

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

PRESENT: HON. GERALD LEBOVITS PART 07

Justice

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ANTONIA NOBLE LUDWIG, individually, as Administrator
of the ESTATE OF AVRAM LUDWIG, and on behalf of
BULL-POET, LLC,

Plaintiff,

INDEX NO. 152866/2022

MOTION DATE 12/08/2022

MOTION SEQ. NO. 001

- v -

WILLIAM A. SAHLMAN, DOUGLAS LIMAN, BULL-POET
LLC, DOUG LIMAN INC., and HYPNOTIC INC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to DISMISS.

Law Office of Allison M. Furman, P.C., New York, NY (Allison M. Furman of counsel) for plaintiff.

Paul, Weiss Rifkind Wharton & Garrison LLP, New York, NY (Brad S. Karp and Maia Usui of counsel), for defendants.

Gerald Lebovits, J:

In this action for breach of fiduciary duty, an accounting, and other equitable relief, defendants move under CPLR 3211 to dismiss plaintiff's amended complaint. The motion is granted in its entirety.¹

BACKGROUND

Defendants William A. Sahlman and Douglas Liman, together with nonparty Avram Ludwig (Ludwig), equally owned a 42-foot Catalina recreational sailboat through defendant Bull-Poet LLC, a New York limited liability company. Ludwig, Sahlman, and Liman formed Bull-Poet for the sole purpose of owning and maintaining the sailboat. On August 26, 2014, the three executed Bull-Poet's operating agreement. Sahlman was elected the managing member for a one-year term. (NYSCEF No. 11 at 10.) A successor was never named.

¹ This court informed the parties on the record of its disposition of the motion and the reasons for that disposition on December 8, 2022, following oral argument on Microsoft Teams. This decision memorializes the court's oral ruling.

On March 28, 2019, Ludwig died. His membership interest in Bull-Poet passed to his estate. The surviving members, Sahlman and Liman, did not elect to dissolve Bull-Poet. On August 13, 2019, letters of administration were issued to Ludwig's sister, plaintiff Antonia Noble Ludwig (plaintiff). Plaintiff alleges that she repeatedly requested financial information concerning Bull-Poet but that defendants have withheld information. (NYSCEF No. 16 at 5.)

Plaintiff in her amended complaint asserts six causes of action. *First*, plaintiff seeks a money judgment for no less than \$2,000,000, alleging that Sahlman and Liman, as managing members, breached their duty of loyalty and good faith and fair dealing to plaintiff by not operating the business properly, or timely dissolving Bull-Poet. *Second*, plaintiff seeks a money judgment for no less than \$70,000 because Sahlman and Liman, as the designated president and treasurer of Bull-Poet, have not filed tax returns for the company, which, plaintiff believes, could lead to penalties imposed against Avram Ludwig's estate. *Third*, plaintiff seeks a judgment directing Sahlman and Liman to account for all monies received and distributed in Bull-Poet from August 26, 2014, to date and a judgment for one-third of the profits. *Fourth*, plaintiff seeks an order dissolving Bull-Poet and directing Sahlman and Liman to wind up Bull-Poet under Article VII of the operating agreement, and to sell the sailboat. *Fifth*, plaintiff seeks an injunction compelling Sahlman and Liman to file tax returns for Bull-Poet from its formation to date and to pay for all penalties and interests imposed. *Sixth*, plaintiff seeks a money judgment for no less than \$100,000, alleging that corporations controlled by Liman, defendants Doug Liman Inc. and Hypnotic Inc., exposed Ludwig's estate to substantial income tax by helping Ludwig commit medicaid fraud.

Defendants now move to dismiss the complaint under CPLR 3211. The motion is granted.

DISCUSSION

Defendants' common argument across all six claims asserted by plaintiff is that the claims are subject to dismissal under CPLR 3211 (a) (7) for failure to state a cause of action.² In deciding an (a) (7) motion to dismiss, the court must determine "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013] [internal quotation and citation omitted].) In this analysis, the complaint is liberally construed, all facts alleged in the complaint are accepted as true, and the plaintiff is given the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].)

I. The Claim for Breach of Art. X, § 3, of the Bull-Poet Operating Agreement

Plaintiff contends in her first cause of action that Sahlman and Liman breached Article X, § 3, of the Bull-Poet operating agreement. That provision requires Bull-Poet to maintain proper books of account; and it provides that the books must be reviewed each year by an accountant,

² Defendants also argue that plaintiff's sixth claim should be dismissed as against defendant Hypnotic Inc. under CPLR 3211 (a) (8) for lack of personal jurisdiction. That argument is addressed below in this court's discussion of the sixth claim.

who shall prepare a report based on that review. (NYSCEF No. 11 at 7.) Plaintiff alleges that defendants failed to maintain Bull-Poet's books (or to have the books reviewed by an accountant), that they did so in bad faith, and that this omission exposed plaintiff to liability—for which she claims damages of at least \$250,000.

Plaintiff's claim for breach of Article X, § 3, does not state a cause of action. Plaintiff does not explain, either in the amended complaint or in her opposition to the motion to dismiss, why the Bull-Poet brokerage statements provided to her by defendants are insufficient to satisfy this provision of the operating agreement. Additionally, the amended complaint's liability-exposure allegations are merely conclusory: they do not identify the nature of the liability that she professes to fear, nor why she would be exposed to any such liability—much less \$250,000 in liability. Plaintiff's opposition to the motion to dismiss does not remedy this defect: It states only that the alleged breach of Article X, § 3, "damaged Plaintiff by preventing her from understanding the assets and liabilities of Bull-Poet, an entity of which she is a member." (NYSCEF No. 16 at ¶ 15.) That is not sufficient to state a cause of action.

II. The Claim for Breach of Art. IX, § 3, of the Operating Agreement

Plaintiff contends in her second cause of action that Sahlman and Liman breached Article IX, § 3, of the operating agreement by not filing all necessary tax returns for Bull-Poet or providing the members of Bull-Poet with partnership K-1 forms to be filed individually with the IRS. Plaintiff alleges that this failure exposes each member of Bull-Poet to individual tax penalties, for which she seeks damages of at least \$250,000.

But, as defendants argue, plaintiff has not sufficiently alleged why Bull-Poet is required to file a tax return, given its minimal annual income (approximately \$14 in total from 2018-2020, as reflected on the account statements for those years provided to plaintiff, *see* NYSCEF Nos. 22-24); nor why that minimal income would entail the preparation of partnership K-1s. In opposition, plaintiff argues only that she has been unable to gain access to Bull-Poet's books and records; and that absent that access, she reasonably believes that "tax returns may be necessary and, if they are, then failure to file tax returns and issue K-1s could result in tax liability and the imposition of penalties." (NYSCEF No. 16 at ¶ 17.) But plaintiff has not identified a reason to believe that books and records exist beyond the brokerage statements she has already received—particularly given Bull-Poet's limited purpose of owning and maintaining a single sailboat (however large). And the speculative possibility that tax returns are required and that their absence could result in tax penalties (much less \$250,000 in penalties) is not sufficient to state a cause of action.

III. The Claim for a Books-and-Records Injunction

In her third cause of action, plaintiff seeks an injunction compelling defendants to give plaintiff access to Bull-Poet's books and records under Article II, § 3, of the operating agreement. As discussed above, plaintiff has not alleged a basis to conclude that books and records exist beyond the brokerage statements she has already received from defendants. Nor has plaintiff adequately alleged that she will suffer irreparable harm absent an injunction.

IV. The Claim for an Accounting

Plaintiff's fourth cause of action seeks an order requiring defendants Sahlman and Liman to account for all money received and distributed by Bull-Poet from August 26, 2014, to date, and granting plaintiff a judgment for one-third of the profits. Defendants contend that an accounting is not warranted because, among other things, Bull-Poet engages in no business and has no profits, but was formed only to own and maintain a recreational sailboat for use by its members. This court agrees with defendants. Plaintiff has not alleged an adequate basis to believe that the financial information she has received from defendants is incomplete, such that Bull-Poet earned revenue or profits not reflected in its brokerage statements that might be the proper subject of an accounting.

