

**Devane v Garg**

2025 NY Slip Op 31774(U)

May 12, 2025

Supreme Court, New York County

Docket Number: Index No. 155096/2017

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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THOMAS DEVANE,

Plaintiff,

- v -

VISHAL GARG,

Defendant.

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INDEX NO. 155096/2017

MOTION DATE 04/24/2025

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210

were read on this motion to/for JUDGMENT - SUMMARY

In this action sounding in defamation and tortious interference with contract, defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint, arguing that (1) the defamation claim is time-barred and (2) the tortious interference claim fails because (a) the evidence demonstrates defendant did not intend to procure a breach of the subject contract and (b) based on the doctrine against double recovery, because plaintiff already recovered in a separate arbitration the investment fees he seeks as damages. In the alternative, defendant moves in limine pursuant to CPLR 4011 to preclude plaintiff from introducing evidence at trial concerning: (1) any alleged defamatory statements made outside the applicable limitations period; (2) his entitlement to investment fees, such fees having already been received through the separate arbitration award; and (3) a letter agreement that the First Department previously determined is of no legal effect because of a forged signature. Plaintiff opposes the motion and cross-moves for an award of attorneys' fees and costs incurred in responding to it, which cross-motion is in turn opposed by defendant. Both the motion and cross-motion are denied.

By way of background, plaintiff is an investment advisor whose former employer, Rosenblatt Securities Inc. ("RSI"), was retained by Better Mortgage, a company founded and led

by defendant, to advise it in connection with securing financing. Plaintiff alleges that, during a call in April 2016 to discuss the investment banking fee due to RSI from Better Mortgage, defendant, purportedly for the purpose of securing RSI's agreement to a reduced fee, informed RSI that plaintiff, who had by then already switched employers, had been drunk at a meeting between defendant, plaintiff, and a potential investor in Better Mortgage. Plaintiff commenced this action in June 2017 seeking to recover damages from defendant for defamation and tortious interference with contract, including a share of the investment banking fee that Better Mortgage ultimately paid to RSI. In June 2018, plaintiff commenced a separate FINRA arbitration against RSI and others, in which he also sought to recover a share of the investment fee RSI received from Better Mortgage as compensation for his work on the Better Mortgage account while an RSI employee.

In July 2018, defendant moved for partial summary judgment in this action (MOT SEQ 003). Though initially granted by this court in a decision and order dated December 13, 2018, defendant's prior summary judgment motion was ultimately denied by the First Department in April 2019 (*see Devane v Garg*, 171 AD3d 605 [1st Dept. 2019]). Of note, the First Department held that "[plaintiff's] damages [on both his causes of action]—insofar as they are based on his share of [RSI's] investment banking fee—would be limited to 25% of the amount [RSI] received" (*id.* at 607).

Plaintiff thereafter filed the note of issue on July 29, 2021, indicating that the damages demanded were "\$24,687.50 plus interest and general compensatory damages (including humiliation, mental anguish, and injury to reputation)" as well as punitive damages, attorneys' fees, and costs. Just under two weeks later, on August 10, 2021, the FINRA panel issued an arbitration award in favor of plaintiff and against RSI in the amount of \$24,687.50. Defendant did not file the instant, second motion for summary judgment until April 7, 2025, well over three years after the note of issue was filed and approximately six weeks before the start of trial, which is presently scheduled to commence with jury selection on May 21, 2025.

Defendant's motion for summary judgment is denied as both untimely (*see* CPLR 3212[a]) and an improper successive motion. "Absent a 'satisfactory explanation for the untimeliness,' constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits" (*Wittenberg v Long Island Power Auth.*, 225

AD3d 730, 732 [2nd Dept. 2024], citing *Brill v City of New York*, 2 NY3d 648, 652 [2004]). This is so even if the untimely motion is meritorious and there is no prejudice to the non-movant (*Brill*, 2 NY3d at 652). Similarly, “it is axiomatic that successive summary judgment motions are disfavored” (*Priester v Phanor*, 228 AD3d 593, 594 [1st Dept. 2024]), and “should not be entertained without a showing of newly discovered evidence or other sufficient justification” (*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept. 2010]; see *Amill v Lawrence Ruben Co., Inc.*, 117 AD3d 433, 433-34 [1st Dept. 2014]; *Varsity Tr., Inc. v Bd. of Educ. of City of New York*, 300 AD2d 38, 39 [1st Dept. 2002]).

Defendant asserts there is good cause for the present motion, citing evidence that was unavailable when he filed his initial summary judgment application, specifically, the deposition testimony of RSI’s Managing Director of Investment Banking, Vikas Shah, who was deposed in November 2019, and statements made by plaintiff during the FINRA arbitration, as well as the issuance of the FINRA arbitration award. However, the “new” evidence on which defendant relies was all taken prior to plaintiff’s filing of the note of issue, and the FINRA arbitration award was issued less than two weeks after the note of issue was filed. Defendant offers no reasonable explanation as to why he waited more than three years after the filing of the note of issue before making the present untimely motion.

Defendant contends that, in late August 2021, upon RSI’s payment of the arbitration award, his counsel wrote to plaintiff’s counsel stating that the arbitration payment also fully satisfied plaintiff’s claims for relief against defendant herein,<sup>1</sup> and attached a stipulation of discontinuance, which plaintiff never signed. Despite plaintiff’s refusal to sign the stipulation of discontinuance, defendant contends that, out of a desire to avoid unnecessary expenditure, and assuming this case was a dead letter, he did nothing to pursue the present motion until it became clear this action would be going to trial. This contention is unavailing because, if anything, plaintiff’s refusal to discontinue the action ought to have triggered defendant to timely file his motion rather than unreasonably assuming this action would not move forward.

Defendant’s alternative request for *in limine* relief is likewise denied, as it is functionally the equivalent of his untimely motion for summary judgment. “[A] motion in limine is an

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<sup>1</sup> It is undisputed that RSI was paid an investment banking fee by Better Mortgage of \$98,750. Therefore, 25% of the fee paid to RSI would equal \$24,687.50, which is identical to the amount referenced in the note of issue and awarded to plaintiff in the FINRA arbitration.

inappropriate substitute for a motion for summary judgment” and should not be considered “in the absence of any showing of good cause for the late filing of such a motion” (*Desantis v Desantis*, 225 AD3d 839, 840 [2nd Dept. 2024] [internal quotation marks omitted]; *see Kim v K.Y.W. Enter. Corp.*, 191 AD3d 530, 530 [1st Dept. 2021]; *Downtown Art Co. v Zimmerman*, 232 AD2d 270, 270 [1st Dept. 1996]; *Farias-Alvarez v Interim Healthcare of Greater New York*, 166 AD3d 945, 947 [2nd Dept. 2018]; *In re Singer*, 99 AD3d 802, 803 [2nd Dept. 2012]).

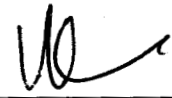
Plaintiff’s cross-motion for an award of attorneys’ fees as a sanction for defendant’s filing of his untimely and procedurally improper motion is also denied. 22 NYCRR § 130-1.1(a) provides, in relevant part, that the court, “in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct.” “Although the advancement of a meritless position may serve as the basis for a finding of frivolity, the standard for such a showing is high: the rule provides that a position will be deemed frivolous only where it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” (*U.S. Bank Nat’l Ass’n v Tait*, 234 AD3d 889, 892 [2nd Dept. 2025] [internal quotation marks omitted]; *see* 22 NYCRR § 130-1.1[c][1]). Applying this standard, the court determines that plaintiff does not demonstrate that sanctions are warranted.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment or, in the alternative, for *in limine* relief, and plaintiff’s cross-motion for sanctions are both denied; and it is further

ORDERED that the Clark shall mark the file accordingly.

This constitutes the Decision and Order of the court.

<u>5/12/2025</u> DATE	 <hr/> LYNN R. KOTLER, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE