

**Escalante v Hotel Asset Value Enhancement, Inc.**

2024 NY Slip Op 34577(U)

December 27, 2024

Supreme Court, New York County

Docket Number: Index No. 153816/2024

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

-----X

MICHAEL ESCALANTE

Plaintiff,

- v -

HOTEL ASSET VALUE ENHANCEMENT, INC.,

Defendant.

-----X

INDEX NO. 153816/2024

MOTION DATE 06/24/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18

were read on this motion to/for DISMISS

Upon the foregoing documents, and after a final submission date of September 19, 2024, Defendant Hotel Asset Value Enhancement, Inc.’s (“Defendant”) motion to dismiss Plaintiff Michael Escalante’s (“Plaintiff”) Complaint is granted.

**I. Background**

This is an action seeking declaratory judgment that a non-compete clause is unenforceable and seeking damages for alleged tortious interference with business relations. Plaintiff was offered a long-term position with Defendant and executed an employment agreement on October 1, 2022. As part of his employment agreement, Plaintiff signed a non-compete clause. Plaintiff resigned from his employment with Defendant on July 21, 2023, and then started working for Aimbridge Parent, Inc. (“Aimbridge”) on October 20, 2023. Defendant served Aimbridge with a cease-and-desist letter citing the non-compete clause on February 22, 2024. Subsequently, on February 24, 2024, Aimbridge ceased working with Plaintiff. While Plaintiff alleges that Aimbridge is not a competing business with Defendant he also alleges that both Defendant and Aimbridge are in the hotel business, and that he worked to increase the efficiency at both businesses.

## II. Discussion

### A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

### B. Declaratory Judgment

Plaintiff's declaratory judgment claim is dismissed. Generally, noncompete clauses are only enforced to the extent reasonable and necessary to protect valid business interests (*see, e.g. BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]). However, the employee choice doctrine is an exception to this rule and applies "where an employer conditions receipt of postemployment

benefits upon compliance with a restrictive covenant” (*Morris v Schroder Capital Management Intern.*, 7 NY3d 616 [2006] citing *Post v Merrill Lynch, Pierce, Fenner & Smith*, 48 NY2d 84 [1979]). The reason for this is that an employee who voluntarily leaves his employer must make an informed choice of either forfeiting a benefit under an employment agreement or retaining the benefit but avoiding competitive employment (*id.* citing *Kristt v Whelan*, 4 AD2d 195, 199 [1st Dept 1957]).

Plaintiff does not allege that his employment was terminated involuntarily, nor does he allege constructive discharge. In fact, Plaintiff negotiated a larger severance to reaffirm the noncompete clause found in his employment agreement (*see* NYSCEF Doc. 11). These e-mails, which constitute documentary evidence, coupled with the unrefuted terms of the separation agreement, definitively establish Defendant’s employee choice doctrine defense (*see e.g. Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 57-8 [1st Dept 2015]). The separation agreement explicitly states that Plaintiff received a lump sum severance and acknowledged “that some or all of these benefits exceed the benefits that I would otherwise be entitled to upon separation from employment with [Defendant]” (NYSCEF Doc. 10 at ¶ 3). Plaintiff also agreed to fulfill his “obligations and commitments” with respect to “the non-compete for twenty-four (24) months...” (*id.* at ¶ 7). Finally, Plaintiff agreed that “by signing this Agreement, [Plaintiff] is electing to receive the benefits described above under the terms set forth herein, which [Plaintiff] acknowledges are sufficient and valuable consideration” (*id.* at ¶ 13). The irrefutable terms of the separation agreement fit squarely within the employee choice doctrine.

In e-mail negotiations over the terms of the non-compete, Plaintiff expressly asked that Aimbridge be excluded from the non-compete, and Plaintiff was told reducing the scope of the noncompete would result in reduction Plaintiff’s severance (NYSCEF Doc. 11). The Separation

Agreement was signed just two days after this e-mail exchange (NYSCEF Doc. 10). Plaintiff cannot negotiate a higher severance than he was entitled in exchange for including Aimbridge in his non-compete, and then sue for declaratory judgment that the non-compete which he agreed to is invalid (*see, e.g. Tasciyan v Marsh USA, Inc.*, 2007 WL 950091 at \*4-5 [SDNY 2007]).

The documentary evidence further establishes that Plaintiff's work with Aimbridge violated the agreement. Plaintiff sought to carve out Aimbridge from the non-compete clause and Plaintiff specifically agreed to avoid providing consulting services regarding hotel effectiveness and efficiency (NYSCEF Doc. 1 at ¶ 12). Nonetheless, Plaintiff specifically alleges that he is working at Aimbridge to enhance its effectiveness and efficiency. Plaintiff's own factual allegations, coupled with the documentary evidence, establish that Plaintiff's work with Aimbridge violates the non-compete clause. Plaintiff's conclusory allegations to the contrary are insufficient (*see generally Barnes v Hodge*, 118 AD3d 633 [1st Dept 2014]).

### **C. Tortious Interference**

Plaintiff's claim for tortious interference is dismissed. To state a claim for tortious interference with business relations, a party must allege (1) it had a business relationship with a third party; (2) defendant knew of that relationship and intentionally interfered with it; (3) that defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2009]).

Here, Plaintiff has failed to allege Defendant acted "solely out of malice or used improper or illegal means that amounted to a crime or independent tort" when it forwarded a cease-and-desist letter. As shown by the documentary evidence, Plaintiff accepted higher severance pay in exchange for not receiving a carve out for Aimbridge in his non-compete clause. Under the terms

of the agreement, Defendant was entitled to serve the cease-and-desist letter. Therefore, Plaintiff’s Complaint is dismissed (*see also De Vito v Yeh*, 217 NYS3d 547 [1st Dept 2024]; *1034 Third Ave. LLC v Pure Green NYC 62nd Street Corp.*, 199 AD3d 505 [1st Dept 2021]; *Streit v Bombart*, 187 AD3d 529 [1st Dept 2020]).

Accordingly, it is hereby,

ORDERED that Defendant’s motion to dismiss Plaintiff’s Complaint is granted in its entirety, and Plaintiff’s Complaint is hereby dismissed; and it is further

ORDERED that within ten days of entry, counsel for Defendant shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF; and it is further

ORDERED that the Clerk of the Court shall mark this matter disposed.

This constitutes the Decision and Order of the Court.

<u>12/27/2024</u> DATE		<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE