

CAUSE NO. 2023-57027

BRADFORD JOHNSON,

Plaintiff,

v.

WHITESTONE REIT,

Defendant

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

334th JUDICIAL DISTRICT

**DEFENDANT WHITESTONE REIT'S
ANSWER AND SPECIAL EXCEPTIONS TO PLAINTIFF'S ORIGINAL PETITION**

Defendant Whitestone REIT ("Whitestone") respectfully files the following Answer and Special Exceptions in response to Plaintiff Bradford Johnson's ("Plaintiff") Original Petition (the "Petition")

**I.
General Denial**

Subject to and without waiving any other defenses, Whitestone generally denies each and every allegation in the Petition pursuant to Texas Rule of Civil Procedure 92 and demands strict proof thereof. Whitestone reserves the right to amend this pleading as authorized by the Texas Rules of Civil Procedure.

**II.
Affirmative and Other Defenses**

Pursuant to Rule 94 of the Texas Rules of Civil Procedure, Whitestone asserts the following affirmative defenses without conceding that it bears the burden of proof as to any of these issues. Whitestone reserves the right to amend or supplement these responses or assert additional affirmative defenses after it has a more complete understanding of Plaintiff's claims, or as discovery indicates is proper:

1. Plaintiff's Petition, in whole or in part, fails to state a cause of action upon which relief may be granted.
2. Plaintiff's Petition fails to state facts sufficient to constitute a cause of action entitling Plaintiff to recover damages.
3. Plaintiff's Petition is vague, ambiguous, and uncertain.
4. Plaintiff's claims are barred, in whole or in part, by the business judgment rule.
5. Plaintiff's claims are barred, in whole or in part, by the existence of a valid express contract.
6. Plaintiff's claims are barred by Plaintiff's own anticipatory material breach of contract, and material breach of contract.
7. Plaintiff's claims are barred, in whole or in part, because Whitestone did not breach any duty owed to Plaintiff.
8. Plaintiff's claims are barred to the extent he seeks extra-contractual damages.
9. Plaintiff is barred from recovering court costs, attorney's fees, or treble damages because he is not entitled to actual damages.
10. Whitestone asserts that Plaintiff, in equity and good conscience is not entitled to recover any of the money allegedly owed to him.
11. To the extent Plaintiff's claims are premised on a contract, Whitestone asserts the defenses of privilege and legal justification.
12. Plaintiff failed to satisfy conditions precedent of any agreements between Plaintiff and Whitestone.
13. Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.
14. Plaintiff's claims are barred, in whole or in part, by the doctrines of estoppel or equitable estoppel.
15. Plaintiff's claims are barred by his material breach of fiduciary duties owed to Whitestone prior to any alleged breach of contract by Whitestone.
16. Plaintiff's claims are barred, in whole or in part, by Plaintiff's failure to mitigate damages.

Whitestone reserves the right to further amend or add additional affirmative defenses, legal or equitable, as authorized by the Texas Rules of Civil Procedure.

III.
Special Exceptions

Pursuant to Texas Rule of Civil Procedure 91, Whitestone specially excepts to the Petition as follows:

A. Negligence

Whitestone specially excepts to Plaintiff's negligence claim (Pet. §§ 27-31) and the allegations pleaded in support thereof as defective. Plaintiff alleges a theory of "negligent undertaking" regarding Whitestone's investigation in allegation of misconduct against former-Chief Executive Officer James C. Mastandrea ("Mastandrea"). *See id.*

For the reasons stated below, Whitestone requests dismissal with prejudice because the Petition the Texas Supreme Court and several Texas Appellate Courts have held that there is no cause of action based on a theory of negligent undertaking in relation to an employer's investigation into employee misconduct. Accordingly, Plaintiff's negligence claim is defective as a matter of law.

First, Texas courts have rejected the precise theory presented by Plaintiff here, namely that when a corporation undertakes an investigation of an employee's alleged misconduct, it voluntarily imposes upon itself a duty of care to that employee. In each case, courts have rejected this theory on the grounds that an investigation into employee misconduct is to the benefit of the company, not the employee. *See, e.g., Texas Farm Bureau Ins. Companies v. Sears*, 54 S.W.3d 361, 368 (Tex. App.—Waco 2001), *rev'd sub nom. Texas Farm Bureau Mut. Ins. Companies v. Sears*, 84 S.W.3d 604 (Tex. 2002) (reversed on other grounds) ("Under either the common law rule or section 323, liability arises when the actor undertakes a particular course of action for the benefit of another party. Farm Bureau did not undertake its investigation to benefit Sears. The evidence shows Sears was suspected of wrongdoing. The company was attempting to determine if that was

true, not for Sears's benefit, but for the company's."); *Cuellar v. Walgreens Co.*, No. 13-00-594-CV, 2002 WL 471317, at *5 (Tex. App.—Corpus Christi Mar. 28, 2002, no pet.) (“Cuellar argues that the tort of ‘negligent undertaking’ is applicable to the facts in the present case. The Sears court, however, rejected the argument that ‘negligent undertaking’ is applicable in circumstances where, as here, a company, for its own benefit, conducts an investigation into alleged wrongdoing by an employee.”)

The Texas Supreme Court explained why such theories are inappropriate in the context of employee terminations:

Nearly every investigation that an employer conducts requires it to resolve factual disputes and make reasonable credibility determinations. Certainly it is hoped that employers will exercise due care in making the potentially devastating decision to terminate an employee for misconduct. But second-guessing an employer's judgment in such a situation provides a strong disincentive for companies to investigate allegations of employee misconduct in the first instance. It is simply not in the public's interest to dissuade employers from conducting internal investigations when employee-wrongdoing is suspected. Nor is it in employees' best interest to recognize a duty that would encourage employers to discharge employees suspected of wrongdoing without first attempting to discover the truth.

Texas Farm Bureau Mut. Ins. Companies v. Sears, 84 S.W.3d 604, 610 (Tex. 2002).

Second, to the extent Maryland law applies (because Whitestone is incorporated in Maryland),¹ the result is the same. *See, e.g., Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 520, 665 A.2d 297, 321 (1995) (holding that, under Maryland law, an employer has no duty of care with respect to investigation of employee's alleged violation of company policy).

¹ Under Texas law, a corporation's “internal affairs” are governed by the law of the state where it was incorporated. *See* TEX. BUS. ORGS. CODE ANN. § 1.102. Because “internal affairs” include “the rights, powers, and duties of [a corporation's] governing . . . persons, officers, and owners,” the law of the state where the corporation was incorporated governs the question of whether the corporation owed duties to Plaintiff. *See Klinek v. LuxeYard, Inc.*, 596 S.W.3d 437, 449 (Tex. App.—Houston [14th Dist.] 2020, pet. denied). Whitestone REIT is incorporated under the laws of the State of Maryland

Accordingly, Plaintiff's negligence claim fails as a matter of law and, therefore, must be dismissed with prejudice.

B. Damages

Whitestone specially excepts to Plaintiff's claim for damages (Pet. § Prayer) because the Petition lacks a specific statement of the relief sought, including the maximum amount claimed. Accordingly, Whitestone asks the Court to require Plaintiff to replead its damages as required by Rule 47 of the Texas Rules of Civil Procedure.

Plaintiff's failure to plead basic and essential facts in the Petition as described above deprives Whitestone of the fair notice of claims to which it is entitled under the Texas Rules of Civil Procedure. Whitestone therefore requests that the Court order Plaintiff to replead the claims as set forth above. If Plaintiff refuses to replead within 30 days, Whitestone requests this Court strike the Petition as to Whitestone.

C. Attorneys' Fees

Whitestone specially excepts to Plaintiff's claim for attorneys' fees (Pet. ¶ 32.) because the Change in Control Agreement ("CIC") underlying Plaintiff's Breach of Contract claims explicitly states that each party to the Agreement shall pay their own costs and fees. (*See* Change in Control Agreement ¶ 9 ("In the event legal action is instituted to enforce any provision of this Agreement, each party shall pay its own cost and expense thereof."))²

Therefore, Whitestone requests that the Court dismiss Plaintiff's prayer for attorneys' fees in its entirety because Plaintiff is not entitled to such relief as a matter of law.

² Change in Control Agreement Between Whitestone REIT and Bradford Johnson (dated Aug. 29, 2014), *available at* <https://www.sec.gov/Archives/edgar/data/1175535/000117553514000024/exhibit105.htm>

IV.
Jury Demand

Whitestone hereby requests a trial by jury on all allowable claims.

V.
Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, Whitestone respectfully prays that:

1. This Court set Whitestone's special exceptions for hearing and, after the hearing, sustain its special exceptions and order Plaintiff to replead and cure its pleading defects and, if Plaintiff does not cure its defects, strike the defective portions of Plaintiff's pleading;
2. Plaintiff takes nothing by his suit; and
3. Any other relief, in law or equity, to which Whitestone may show themselves to be justly entitled and that the court deems proper.

Unofficial Copy Office of Marilyn Burgess Burgess District Clerk

Dated: September 25, 2023

Respectfully submitted,

KING & SPALDING LLP

/s/ Bruce Hurley

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2023, a true and correct copy of the foregoing document was served on all counsel of record via the electronic filing manager utilized to file this document with the Court.

/s/ Mitchell B. Bryant
Mitchell B. Bryant

Unofficial Copy Office of Marilyn Burgess District Clerk

Automated Certificate of eService

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Filing Description: Defendant Whitestone REITs Answer and Special Exceptions to Plaintiffs Original Petition

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