V. The Claim for an Order Dissolving Bull-Poet under the Terms of the Operating Agreement

Plaintiff seeks an order dissolving Bull-Poet and directing Sahlman and Liman to wind up Bull-Poet—including selling the sailboat that it owns—under Article VIII, § 1, of the operating agreement. Section 1 (b) of Article VIII requires the LLC to be “dissolved and wound up” upon the “retirement expulsion, death, bankruptcy or insanity of a member.” (NYSCEF No. 11 at 6.) Plaintiff argues that because a Bull-Poet member (*i.e.*, Ludwig) has died, the LLC must be dissolved and wound up. This court is not persuaded.

Defendants offer two principal arguments in opposition: That (i) plaintiff has not met the high bar required for judicial dissolution of the LLC under Limited Liability Company Law (LLC Law) § 702; and (ii) § 2 of Article VIII permits the remaining members of the LLC to elect to continue operation of the LLC following the death of a member, and that Sahlman and Liman have so elected. It is not entirely clear to the court whether plaintiff must (as defendants suggest) satisfy the requirements of LLC Law § 702 to obtain dissolution, should dissolution otherwise be required under the terms of the LLC's operating agreement; and the authority provided by defendants does not directly address that question. Regardless, though, this court agrees with defendants that the operating agreement permitted Sahlman and Liman to continue to operate Bull-Poet after Ludwig's death; and that dissolution is not required.³

To be sure, as plaintiff points out, Article VIII, § 2, provides that the “events specified in Article 7 paragraph 1 shall not result in the dissolution, winding up, and termination” of the LLC absent a vote of the remaining members—not Article 8 paragraph 1. (NYSCEF No. 11 at 6 [emphasis added].) And Article VII, addressing the consequences of withdrawal of a member, concededly does not apply here. This court concludes, however, that the reference to “Article 7” in Article VIII, § 2, is merely a scrivener's error, and that this provision should instead be treated as referring back to Article VIII, § 2, as defendants would have it.

Several aspects of the operating agreement underlie this conclusion. Most obviously, there would be no reason for an exception to the provisions of Article VII, § 1, to be placed in

³ This court does not understand plaintiff to argue that she could satisfy LLC Law § 702 absent a provision in the operating agreement requiring dissolution.

Article VIII, rather than in Article VII. Article VIII, § 2, also refers to dissolution-triggering *events*, plural. Article VIII, § 1, has multiple possible triggering events; Article VII, § 1, only one.

Additionally, it would be odd to read Article VIII, § 2, as creating an exception to Article VII, § 1. That is, Article VIII, § 2, is phrased as limiting the effect of the operating-agreement provision to which it applies—it states that the events at issue “*shall not* result in the dissolution, winding up and termination of the company *unless*” a majority of the remaining members opts to discontinue the company. (NYSCEF No. 11 at 6 [emphases added].) But Article VII does not, by its own terms, require dissolution/winding-up of the LLC upon a member’s withdrawal. (*See id.* at 5-6.) There would thus be no reason for Article VIII, § 2, to be phrased in restrictive terms if it were tied to Article VII, as plaintiff’s position requires.

Further, Article VI of the operating agreement imposes restrictions on transferability of membership interests. Section 4 of that article exempts the transfer of the interest of a “Bankrupt . . . or Incompetent Member to his or her successor in interest.” (*Id.* at 5.) But as noted above, the “bankruptcy or insanity of a Member” is a dissolution-triggering event under Article VIII, § 1. (*Id.* at 6.) If, as plaintiff contends, Article VIII, § 2, were to apply only to Article VII without limiting the effect of Article VIII, § 1, then an important aspect of Article VI, § 4, would be rendered meaningless.

Given all these considerations, this court concludes that Article VIII, § 2, applies to Article VIII, § 1, not Article VII. Under the operating agreement, therefore, Ludwig’s death did not require the dissolution of Bull-Poet absent a timely determination to that effect by Sahlman and Liman. Plaintiff does not allege that Sahlman and Liman chose to discontinue Bull-Poet’s business and wind up its affairs. Plaintiff’s dissolution claim fails to state a cause of action.

