

**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA
CIVIL DIVISION**

JUSTIN GREEN,

Plaintiff,

v.

Case No. 01-2020-CA-001249

ALACHUA COUNTY, a political subdivision
of the State of Florida, and the Honorable RON
DESANTIS, in his official capacity as Governor
of the State of Florida,

Defendants.

GOVERNOR DESANTIS' MOTION TO DISMISS AMENDED COMPLAINT

In this suit, Plaintiff challenges Emergency Order 2020-21, an order adopted by Alachua County. DE 6. The County, a “home rule charter county” and “political subdivision of the State,” issued its order through independent, local decision making by the Board of County Commissioners. DE 6 at ¶ 3. The Governor was uninvolved in the process, and he is not a proper party defendant to this case. For this reason and because Plaintiff’s Amended Complaint fails to state a claim upon which relief can be granted, this Court should dismiss Plaintiff’s suit against the Governor pursuant to Florida Rule of Civil Procedure 1.140(b).

BACKGROUND¹

A. In late 2019, a novel infectious respiratory disease was detected in Wuhan, China. This

¹ This overview references publicly available government Orders, which are subject to judicial notice. *See, e.g., Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1062 n.7 (Fla. 3d DCA 2018) (Lagoa, J.) (acknowledging that a court may take judicial notice of “[o]fficial actions of the . . . executive . . . department[] . . . of any state . . . of the United States” and “[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned” (quoting § 90.202(5), (12), Fla. Stat.) (alterations in original).

virus, eventually named Novel Coronavirus Disease 2019 (COVID-19), spread rapidly across the globe, leading the World Health Organization to declare a Public Health Emergency of International Concern and a global pandemic. When two Florida residents tested positive the first week of March 2020, Governor Ron DeSantis issued Executive Order 20-51, which directed the Florida Department of Health to declare a Public Health Emergency. *See* <https://www.flgov.com/2020-executive-orders/> (listing all of the Governor’s publicly available Executive Orders related to COVID-19). On March 9, Governor DeSantis declared a State of Emergency by issuing Executive Order 20-52.

Since his March 9 state-of-emergency declaration, the Governor has issued numerous Executive Orders related to the COVID-19 pandemic. *See, e.g.*, Executive Order 20-91 (directing all persons in Florida to limit their movements and personal interactions outside the home to those necessary for obtaining or providing essential services or conducting essential activities). But the Governor never issued an Executive Order requiring the general public to wear masks or directing counties to impose a general-public mask requirement.²

B. On May 4, 2020, Alachua County enacted Emergency Order 2020-21. DE 6 at ¶ 9 (citing Ex. A.). The Order, issued in response to the COVID-19 pandemic, is intended to protect the “lives, health, welfare, and safety of the people of Alachua County.” DE 6, Ex. A at p. 1. The Order acknowledges that the Governor’s Executive Order 20-112 “does not preempt the authority of local governments to add additional restrictions to businesses opened by the Governor.” DE 6, Ex. A at p. 2. Among other things, the Order mandates that “[p]ersons working

² The *only* mask requirement the Governor has ever imposed applies solely to employees of barbershops, cosmetology salons, and cosmetology specialty salons. *See* Executive Order 20-120 (requiring the employees of barbershops, cosmetology salons, and cosmetology specialty salons to wear a mask while providing personal services as outlined by the Department of Business and Professional Regulation at <http://www.myfloridalicense.com/DBPR/emergency/>).

in or visiting grocery stores, restaurants, retail facilities, pharmacies, construction sites, public transit vehicles, vehicles for hire, along with locations where social distancing measures are not possible shall wear facial coverings as defined by the CDC.” DE 6, Ex. A at ¶ 8.a. “[C]hildren under six” and “persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem” are exempt from the mask requirement. DE 6, Ex. A at ¶ 8.c. Masks may be “store bought or homemade.” DE 6, Ex. A at ¶ 8.b. The Order authorizes both the County and its municipalities to enforce the Order. DE 6, Ex. A at ¶¶ 13-14. Violations of the Order “shall be enforced by law enforcement as provided by law.” DE 6, Ex. A at ¶ 16.

C. Plaintiff, a resident of Alachua County, filed his Amended Complaint for Declaratory and Injunctive Relief on May 11, 2020. DE 6. In his view, Emergency Order 2020-21 is unlawful both because Alachua County lacked the authority to enact the mask requirement and because the mask requirement violates various provisions of the United States and Florida Constitutions. *See, e.g.*, DE 6 at ¶¶ 59-84, 92-110, 115-127. Plaintiff seeks (1) a declaration that the mask requirement contained in the Order is unconstitutional and (2) injunctive relief enjoining Alachua County from enforcing the mask requirement. DE 6 at pp. 1, 22. His sole claim against the Governor is that the Governor “conspired with” Alachua County to deprive Plaintiff of his constitutional rights by ratifying or endorsing the County’s mask requirement. *See* DE 6 at ¶¶ 51-58, 111-114. Despite his recognition that Executive Order 20-112 “does not require citizens to wear masks to purchase essential goods and services,” DE 6 at ¶ 118, and his averments that the mask requirement is “inconsistent with” and “in conflict with the Governor’s orders,” DE 6 at p. 22 & ¶ 127, Plaintiff nevertheless accuses the Governor of conspiracy and requests that the Court award Plaintiff “damages and attorney’s fees and costs,” DE 6 at ¶ 114.

LEGAL STANDARDS

“A suit challenging the constitutionality of a[n act] must be brought against the state agency or department charged with enforcing the statute at issue.” *Haridopolos v. Alachua Cty.*, 65 So. 3d 577, 578 (Fla. 1st DCA 2011). “Where it is clear . . . that the plaintiff cannot allege any proper basis for naming the Governor as a party defendant, the court should decline to assert jurisdiction.” *Scott v. Francati*, 214 So. 3d 742, 747 (Fla. 1st DCA 2017).

A complaint must be dismissed if it “fail[s] to state a cause of action.” Fla. R. Civ. P. 1.140(b). “Whether a complaint is sufficient to state a cause of action is an issue of law.” *Doe v. Baptist Primary Care, Inc.*, 177 So. 3d 669, 674 (Fla. 1st DCA 2015) (quoting *Locker v. United Pharm. Grp., Inc.*, 46 So. 3d 1126, 1128 (Fla. 1st DCA 2010)). Although courts must “accept as true all well-pled allegations” and “draw all reasonable inferences in favor of the pleader,” courts “need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party.” *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (citing *Response Oncology, Inc. v. MetraHealth Ins. Co.*, 978 F. Supp. 1052, 1058 (S.D. Fla. 1997)).

Dismissal is also warranted if a complaint fails to allege “a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.” Fla. R. Civ. P. 1.110(b). This pleading rule “forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort.” *Horowitz v. Laske*, 855 So. 2d 169, 172-73 (Fla. 5th DCA 2003).

ARGUMENT

A. The Governor is not a proper party defendant to this case.

A court's jurisdiction is limited; "there . . . must exist some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction." *Atwater v. City of Weston*, 64 So. 3d 701, 705 (Fla. 1st DCA 2011) (quoting *Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991)). "Where it is clear . . . that the plaintiff cannot allege any proper basis" for including a given party as a defendant, "the court should decline to assert jurisdiction." *Francati*, 214 So. 3d at 747.

In an action seeking to declare a law unconstitutional, the "proper defendant" is the official or agency of government charged with enforcement or implementation of the statutory provision. *Atwater*, 64 So. 3d at 703; *accord Walker v. President of the Senate*, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995). The proper party defendant in a lawsuit challenging the constitutionality of a county order is the county official designated to enforce the order. *See Atwater*, 64 So. 3d at 703; *Walker*, 658 So. 2d at 1200. If "the named official is not the enforcing authority, then courts must consider two additional factors: (1) whether the action involves a broad constitutional duty of the state implicating specific responsibilities of the state official; and (2) whether the state official has an actual, cognizable interest in the challenged action." *Francati*, 214 So. 3d at 746.

Here, the Governor is not a proper party defendant. Plaintiff does not seek to vitiate any order of the Governor. Plaintiff alleges no grievance with any gubernatorial Executive Order or mandate related to masks. His claims arise solely from the mask requirement contained in Alachua County's Emergency Order 2020-21—an order that was independently adopted by the Alachua County Board of County Commissioners using their emergency-response authorities.

