21 corporation, the corporation was the beneficial
22 owner of the parcels and that the deeds would
23 be titled the names of the entities that would
24 hold the properties entitled to the
25 corporation. Now that's Jonathan's initial

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1 claim about the misrepresentation made by
2 Joseph.

3 But now listen to what Joseph
4 says in opposition. He says, that allegation
5 is preposterous. I never said any such thing.
6 Each of the properties was purchased by the
7 titled owners for their own benefit with their
8 own money or financing paid for by them. The
9 corporation did not pay any of the costs to
10 acquire or improve any of the properties.

11 Now that's clearly not true. It
12 was never true. And that active concealment
13 was the case after this lawsuit started in 2016
14 and it continued when defendants opposed the
15 subpoenas that would have revealed the fact
16 that Joseph took credit for all of the
17 corporation's payments when he closed in 2013.
18 They did not produce any of those documents in
19 discovery. And in fact, I went back and
20 reviewed the correspondence that occurred
21 between my firm and Mr. Mahler, the partner on
22 this case before litigation commenced, about
23 getting copies of financial records of the
24 corporation and that was delayed. We had to
25 ask for them because they weren't available in

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1 the office and it was delayed until we were
2 prepared to sign a nondisclosure agreement.

3 So here we have a fiduciary who
4 not only made active misrepresentations, but
5 actively concealed the true facts. The true
6 facts that there was a 2006 contract, never
7 revealed. The true facts that he took credit
8 for all of the corporation's payments, as well
9 as acquiring the property itself, so a double
10 wrong. And --

11 (Phone ringing.)

12 MS. MARGOLIN: I'm sorry, Your
13 Honor. Can Your Honor hear that?

14 THE COURT: It's okay.

15 MS. MARGOLIN: This rings through
16 my hearing aid, so I apologize.

17 THE COURT: It's okay.

18 MS. MARGOLIN: There are some
19 technical issues as well that I wanted to
20 address with respect to this motion. I don't
21 believe that the motion papers themselves are
22 sufficient in terms of admissible evidence that
23 the defendants want to rely on. All of the
24 documents except for the check basically come
25 into this motion on Mr. Mahler's affirmation.

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1 Mr. Mahler's affirmation claims that he has
2 personal knowledge, but he is authenticating a
3 variety of documents that date back to 2006 and
4 before. And I don't know what the basis of his
5 personal knowledge could possibly be that those
6 documents are authentic. Mr. Mahler came on to
7 the scene in 2016 according to my notes.
8 Joseph was previously represented by a
9 different attorney. These documents were not
10 authenticated by his prior transactional
11 attorney. Joseph didn't authenticate them.
12 And so I think, as a technical basis, many of
13 the documents on which they rely with the
14 exception of, I think, the check, back and
15 front, have not been authenticated and
16 presented in admissible form by a party with
17 actual knowledge.

18 As to when Your Honor had a phone
19 call with us in which I asked for oral
20 argument, you asked Mr. McRoberts if in fact
21 the issue before the Court was not a mixed
22 issue of law and fact. And if it is a missed
23 issue of law and fact and the parties dispute
24 each other on what the facts are, Your Honor,
25 as I know you're aware, cannot find that one

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1 party is credible and the other party is not.

2 So I believe there is

3 -- Jonathan's proof of concealment and

4 misrepresentation is here. I don't think that

5 at this juncture it should be required that we

6 plead it. But if this motion had been made in

7 a pre-answer motion to dismiss, we would have

8 asked for leave to amend the pleading because

9 at that time we had enough information to

10 allege the act of concealment and

11 misrepresentation.

12 We are here now with years of

13 discovery, six years of litigation, and to base

14 this on the pleading seems, to me, to be an

15 absurd result and not required by the authority

16 of the cases. Let me just see if there's

17 anything else.

18 THE COURT: Always end with the

19 remedy you seek.

20 MS. MARGOLIN: The remedy we seek

21 is financial recompense for the wrong; damages

22 for the wrong. Since the corporation no longer

23 exists, returning the property to the

24 corporation is obviously not a feasible thing

25 to do, so we're asking for the monetary

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1 damages, which would be, as we understand the
2 wrong, all of the funds that Joseph took credit
3 for when he made the purchase, with interest,
4 from the date of the wrong.

5 THE COURT: Thank you.

6 MR. MC ROBERTS: May I just say a
7 few words?

8 THE COURT: Five minutes.

9 MR. MC ROBERTS: Thank you. I can
10 do it in five and I'm going to go in reverse
11 order. Ms. Margolin said Mr. Mahler's
12 affirmation is defective in some way --

13 THE COURT: The same thing you
14 said about their papers in some fashion.

15 MR. MC ROBERTS: Well, not
16 exactly.

17 THE COURT: I said in some
18 fashion.

19 MR. MC ROBERTS: A lawyer
20 affirmation can be used as --

21 THE COURT: Firsthand knowledge
22 evidentiary in support of a position.

23 MR. MC ROBERTS: Right. It can be
24 used as a vehicle for the introduction of
25 admissible evidence and the Court can consider

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1 it without some other client affidavit
2 attesting to authenticity as long as there's no
3 bona fide dispute about authenticity.

4 THE COURT: You don't have to
5 repeat yourself again. I normally hear the
6 stuff first time around. I don't forget
7 either, plus I order the minutes.

8 MR. MC ROBERTS: Okay.

9 MR. MC ROBERTS: Ms. Margolin
10 argued that failure to disclose is sufficient
11 to raise a triable issue of fact on equitable
12 estoppel. There has to be some sort of
13 misrepresentation or concealment separate and
14 apart from the underlying tort. She doesn't
15 allege it here. I have a Second Department
16 case that addresses that exact subject, Plain
17 versus Vassar Brothers Hospital,
18 115 A.D.3d 922. A plaintiff must allege a
19 later misrepresentation, fraudulent
20 misrepresentation, made for the purpose of
21 concealing a former tort. That's not what she
22 alleges here. She alleges that the tort itself
23 is the estoppel. That's not enough.

24 Let's see. She argues a number
25 of times that Jonathan didn't have the contract

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1 of sale, he didn't have various other documents
2 and therefore he couldn't have timely brought a
3 lawsuit. Claims generally and claims for
4 misappropriation of corporate opportunity
5 specifically occur when the wrongdoing happens,
6 not when the claim is discovered, unless you
7 have some kind of fraud discovery tolling.

8 There's no allegation here at all
9 that there's a fraud discovery rule that
10 applies. The date of the wrongdoing, the date
11 of the tort, is when the corporate opportunity
12 was first misappropriated back in 2006, not
13 when the transaction closed in 2013. We've
14 cited our cases. Ms. Margolin didn't cite
15 anything to refute those cases.

16 Let's see. Ms. Margolin asked
17 for leave to amend her pleading. You can't do
18 that at an oral argument in opposition to a
19 motion for summary judgement to grant leave to
20 amend. There has to be a proposed amended
21 pleading before the Court. She didn't even ask
22 for permission to do it in her papers. It's
23 too late to do it now at oral argument. That
24 would be error and so I ask the Court to please
25 reject that argument. I don't have anything

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1 else.

2 THE COURT: Ms. Margolin, do you
3 need a few moments to respond? I'll give it to
4 you. Otherwise I'll thank you both for a most
5 professional presentation.

6 MR. MC ROBERTS: Thank you.

7 MS. MARGOLIN: Let me just see.

8 THE COURT: And I say that
9 sincerely.

10 MR. MC ROBERTS: I really
11 appreciate it. Thank you.

12 MS. MARGOLIN: I appreciate this
13 opportunity, Your Honor.

14 THE COURT: Sure.

15 MS. MARGOLIN: Your Honor, I'll
16 just say that our position is that the accrual
17 date for this claim, which is not just usurping
18 an opportunity to acquire title to the
19 property, but also taking credit for all of the
20 payments that were made, did not occur until
21 2013. And the failure by a person who had a
22 fiduciary duty to disclose these things can, in
23 and of itself, constitute a basis for equitable
24 estoppel.

25 So there is no question, because

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1 Joseph does not allege that Joseph did not give
2 Jonathan a copy of the 2006 of contract, did
3 not tell Jonathan that he intended to take
4 credit for all of the payments that the
5 corporation made. So Joseph's concealment
6 entitling Jonathan to equitable estoppel is
7 undisputed.

8 Other things may be disputed.
9 Whether he promised him that title would be
10 taken for the benefit of the family or the
11 corporation, even though it would be in a
12 different name. But the fact that Joseph did
13 not provide the actual information and didn't
14 tell Jonathan that he'd acquired title with a
15 benefit of \$340,000 worth of rental payments
16 that the corporation made, there's no question
17 about that.

18 So those are the undisputed facts
19 that Jonathan was never informed by Joseph.
20 Joseph does not claim to have told him. And
21 that concealment, as I said, continued through
22 this lawsuit. There are other affidavits by
23 Joseph. He repeatedly said the corporation
24 didn't pay anything. Thank you.

25 THE COURT: Thank you. Decision

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1 reserved. I wish you both a good day. Thank you.

2 MR. MC ROBERTS: Should we upload the
3 transcript?


4 THE COURT: Yes.

5 * * * * *

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

7
8 I, Rebecca Wood, a Senior Court Reporter for the
9 Supreme Court of the State of New York do hereby certify
10 that the above and foregoing is a true and accurate
11 transcription of my stenographic notes taken in this matter.

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REBECCA WOOD
Senior Court Reporter