VI. The Claim for Fraud

Plaintiff alleges that Liman, defendant Doug Liman Inc., and defendant Hypnotic Inc. defrauded Medicaid by paying directly expenses incurred by Ludwig, rather than paying Ludwig under the terms of his contract and leaving him to cover his expenses, so as to reduce Ludwig’s apparent income and preserve his eligibility for Medicaid. To cover up this alleged fraud, plaintiff contends, Doug Liman Inc. and Hypnotic Inc. issued Ludwig after his death false 1099 statements reflecting income for services he did not provide. These statements, plaintiff alleges, exposed Ludwig’s estate to substantial tax liability, for which she seeks damages of at least \$100,000.

Defendants first seek dismissal of this claim as against Hypnotic under CPLR 3211 (a) (8), arguing that this court lacks long-arm personal jurisdiction over Hypnotic (a foreign corporation). This court disagrees. The amended complaint alleges that (i) Hypnotic entered into a contract with Ludwig, a New York resident, to provide services in New York; (ii) Hypnotic issued a 1099 statement to Ludwig at his New York address; and (iii) that statement was false and intended to cover up an instance of fraud. Defendant does not seriously dispute that the contract with a New York resident and the associated issuance in New York of a 1099 statement constitute transacting business in this State for purposes of CPLR 302 (a) (1). And this court

concludes that plaintiff, in alleging that Hypnotic's 1099 falsely reported income that Ludwig supposedly earned in New York under the parties' contract, has sufficiently alleged for pleading purposes a substantial relationship between Hypnotic's transaction of business in New York and plaintiff's fraud claim.

The question, therefore, is whether plaintiff's allegations state a cause of action against Liman, Doug Liman Inc., and Hypnotic. This court concludes that they do not.

Most fundamentally, fraud requires allegations that defendant made misrepresentations, that plaintiff justifiably relied on the misrepresentations, and that plaintiff was injured as a result of that reliance. (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996].) Here, plaintiff has not alleged that either she or Ludwig relied on any misrepresentations by Liman, Doug Liman Inc., Hypnotic. To the contrary, the complaint appears to allege that those defendants made or participated in making misrepresentations to the New York agencies administering Medicaid and to the federal, state, and local taxing authorities—not to Ludwig or his estate. Absent an allegation of reliance, no fraud claim lies.

In any event, plaintiff has not sufficiently alleged that the 1099s at issue contained false statements. At most, she has alleged that the 1099s, issued in 2019 (or later), reflected contractual income; and that Ludwig did not perform compensable work for Liman or Hypnotic in 2019. That is different from alleging that the 1099s falsely reflected contractual income for work performed in 2019. Nor has plaintiff alleged that Ludwig's estate has in fact incurred additional income-tax liability (or Medicaid recoupment penalties) due to the conduct of Liman, Doug Liman Inc., and Hypnotic; only that such liability might result in the future. That is insufficient.⁴ (*See Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 538-539 [1st Dept 2016] [affirming dismissal of fraud claim when the complaint's allegations "at best suggest that, depending on the future actions of [third parties], plaintiff might suffer injury," not that plaintiff had already sustained "actual pecuniary damages"].)

Accordingly, for the foregoing reasons, it is

ORDERED that defendants' motion to dismiss the complaint is granted in its entirety, and the action is dismissed, with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

⁴ For that matter, plaintiff alleges that Liman deceived Medicaid by concealing \$105,000 in what otherwise would have been income received by Ludwig; and that Liman later directed issuance of a 1099 reflecting \$50,000 in income earned by Ludwig. (NYSCEF No. 15 at ¶¶ 77-79.) Although the definitions of income for Medicaid and for tax purposes are not necessarily the same, the juxtaposition of these two allegations at least calls into question whether, as alleged, the issuance of the 1099 represented *more* income than Ludwig received before he died—or less.

ORDERED that defendants serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.


HON. GERALD LEBOVITZ
J.S.C.

12/12/2022
DATE

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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE