IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

BUSINESS COMPLEX LITIGATION DIVISION

ANDREW CHESNICK, an individual,

Plaintiff,

vs.

Case No. 2017-023511-CA-43

DEZER DEVELOPMENT, LLC, a Florida Limited, Liability Company, GIL DEZER, an individual, MICHAEL DEZER, an individual, 18555 DEVELOPERS, LLC a Florida Limited Liability Company, DEZER FAMILY HOLDINGS, INC., a Florida Corporation, 18555 COLLINS AVENUE CONDOMINIUM ASSOCIATION, INC., a Florida Corporation, DEZER SEASHORE HOLDINGS, LLC, a Florida Limited Liability Company, NEOMI DEZERTZOV, in her representative capacity as the trustee of the Estee Dezertzov STAR Trust, the Gil Dezertzov STAR Trust, and the Leslie Dezertzov STAR Trust, DEZER LAROCHE HOLDINGS, LLC, a Florida Limited Liability Company, TRUSTEE OF THE MICHAEL DEZER REVOCABLE TRUST U/A/D/ JANUARY 8, 2004, in his or her representative capacity, TRUSTEE OF THE NEOMI DEZERTZOV REVOCABLE TRUST U/A/D JANUARY 8, 2004, in his or her representative capacity, DEZER INTRACOASTAL MALL, LLC, a Florida Limited Liability Company, and DEZER PROPERTIES, LLC, is a New York Limited Liability Company,

Defendants.
_____/

DEFENDANTS DEZER DEVELOPMENT, LLC, MICHAEL DEZER AND GIL DEZER'S MOTION TO DISMISS COMPLAINT

Pursuant to Florida Rules of Civil Procedure 1.130 and 1.140(b)(6), Defendants Dezer Development, LLC ("Dezer Development"), Gil Dezer ("Gil"), and Michael Dezer ("Michael") move to dismiss Plaintiff Andrew Chesnick's ("Plaintiff" or "Chesnick") Complaint with prejudice. The following memorandum supports this Motion.

MEMORANDUM

I. INTRODUCTION

Plaintiff has filed a ten-count complaint against Defendants and several other individuals and entities associated with the Dezer family. Plaintiff is a former employee of Dezer Development who resigned, purportedly after Gil, along with his father, Michael, became "overtly hostile and unduly critical towards Chesnick in public and private settings." (Compl. ¶ 42.) Because of this alleged "hostile and abusive work environment that they purposefully created and perpetrated on an almost daily basis," Plaintiff claims that his voluntary resignation was actually a "constructive termination." (*Id.* ¶ 49.)

Because of this alleged termination without cause, Plaintiff asserts that Dezer Development and Gil breached Chesnick's employment agreement (the "Agreement") by failing to acknowledge that they will pay him certain profits from various development projects identified in the Agreement (the "Incentive Compensation"). Specifically, Plaintiff alleges that he is entitled to the Incentive Compensation from the Porsche Design Project, the Armani/Casa Project, the Intracoastal Project, the Solis Project, the Brickell Project, the Epicure Project, the Midtown Project, the Bluegrass Project, the Powerline Project, and the Thunderbird East/West Projects (collectively, the "Development Projects").[1]

Taking the allegations of the Complaint as true, Plaintiff has failed to allege any plausible cause of action. As a threshold matter, the Agreement limits the circumstances under which Plaintiff is entitled to Incentive Compensation stemming from the Development Projects in the event of termination. (Agmt. ¶ 10.) Under the terms of the Agreement, Plaintiff is not entitled to

[1] For purposes of this Motion, Defendant adopts the definitions of these projects provided in the Complaint ¶¶ 31-32.

any Incentive Compensation because he resigned. (*Id.*) Because there is no cognizable "constructive termination" under the facts alleged, Plaintiff's breach of contract claims fail.

Additionally, Plaintiff's claims against Gil and Michael as individual corporate officers cannot stand. Even if the breach of contract claim against Dezer Development could stand, Gil signed the Agreement in his corporate capacity on behalf of Dezer Development, not in his individual capacity. Moreover, Plaintiff's contention that Michael and Gil, two officers of the Dezer Development, "conspired" to constructively terminate him is fundamentally flawed, as the alleged conduct amounts to neither constructive termination nor civil conspiracy.

Plaintiff further admits that the Agreement is valid – indeed, he sued on it – and expressly covers the subject matter of this lawsuit. Thus, both declaratory relief and equitable accountings are improper relief here. For these reasons, Plaintiff's Complaint fails to state a cause of action and should be dismissed with prejudice.

II. FACTUAL BACKGROUND

Plaintiff entered the Agreement with Defendant on January 1, 2013 for a five (5) year term. (Compl. ¶ 30.) The Agreement contained various provisions concerning Plaintiff's compensation. (*Id.* ¶¶ 31-34.) Plaintiff resigned from Defendant corporation when Plaintiff's officers confronted him about his substandard job performance and inability to do his job. (Compl. ¶ 49.) Defendant, however, contends that he was constructively terminated by Plaintiff because Michael and Gil Dezer were unduly critical, harsh, abusive, or hostile toward him publicly and privately. (Compl. ¶ 49.)

Plaintiff's right to compensation is governed by the terms of the Agreement, attached as Exhibit A to the Complaint. In particular, the Agreement contains a provision on termination,

which details the circumstances under which Defendant is entitled to different forms of compensation. Section 10 of the Agreement provides:

> 10. Termination. Notwithstanding the provisions of Section 1 hereof, the Term of Employment shall terminate prior to the end of the period of time specified in Section 1, immediately upon:
>
> (a) The death of the Employee; or
>
> (b) The Employee's Disability during the Term of Employment … or
>
> (c) Upon thirty (30) days prior notice of termination by the Company without cause; or
>
> (d) Employee resigning from the Company; or
>
> (e) The Employee is terminated "For Cause", as defined below.
>
> * * *
>
> In the event of termination of this Agreement pursuant to this Section 10, Employee or the Employee's estate, as appropriate, shall be entitled to receive the Annual Base Salary provided for herein up to and including the effective date of termination, prorated on a daily basis as well as the vested Incentive Compensation set forth in Section 5c above, **and only in the event of termination pursuant to Section 10(a), 10(b) or 10(c), Employee shall receive Incentive Compensation in accordance with Section 5 d above.**

(Agmt. §10 (Emphasis added).) Thus, section 10(2) of the Agreement limits Plaintiff's compensation in the event of termination, entitling him to the claimed Incentive Compensation **only** in the event of his death, disability, or termination from Defendant company without cause. (Agmt. ¶ 10.) The Agreement explicitly excludes Plaintiff's resignation as a basis for receiving a share of the Incentive Compensation from each of the Development Projects. (*Id.*)

III. LEGAL STANDARD

Florida Rule of Civil Procedure 1.140(b) provides that dismissal of a cause of action is appropriate when no relief could be granted under the alleged set of facts. *Siegle v. Progressive*

Consumers Ins. Co., 819 So. 2d 732, 734 (Fla. 2002). When evaluating a motion to dismiss, the court confines its considerations to the four corners of the complaint and must accept all well-pleaded allegations as true. *Gogoleva v. Soffer*, 187 So. 3d 268, 273 (Fla. 3d DCA 2016); *Locker v. United Pharmacy Group, Inc.*, 46 So. 3d 1126, 1128 (Fla. 1st DCA 2010). But exhibits and attachments to a complaint are part of the complaint, and must be considered when evaluating a pleading. *Blue Supply Corp. v. Novos Electro Mechanical, Inc.*, 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008); *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994). When an exhibit contradicts the allegations in a complaint, the exhibit controls and may properly serve as the basis for a motion to dismiss. *See* Fla. R. Civ. P. 1.130; *see also Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000); *Ginsberg*, 645 So. 2d at 494. Here, the alleged facts and terms of the Agreement show that Plaintiff has no claim.

IV. ARGUMENT

A. Plaintiff Has Not Stated a Cause of Action for Breach of Contract.

Plaintiff alleges that Dezer Development and Gil breached the Agreement by not paying him a portion of the profits from certain Development Projects. Plaintiff's allegations ignore the fundamental fact that he resigned, making his allegations inconsistent with the terms of the Agreement. Moreover, Gil cannot be held personally liable for any of Dezer Development's alleged actions.

1. Plaintiff's allegations contradict the terms of the Agreement.

The Agreement clearly limits the circumstances in which Plaintiff is entitled to profits stemming from the Projects. His resignation is not one of them. But Chesnick seeks to avoid the consequences of his voluntary resignation by claiming that he was constructively terminated because his superiors unfairly berated him about business deal that had gone poorly (Compl. ¶

41), "became overtly hostile and unduly critical towards Chesnick in public and private settings" (*id.* ¶ 42), yelled "at Chesnick using language that it inappropriate for repetition in this Complaint" (*id.*¶ 44), "attempted to coerce Chesnick [to renegotiate his employment contract] by bringing up unrelated personal matters and alleging that Chesnick was not capable of doing his job" (*id.*), and conducted "a calculated campaign to make Chesnick's tenure as difficult and unpleasant as possible" (*id.* ¶ 46). Even accepting these allegations as true, this conduct cannot be deemed a constructive termination.

The concept of constructive termination is meant to protect employees from an employer's **illegal discriminatory actions** that make working conditions so difficult that a reasonable person in the same position would resign. *McCaw Cellular Communications of Florida, Inc. v. Kwiatek*, 763 So. 2d 1063, 1066 (Fla. 4th DCA 1999). Plaintiff has not alleged that Defendant's alleged actions were either illegal or discriminatory under any federal or state law. None of the allegations in the Complaint, if taken as true, amount to illegal or discriminatory conduct.

Instead, Plaintiff's grievances amount to nothing more than his inability to handle workplace stress. As one federal court stated:

> The fact that problems and tensions are encountered on the job does not suffice to establish constructive discharge. . . . Every job has its frustrations, challenges and disappointments; these inhere in the nature of work. An employee . . . is not, however, guaranteed a working environment free of stress. The employment discrimination laws . . . cannot be transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quitting.

Bristow v. Daily Press, Inc., 770 F. 2d 1251, 1254-55 (4th Cir. 1985). Regardless of how mean, harsh, or expletive-driven the criticism of Chesnick, such conduct is simply not illegal or discriminatory. And indeed, Chesnick does not bring a claim for any discriminatory act

recognizable under federal or state law. Instead, Plaintiff's allegations are merely an attempt to circumvent the fact that he voluntarily resigned and cannot claim a share of profits under the terms of the Agreement. But because they do not fit legal definition of constructive termination, Count I must be dismissed.

2. Plaintiff has not alleged any basis for holding Gil Dezer liable for the acts of Dezer Development.

In Count II, Plaintiff alleges that Gil breached the Agreement between Plaintiff and Dezer Development. Plaintiff further makes allegations throughout the Complaint that Gil is a party to the Agreement. (Compl. ¶ 30.) These allegations, however, are fundamentally incorrect and contradict the Agreement. Moreover, Plaintiff has not alleged any basis for holding Gil personally liable for Dezer Development's actions. As a result, Plaintiff has failed to state a cause of action for breach of contract against Gil.

"An officer of a corporation cannot be held liable in his individual capacity unless he either signed the contract in his individual capacity or unless the corporate veil was pierced or the corporate entity should be ignored because it was found to be formed or used for fraudulent purposes or where the corporation was merely the alter ego of the shareholder." *Ryan v. Wren*, 413 So. 2d 1223, 1224 (Fla. 2d DCA 1982); *see also Naranja Lakes Condo. No. One, Inc. v. Rizzo*, 422 So. 2d 1080, 1080 (Fla. 3d DCA 1982) (affirming dismissal of counts sounding in contract against corporate officer of developer and builder); *E & A Produce Corp. v. Olmo*, 864 So. 2d 447, 448 (Fla. 3d DCA 2003) ("Officers of a corporation are not liable for corporate acts simply by reason of the officer's relation to the corporation.").

Gil signed the Agreement in his capacity as an officer of Dezer Development, not as an individual. He signed the Agreement on a line under the name of Dezer Development, preceded

by the word "By." (*See* Agmt. at 13.) "It has been established that the signature of a corporate officer placed under the name of the corporation and preceded by the word 'By' does not create personal liability." *Delta Air Lines, Inc. v. Wilson*, 210 So. 2d 761, 763. Additionally, the Agreement states that it is "made and entered into . . . by and between" Dezer Development and Plaintiff. (*See* Agmt. pmbl.) The plain language of the contract therefore shows that only Dezer Development was a party to the Agreement and that Gil's signature was made on the corporation's behalf. Plaintiff has failed to allege any basis for holding Gil liable for the acts of Dezer Development, and Count II should be dismissed with prejudice.

B. Plaintiff Has Not Stated a Claim for Civil Conspiracy Between Michael and Gil.

Count III of the Complaint alleges the existence of a civil conspiracy between two officers of a corporation regarding the alleged "constructive termination" of an employee. Under Plaintiff's standard, any agreement between officers of a company to take an action with which another disagrees could be an alleged "conspiracy". Obviously, such is not the law.

To state a civil conspiracy claim, Plaintiff must allege: (1) the existence of an agreement between two or more parties; (2) to perform an unlawful act or a lawful act by unlawful means; (3) the doing of some overt act in furtherance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy. *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997). "General allegations of conspiracy are inadequate. A complaint must set forth clear, positive, and specific allegations of civil conspiracy." *Eagletech Commc'ns, Inc. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 863 (Fla. 3d DCA 2012) (internal citations omitted). "The gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the plaintiff." *Buckner v. Lower Fla. Keys Hosp. Dist.*, 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981); *Wright v. Yurko*, 446 So. 2d 1162, 1165 (Fla. 5th

DCA 1984) ("An act which does not constitute a basis for a cause of action against one person cannot be made the basis for a civil action for conspiracy.").

Plaintiff alleges that "M. Dezer conspired with G. Dezer to constructively terminate" Plaintiff's employment with Dezer Development by, undertaking a meanness campaign to drive him to quit. (Compl. ¶¶ 68-70). These allegations are insufficient to state a claim. For starters, Plaintiff has not alleged the existence of an agreement between Michael and Gil. Rather, he generally alleges that they conspired to "constructively terminate" him, which is insufficient to establish a claim for civil conspiracy. *See Ocala Loan Co.*, 155 So. 2d at 716 (general allegation of conspiracy insufficient to state claim for civil conspiracy); *Eagletech Commc'ns, Inc.*, 79 So. 3d at 863 ("General allegations of conspiracy are inadequate.").

Additionally, a conspiracy necessarily requires a combination of two or more parties. It is well-settled law in Florida that a corporation and its officers are viewed as a single entity and so a corporation cannot conspire with these individuals, unless the officers have an independent personal stake in the activity, separate from that of the corporation. *See, e.g., Buckner*, 403 So. 2d at 1029; *Garrido v. Burger King Corp.*, 558 So. 2d 79, 81 (Fla. 3d DCA 1990); *Lipsig v. Ramlawi*, 760 So. 2d 170, 180-81 (Fla. 3d DCA 2000); *Cedar Hills Props. v. E. Fed. Corp.*, 575 So. 2d 673, 676 (Fla. 1st DCA 1991). Plaintiff has not and cannot allege that Michael and Gil had an independent personal stake in his resignation, so they could not have engaged in any alleged conspiracy with Dezer Development to constructively terminate him.

Furthermore, none of Plaintiff's allegations amount to the performance of unlawful acts or lawful acts by unlawful means. As discussed above, the concept of constructive termination protects employees from an employer's **illegal discriminatory** actions that make working conditions so difficult that a reasonable person in the same position would resign. *McCaw*

Cellular Commc'ns of Fla., Inc., 763 So. 2d at 1066. Not a single allegation against either Gil or Michael references an illegal act.

In short, Plaintiff's allegations are merely a post-resignation attempt to circumvent the consequences of his actions under the plain terms of the Agreement. As two officers cannot be found to "conspire" in making a decision for their company and no unlawful agreement is alleged here, Count III must be dismissed.

C. Plaintiff Has Also Failed to State a Claim for Declaratory Relief.

Count VII of Plaintiff's Complaint seeks a declaration that "his profit participation in the Intracoastal Project has vested," and that "all vested amounts shall be paid to [him] in accordance with the Contract." (Compl., Count VII.) Plaintiff's request for this equitable, declaratory relief, however, is also flawed. As Florida courts have repeatedly stated:

> A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract. It is not the role of the courts to make an otherwise valid contract more reasonable from the standpoint of one contracting party. A declaratory judgment is not available to settle factual issues bearing on liability under a contract which is clear and unambiguous and which presents no need for its construction.

Med. Ctr. Health Plan v. Brick, 572 So. 2d 548, 551 (Fla. 1st DCA 1990) (internal citations omitted); *see also Abruzzo v. Haller*, 603 So. 2d 1338, 1339 (Fla. 1st DCA 1992) ("A declaratory judgment is not available to settle factual issues bearing on liability under a contract which is clear and unambiguous and which presents no need for its construction.") (internal quotes and citations omitted); *Kelner v. Woody*, 399 So. 2d 35, 37-38 (Fla. 3d DCA 1981) (declaratory relief is not to be used "for the determination of purely factual issues under an instrument that is clear and unambiguous").

The case of *Abruzzo v. Haller* is instructive here. In *Abruzzo*, plaintiff sought declaratory relief and asked the trial court "to interpret the parties' [employment] agreement and guide them as to [plaintiff's] rights, if any, for compensation[.]" 603 So. 2d at 1339. The court held that the employment agreement was clear and unambiguous and that plaintiff failed to allege that he was in doubt or uncertain about his rights or status under the contract. As a result, the court dismissed plaintiff's request for declaratory relief because it sought a determination of factual issues relating to the parties' liability under the contract. *Id.*

As in *Abruzzo*, the Agreement is clear and unambiguous as to Plaintiff's compensation structure. Plaintiff has not alleged that he is in doubt or uncertain about his rights under the contract. To the contrary, the Complaint definitively states that Plaintiff is entitled to the Incentive Compensation. (Compl. ¶ 89). Plaintiff is merely seeking a determination of factual issues relating to his compensation under the contract and has therefore failed to state a claim for declaratory relief. As such, this Court should dismiss Count VII with prejudice.

D. Plaintiff Is Not Entitled to an Equitable Accounting of Any of the Development Projects.

Finally, Plaintiff alleges that he is entitled to an equitable accounting of the Porsche Design Project (Count VIII), the Armani/Casa Project (Count IX), and the Intracoastal Project (Count X). As with the rest of the Complaint, Plaintiff misses the mark.

To state a claim for an equitable accounting, Plaintiff must allege that "the contract demands between litigants involve extensive or complicated accounts and it is not clear that the remedy at law is as full, adequate and expeditious as it is in equity." *Bankers Trust Realty, Inc. v. Kluger*, 672 So. 2d 897, 898 (Fla. 3d DCA 1996) (internal quotes and citations omitted). In Counts VIII, IX, and X of the complaint, Plaintiff states that "[t]he amounts of money involved

and the complicated nature of the various transactions" for the Porsche Design Project, the Armani/Casa Project, and the Intracoastal Project "make it impossible to determine the monetary value of the Dezer Interest and the value of Chesnick's share of the same." This, of course, presupposes Chesnick is entitled to any Incentive Compensation under the Agreement and is merely a vehicle for Chesnick to avoid his burden of establishing damages for breach of contract.

Simply alleging the existence of "extensive or complicated" accounts is not enough to state a claim for an equitable accounting. Count I of the complaint alleges a valid contract for employment containing the terms for Plaintiff's compensation, and a breach of this agreement. These alleged facts, however, are insufficient to establish a claim for equitable accounting, as they "show neither complexity nor inadequacy of a legal remedy." *Chiron v. Isram Wholesale Tours and Travel Ltd.*, 519 So. 2d 1102, 1103 (Fla. 3d DCA 1988) (affirming dismissal of claim for equitable accounting with prejudice where complaint alleged the existence of an employment contract between the parties that provided the terms of employment, and breach of that contract).

Here, Plaintiff has a valid contract with Dezer Development, which provides the terms of his compensation. Because he resigned, Plaintiff is not entitled to any portion of the so-called Dezer Interest. But even if he were, the amount to which he would be entitled is merely his damages, which would be established in the normal course. He, therefore, has an adequate remedy at law, and equitable relief is improper here. For these reasons, this Court should dismiss Counts VIII, IX, and X of the Complaint with prejudice.

V. CONCLUSION

For the foregoing reasons, Defendants Dezer Development, LLC, Gil Dezer, and Michael Dezer respectfully request that the Court dismiss Counts I, VII, VIII, IX, and X of the Complaint

and for such, further relief as justice may require, including Defendants' attorney's fees and costs pursuant to the Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished by the Florida Courts e-filing Portal pursuant to Fla. R. Jud. Admin. 2.516(b)(1), this 2nd day of January 2018, to the following:

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