Florida’s Constitution provides that counties are political subdivisions of the state. Art. VIII, § 1(a), Fla. Const. The Constitution confers upon charter counties, such as Alachua, all powers of local self-governance, authorizing them to issue any ordinance not inconsistent with general or special law. Art. VIII, § 1(g), Fla. Const. The counties’ essential and independent function in emergency situations is reaffirmed by statute. Section 252.38, Florida Statutes, pays heed to the counties’ critical role in responding to disasters within their borders, noting that “[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state.” § 252.38, Fla. Stat. Section 252.38 thus grants certain emergency management “power[s] and authorit[ies]” to the counties. *See* § 252.38(3), Fla. Stat. It also establishes an emergency management chain-of-command that is primarily accountable to the counties. *See* § 252.38(1)(b), Fla. Stat. (providing that the director of each county emergency management agency shall “be appointed by the board of county commissioners or the chief administrative officer of the county” and “serve at the pleasure of the appointing authority”).

In issuing Emergency Order 2020-21, Alachua County drew upon its independently conferred powers, which long pre-dated the pandemic. *See* DE 20 at 18 (“Section 252.38, Fla. Stat., specifically provides that the County is the primary local authority below the Governor for emergency management. This statute provides a broad grant of authority to the counties to provide for the public health, safety and welfare.”). The County did not rely upon any special power conferred by the Governor in an Executive Order, nor did the County request or rely upon the Governor’s “ratifi[cation]” or “endorse[ment].” DE 6 at ¶ 53. Plaintiff does not, and cannot, aver that the Governor took part in Board meetings leading up to the Order’s signing, nor can Plaintiff assert that the Governor took affirmative steps giving any necessary blessing to the County action. These omissions are fatal flaws for Plaintiff’s attempt to bring the Governor into this

case. *Cf. Francati*, 214 So. 3d at 747 (“It is absurd to conclude that the Governor’s general executive power under the Florida Constitution is sufficient to make him a proper defendant whenever a party seeks a declaration regarding the constitutionality of a state law.”).

The text of Emergency Order 2020-21 confirms that the Governor is not a proper party defendant. Nothing with the Order remotely suggests that the Governor is charged with its enforcement. To the contrary, the Order plainly grants enforcement authority to Alachua County, municipalities within Alachua County, and local law enforcement. *See, e.g.*, DE 6, Ex. A at ¶ 14 (“The County has jurisdiction countywide to enforce the terms of this Order.”); *id.* at ¶ 13 (“Municipalities have the authority to enforce this County Order within their jurisdiction.”); *id.* at ¶ 16 (stating that the Order “shall be enforced by law enforcement as provided by law”). Likewise, the County’s Emergency Order does not “implicat[e] specific responsibilities of the” Governor. *See Atwater*, 64 So. 3d at 704. It implicates only the Board’s actions in self-governance. Finally, the Governor has no “actual, cognizable interest” in the Court’s decision related to the constitutionality of the County statute. *See id.* Regardless of whether the Court finds any merit to Plaintiff’s claim regarding the constitutionality of the locally ordered mask requirement, the Governor’s Orders responding to the pandemic remain unaffected, and his emergency powers remain intact. Simply stated, the Governor lacks any clear connection to or responsibility for the challenged Order. He is not a proper party defendant, and this Court lacks jurisdiction to entertain claims against him related to the County’s act.

B. Plaintiff has failed to state any claim against the Governor.

To overcome the lack of connection between the Governor and the County Order, Plaintiff alleges that the Governor is a proper defendant because he purportedly conspired with the County to issue the Emergency Order requiring masks.

“Florida does not recognize civil conspiracy as a freestanding tort.” *Banco de los Trabajadores v. Cortez Moreno*, 237 So. 3d 1127, 1136 (Fla. 3d DCA 2018). Rather, civil conspiracy claims are “a vehicle for imputing the tortious acts of one coconspirator to another to establish joint and several liability.” *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 80 (Fla. 3d DCA 2013) (citation omitted). To state a claim for civil conspiracy, Plaintiff must show “(1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to plaintiff as a result of the acts done under the conspiracy.” *Philip Morris USA, Inc. v. Russo*, 175 So. 3d 681, 686 n.9 (Fla. 2015) (citing *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997)).

Plaintiff claims that the Governor “conspired” and “worked in concert” with Alachua County to “unlawful[ly]” deprive Plaintiff of his constitutional rights by “ratif[ying] or endors[ing]” the County’s mask requirement. DE 6 at ¶¶ 53-55, 113. However, Plaintiff fails to allege ultimate facts plausibly showing that the Governor and Alachua County reached any agreement to deprive Plaintiff of his constitutional rights. The Amended Complaint does not identify any agreement between the Governor and Alachua County, much less an agreement regarding the County’s mask mandate. The Amended Complaint does not even attempt to articulate the who, what, when, or where of an agreement between the alleged co-conspirators. Without sufficient allegations of an agreement, Plaintiff’s conspiracy claim fails. *See Russo v. Fink*, 87 So. 3d 815, 819 (Fla. 4th DCA 2012) (“Because [the complaint] never alleged that there was an agreement, it has failed to allege sufficient facts with respect to the conspiracy count.”).

Generously construed, Plaintiff’s Amended Complaint can be understood to assert that the Governor “conspired with the County to deprive Plaintiff of his constitutional rights,” DE 6

at ¶ 54, because the Governor confirmed to Alachua County that “[l]ocal governments, under the current state of emergency, have the authority to enact more protective measures than those rolled out by the State,” DE 6 at ¶ 52. But this allegation does not support even the inference of any actual agreement between the Governor and Alachua County to deprive Plaintiff of his constitutional rights. The allegation simply shows that the Governor did not preempt whatever authority local governments retain to enact *lawful* measures more protective than those imposed by the Governor. Failure to preempt additional lawful action is not endorsement, much less ratification. And it certainly is not, as Plaintiff suggests, an overt act furthering an agreement to violate the law. *See* DE 6 at ¶ 56.

Driving the nail into the coffin of Plaintiff’s conspiracy claim, portions of Plaintiff’s Amended Complaint directly undermine the suggestion of any agreement or coordination. Plaintiff concedes that the Governor’s Executive Order 2020-112 “does not require the use of masks” or “require citizens to wear masks to purchase essential goods and services.” DE 6 at ¶¶ 29, 118; *see* DE 6 at Ex. B. Plaintiff even goes so far as to aver that the County’s mask requirement is “inconsistent with” and “in conflict with the Governor’s orders.” DE 6 at p. 22 & ¶ 127. The statements suggest the opposite of coordination or conspiracy. Thus, Plaintiff’s allegations are premised on “internally inconsistent factual claims” that must be rejected by the Court. *See W.R. Townsend*, 728 So. 2d at 300.

In short, Plaintiff has not and cannot allege that the Governor and Alachua County conspired to violate Plaintiff’s constitutional rights through the County’s mask requirement. Plaintiff has set forth no facts supporting the existence of an agreement, and he can produce none. This Court should dismiss with prejudice Plaintiff’s civil conspiracy claim against the Governor.

CONCLUSION

For the foregoing reasons, the Governor respectfully requests that this Court dismiss Plaintiff's suit against him.

Respectfully submitted this 18th of May, 2020.

RON DESANTIS
GOVERNOR

/s/ Colleen M. Ernst

Colleen M. Ernst (FBN 112903)

DEPUTY GENERAL COUNSEL

Joseph W. Jacquot (FBN 189715)

GENERAL COUNSEL

Joshua E. Pratt (FBN 119347)

ASSISTANT GENERAL COUNSEL

Executive Office of the Governor

The Capitol, PL-05

Tallahassee, Florida 32399-0001

Phone: (850) 717-9310

Joe.Jacquot@eog.myflorida.com

Colleen.Ernst@eog.myflorida.com

Joshua.Pratt@eog.myflorida.com

Counsel for Governor DeSantis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed using the Florida Courts e-Portal on this 18th day of May, 2020 and will be electronically served to all counsels of record.

/s/ Colleen M. Ernst

Colleen M. Ernst

DEPUTY GENERAL COUNSEL