

STATE OF NORTH CAROLINA
LENOIR COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24 CVS 635

JULIUS P. "JAY" CHERRY, JR. and
ANN B. CHERRY,

Plaintiffs,

v.

ARMISTEAD B. MAUCK,

Defendant,

v.

AJAL INVESTMENTS, LLC and C-
GAS, LLC,

Nominal
Defendants.

**ORDER AND OPINION ON
DEFENDANT'S MOTION TO DISMISS**

Womble Bond Dickinson (US) LLP, by Pressly M. Millen and Samuel B. Hartzell, for Plaintiffs Julius P. "Jay" Cherry, Jr., and Ann B. Cherry.

Williams Mullen, by Walter L. Tippet, Jr., and Lewis H. Hallowell, for Defendant Armistead B. Mauck.

No counsel appeared for Nominal Defendants AJAL Investments, LLC and C-Gas, LLC.

Conrad, Judge.

1. This case arises out of a management dispute in two family businesses, AJAL Investments, LLC and C-Gas, LLC. Julius "Jay" Cherry, Jr., and his wife, Ann Cherry, are the plaintiffs. They accuse their brother-in-law, Armistead Mauck, of distributing company cash without authority. Armistead has moved to dismiss all claims in the amended complaint. (ECF No. 16.) For the following reasons, the Court **GRANTS in part** and **DENIES in part** his motion.

2. **Background.** AJAL and C-Gas are just two of several affiliated family businesses. AJAL primarily manages convenience stores; C-Gas is in the propane business. Jay and Armistead are the companies' only managers. They are also C-Gas's only members, with each holding an equal fifty-percent interest. Likewise, AJAL's membership is divided evenly: the Cherrys own half, and Armistead and his wife, Louise, own the other half. (See V. Am. Compl. ¶¶ 1, 6, 7, 12, ECF No. 9.)

3. AJAL's operating agreement directs its managers to "distribute Distributable Cash and other property at such times and in such amounts as the Majority in Interest of the Members determines, in its sole discretion." The agreement goes on to state that "[w]ithdrawals from [AJAL] bank accounts shall only be made by such parties as may be approved by the Majority in Interest." C-Gas's operating agreement similarly states that "[a]ny cash of the Company which might be available for distribution to the Members shall be distributed to the Members at such times and in such amounts as determined by" all members. For many years, AJAL and C-Gas made regular, monthly distributions with their members' approval. (V. Am. Compl. ¶¶ 9, 10, 13, 14; AJAL Op. Agrmt. §§ 9.3, 9.11, ECF No. 3; C-Gas Op. Agrmt. §§ 8.1, 9.2(g), ECF No. 3.)

4. Since at least May 2021, the Cherrys and the Maucks have quarreled over the management of a third family business, Cherry Oil Company. That quarrel led to related litigation that is still ongoing. See *Mauck v. Cherry Oil Co.*, 2021 NCBC LEXIS 81, at *2 (N.C. Super. Ct. Sept. 20, 2021) ("This action, succinctly put, concerns a dispute among family members over the management and future direction of a

family business.”). According to the Cherrys, the related litigation put “various inter-company issues between [Cherry Oil], AJAL, and C-Gas . . . in a state of limbo.” In June 2024, the Cherrys called a special meeting of AJAL’s members to discuss these issues. The Maucks did not attend the meeting, which meant that there was no quorum. (V. Am. Compl. ¶¶ 15, 18, 19, 22.)

5. This irked the Cherrys. They sent a pointed letter to the Maucks, stating that the lack of quorum “call[ed] into question the ability of AJAL to conduct its business.” In the same letter, the Cherrys withdrew their “consent to make the continuing monthly payments from AJAL.” Armistead, as AJAL’s manager, made the next monthly distribution anyway. In the flurry of letters that followed, the Cherrys objected to any additional cash distributions from AJAL or C-Gas. Over these objections, Armistead made monthly distributions from both companies in August, September, and October 2024. In protest, the Cherrys voided their checks and directed Cherry Oil to withhold rent payments owed to AJAL and C-Gas in amounts equal to the distributions Armistead had made to himself. (See V. Am. Compl. ¶¶ 23–28, 30, 31.)

6. The Cherrys then filed this lawsuit, alleging that Armistead lacked authority to make these distributions. Their amended complaint includes a pair of claims for breach of the companies’ operating agreements and another pair for breach of fiduciary duty. (See V. Am. Compl. ¶¶ 35, 41, 47, 52.)

7. Soon after filing suit, the Cherrys moved for a preliminary injunction to bar Armistead from making additional distributions without the consent of a majority of

the companies' members. With the benefit of briefing and a hearing, the Court granted that motion, reasoning as follows:

Both [operating] agreements give the LLCs' members the right to decide when and whether to distribute company cash, and absent approval of a majority of the members, the managers have no authority to make distributions. The undisputed evidence shows that Armistead distributed cash from both LLCs without majority approval and that he intends to do so going forward, thus establishing a likelihood of success on the claims for breach of the operating agreements.

Cherry v. Mauck, 2024 NCBC LEXIS 160, at *4 (N.C. Super. Ct. Dec. 18, 2024).

8. While the motion for preliminary injunction was pending, Armistead moved to dismiss all claims under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. (See ECF No. 18.) The motion to dismiss is now fully briefed, and in its discretion, the Court elects to decide it without a hearing. See BCR 7.4.

9. **Legal Standard.** A motion to dismiss for failure to state a claim “tests the legal sufficiency of the complaint.” *Isenhour v. Hutto*, 350 N.C. 601, 604 (1999) (citation and quotation marks omitted). In deciding the motion, the Court must treat all well-pleaded allegations as true and view the facts and permissible inferences in the light most favorable to the nonmoving party. See, e.g., *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019).

10. **Breach of Contract.** To state a claim for breach of contract, a plaintiff need only allege the “existence of a valid contract” and a “breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). When these elements are alleged, “it is error to dismiss a breach of contract claim under Rule 12(b)(6).” *Woolard v. Davenport*, 166 N.C. App. 129, 134 (2004).

11. The amended complaint alleges that the operating agreements for AJAL and C-Gas are valid and enforceable; that the agreements allow the companies' managers to distribute cash only with the approval of a majority of the members; and that Armistead breached the agreements by making distributions over the objections of the Cherrys, who represent half of each company's membership. Taken as true, these allegations satisfy the "relatively low bar" for stating a claim for breach of contract. *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *11 (N.C. Super. Ct. June 19, 2019).

12. Armistead's argument for dismissal is more or less the same as the argument that he made in opposition to the Cherrys' motion for preliminary injunction. As he acknowledges in his reply brief, the Court has already considered his position and found it unpersuasive. *See Cherry*, 2024 NCBC LEXIS 160, at *4–5.

13. The Court therefore denies the motion to dismiss the claims for breach of contract.

14. **Breach of Fiduciary Duty.** To state a claim for breach of fiduciary duty, the plaintiff must plead the existence of a fiduciary duty, a breach of that duty, and injury proximately caused by the breach. *See Green v. Freeman*, 367 N.C. 136, 141 (2013). "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651 (2001).

15. The Cherrys have not adequately alleged that Armistead owes them a fiduciary duty. Armistead is a member and manager of AJAL and C-Gas. Generally, members of an LLC do not owe fiduciary duties to each other or to the company, and

managers owe fiduciary duties to the company but not to the members. *See, e.g., Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473–74 (2009). No exception to these default rules applies here. *See, e.g., Strategic Mgmt. Decisions, LLC v. Sales Performance Int'l*, 2017 NCBC LEXIS 69, at *10 (N.C. Super. Ct. Aug. 7, 2017) (stating that “a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest members” (citation and quotation marks omitted)).

16. Nor do the Cherrys have standing to sue for a breach of the fiduciary duties that Armistead owes to AJAL and C-Gas. They have not asserted derivative claims on either company’s behalf. And neither their complaint nor their opposition brief identifies any “special duty” that Armistead owed to them or any “peculiar or personal injury” that he caused them. *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 659 (1997) (citation and quotation marks omitted). Thus, the Cherrys do not have standing to pursue individual claims for wrongs done to the companies.

17. The Court therefore dismisses the claims for breach of fiduciary duty. *See Cosma v. Fit Kitchen, LLC*, 2022 NCBC LEXIS 77, at *3–4 (N.C. Super. Ct. July 18, 2022) (granting motion to dismiss claim for breach of fiduciary duty by one LLC member against another); *Strategic Mgmt. Decisions*, 2017 NCBC LEXIS 69, at *15 (same). Having done so, the Court need not address Armistead’s alternative argument that any fiduciary duties were disclaimed by the operating agreements.

18. **Conclusion.** For these reasons, the Court **DENIES** the motion to dismiss the claims for breach of contract and **GRANTS** the motion to dismiss the claims for breach of fiduciary duty.

SO ORDERED, this the 21st day of January, 2025.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases