[Cite as *Greenwald v. Shayne*, 2010-Ohio-413.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gary D. Greenwald,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-599 (C.P.C. No. 08CVG-11-16119)
Stanley H. Shayne,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
v.	:	
Donald B. Leach, Jr. et al.,	:	
Third-party/ Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 9, 2010

Porter, Wright, Morris & Arthur LLP, Robert W. Trafford, and *Ryan P. Sherman*, for appellee Gary D. Greenwald.

The Zagrans Law Firm, and *Eric H. Zagrans*, for appellant.

Schottenstein, Zox & Dunn Co., L.P.A., and *John P. Gilligan*, for third-party appellee Donald B. Leach Jr.

Tucker, Ellis & West LLP, *Harry D. Cornett Jr.*, and *Benjamin C.* Sasse, for third-party appellee Buckingham Doolittle & Burroughs LLP.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} For more than 12 years, Stanley H. Shayne and Gary D. Greenwald were law partners, until October 2006, when Greenwald left to join a Phoenix firm and they dissolved the partnership. By the terms of their partnership agreement, Shayne and Greenwald agreed to submit any disputes over the dissolution of the partnership to arbitration. Donald B. Leach was chosen as the arbiter. Leach was, then, partner-in-charge of the Columbus office of the Akron-based firm Buckingham Doolittle & Burroughs LLP. In September 2007, Leach presided as arbitrator over Shayne and Greenwald's dispute and, in November 2007, Leach issued a decision, which, according to Shayne, was in favor of Greenwald. In July 2008, the Cincinnati-based firm Dinsmore & Shohl, LLP acquired/merged with Buckingham's Columbus office. Shayne believes that Leach (as partner-in-charge) played a vital role in essentially seceding from the Buckingham firm, and that because of that role, Leach was unable to be objective at the time that he presided over the arbitration. Shayne alleges the circumstances under which Greenwald left the partnership were strikingly similar to those under which Leach left Buckingham. Consequently, after the news of the Buckingham-Dinsmore transaction became public, Shayne filed a motion to vacate the arbitration award, pursuant to R.C. Chapter 2711. Shayne's theory is that Leach breached his fiduciary duty to Buckingham when he orchestrated the transaction with Dinsmore—much in the way that Shayne believes that Greenwald breached his duties to Shayne—and that by failing to disclose the details of the pending transaction, Leach breached his duties of disclosure, which were set forth in the parties' arbitrator selection agreement.

{¶2} Shayne filed his motion to vacate the arbitration award in September 2008, but voluntarily dismissed the case the following month. Greenwald then filed a motion to confirm the arbitration award in November 2008, and Shayne responded by filing a counterclaim and third-party complaint against Leach and the Buckingham firm. Greenwald moved to dismiss Shayne's counterclaim, arguing that it was time-barred by the three-month limitation period in R.C. 2711.13. Both Leach and Buckingham moved to dismiss Shayne's third-party complaint on the basis of arbitral immunity. Shayne countered by arguing that either the discovery rule or principles of equitable tolling should preclude the statute of limitations in R.C. 2711.13 from beginning to run because Leach had purposefully concealed the facts and circumstances that exposed his partiality. Similarly, Shayne countered the assertion of arbitral immunity on grounds that Leach's alleged conflict of interest was separate and apart from the adjudicatory process to which arbitral immunity attaches.

{¶3} In April 2009, the trial court issued its decision dismissing Shayne's counterclaim for failure to state a claim—both procedurally (after the statute of limitations had expired) and on the merits (by failing to plead facts that, if true, sufficiently established a corresponding conflict of interest on Leach's part). Shayne filed a timely notice of appeal, and assigns the following three errors for our consideration:

> [I.] THE TRIAL COURT ERRED IN CONCLUDING THAT ARBITRAL IMMUNITY BARRED SHAYNE'S THIRD-PARTY CLAIMS AGAINST LEACH AND BDB FOR BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTIES[,] AND FRAUD[,] WHERE THE ALLEGED MISCONDUCT BY THE ARBITRATOR WAS HIS [OWN] FAILURE TO DISCLOSE TO THE PARTIES A CONFLICT OR BIAS IN ADVANCE OF THE ARBITRATION. THE MISCONDUCT WAS THEREFORE OUTSIDE OF AND TOTALLY SEPARATE

> FROM THE ADJUDICATORY PROCESS OF THE ARBITRATION.
>
> [II.] THE TRIAL COURT ERRED IN (I) FAILING TO CONSTRUE THE ALLEGATIONS OF SHAYNE'S COUNTERCLAIM AND THIRD-PARTY COMPLAINT AS TRUE AND IN THE LIGHT MOST FAVORABLE TO SHAYNE, (II) MAKING FACTUAL FINDINGS, CONSTRUING THE ALLEGATIONS, AND DRAWING INFERENCES IN A LIGHT UNFAVORABLE TO SHAYNE, AND (III) DISMISSING SHAYNE'S CLAIMS WHEN IT WAS NOT CLEAR BEYOND DOUBT THAT SHAYNE COULD PROVE NO SET OF FACTS IN SUPPORT OF HIS CLAIMS WHICH WOULD ENTITLE HIM TO RELIEF.
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> [III.] THE TRIAL COURT ERRED IN CONCLUDING THAT THE THREE-MONTH LIMITATIONS PERIOD OF R.C. 2711.13 WAS NOT EQUITABLY TOLLED UNTIL SHAYNE DISCOVERED, OR REASONABLY COULD HAVE DISCOVERED, FACTS THE ARBITRATOR CONCEALED OF ARBITRAL MISCONDUCT SUFFICIENT TO PROVIDE GROUNDS FOR VACATING THE ARBITRATION AWARD UNDER R.C. 2711.10.

{¶4} Whether the trial court erred in concluding that arbitral immunity insulates Leach and Buckingham from suit is a question of law, which we review de novo. See *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶21 (holding that appellate review of a trial court's decision not to grant immunity to a political subdivision is de novo); see also *McIntosh v. Lukas* (C.A.6, 2000), 210 F.3d 372, 2000 WL 331947, at *1 ("Qualified immunity is a question of law; this court's review is de novo.") (citing *Long v. Norris* (C.A.6, 1991), 929 F.2d 1111, 1114).

{¶5} The concept of "arbitral immunity" is doctrinal, rather than statutory; it is rooted in principles recognized by the United States Supreme Court that hold that there are certain individuals whose special functions dictate that they enjoy full exemption from liability for acts committed within the scope of their duties. *Corey v. New York*

Stock Exchange (C.A.6, 1982), 691 F.2d 1205, 1209. The rationale behind the doctrine is that the independence necessary for principled and fearless decision-making can best be preserved by protecting the decision makers from bias or intimidation caused by the fear of a lawsuit arising out of the exercise of their official duties. Id., citing *Butz v. Economou* (1978), 438 U.S. 478, 508-11, 98 S.Ct. 2894; *Imbler v. Pachtman* (1976), 424 U.S. 409, 96 S.Ct. 984; *Bradley v. Fisher* (1871), 80 U.S. 335.

{¶6} Arbitral immunity is akin to judicial immunity, first recognized by the Supreme Court with regard to federal judges in *Bradley* at 355–57. Since then, the court has extended the doctrine to include state judges, federal prosecutors, and state prosecutors. See *Pierson v. Ray* (1967), 386 U.S. 547, 87 S.Ct. 1213; *Imbler*, supra; *Yaselli v. Goff* (1927), 275 U.S. 503, 48 S.Ct. 155, affirmed, (C.A.2, 1926) 12 F.2d 396. The court has also extended the doctrine to federal agency examiners, administrative law judges, and agency officials performing functions analogous to prosecutors. See *Butz*. To ensure unintimidated independence of action, legislators also enjoy complete immunity. See *Tenney v. Brandhove* (1951), 341 U.S. 367, 71 S.Ct. 783.

{¶7} The purpose of arbitral immunity is to protect the integrity of the arbitration process from reprisals by dissatisfied parties. See *Internatl. Union, United Auto., Aerospace, and Agr. Implement Workers of Am., and Locals 656 and 985 v. Greyhound Lines, Inc.* (C.A.6, 1983), 701 F.2d 1181, 1185–86. "[A]rbitrators are granted arbitral immunity for acts arising out of the scope of their arbitral functions and within their jurisdiction in contractually agreed upon decisions." *Rashid v. Communications Workers of Am., AFL-CIO* (S.D.Ohio, 2005), No. 3:04-CV-291, 2005 WL 3216666, at *4 (internal quotation marks omitted). Arbitral immunity is justified and defined by the functions it

protects and serves. Id. citing *Austern v. Chicago Bd. Options Exchange, Inc.* (C.A.2, 1990), 898 F.2d 882, 885 cert. denied, 498 U.S. 850, 111 S.Ct. 141.

{¶8} Ohio courts' discussion of arbitral immunity is scant; in fact, we are aware of only three cases (in addition to the reported decision below) that even reference the doctrine. See, e.g., *Garcia v. Wayne Homes, LLC*, 2nd Dist. No. 2001 CA 53, 2002-Ohio-1884, 2002 WL 628619, at *15; *Buyer's First Realty, Inc. v. Cleveland Area Bd. of Realtors* (2000), 139 Ohio App.3d 772, 787; *Wolfe v. Columbia Gas Transmission Co.* (Mar. 30, 1982), 5th Dist. No. 81-CA-19, 1982 WL 5431, at *2. The manner in which all of these cases discuss arbitral immunity, however, is consistent with the principles set forth by the United States Supreme Court. For example, the Eighth District described the policy underlying arbitral immunity as being vital to the "ability to secure such able persons as arbitrators," something that courts value because of crowded dockets. It is, therefore, necessary and within the doctrines of quasi-judicial immunity, that arbitrators be immune from suits for acts performed within their capacity as arbitrators and performed within their assigned duties and authority." *Buyer's First Realty*.

{¶9} Shayne argues, however, that Leach and his former firm are not entitled to arbitral immunity because Leach's failure to disclose his alleged conflict of interest was essentially outside the scope of his contractual duties as an arbitrator. (See Appellant's brief, at 15.) Shayne cites two California cases, and one Fifth Circuit case, each for the proposition that arbitrators are not entitled to immunity for conduct that impedes rather than serves the adjudicatory purpose of arbitration. *Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.* (2006), 140 Cal.App.4th 795, 797; *Baar v. Tigerman* (1983), 140 Cal.App.3d 979, 983. Even if these cases were controlling, however, they fail to support

Shayne's position that Leach's changing law firms compromised his ability to be impartial at the time he presided over the arbitration. As the trial court aptly put it: "[c]losely examined, defendant Shayne offers only threads of argument not circumstances truly suggestive of partiality." (Decision at 12.)

{¶10} Arbitration awards are entitled to a presumption of regularity and formality, and implicit in this presumption is that the arbitrator acted with integrity. See, e.g., *Campbell v. Automatic Die & Prods. Co.* (1954), 162 Ohio St. 321, 329; *Corrigan v. Rockefeller* (1902), 67 Ohio St. 354, 367; cf. *West v. Household Life Ins. Co.*, 170 Ohio App.3d 463, 2007-Ohio-845, ¶11 ("Arbitration is a matter of contract and, in spite of the strong policy in its favor, a party cannot be compelled to arbitrate a dispute which he has not agreed to submit to arbitration."). To overcome the presumption of regularity because of an alleged bias on the part of the arbitrator, the appellant must demonstrate "evident partiality." See R.C. 2711.10(B); *Gerl Constr. Co. v. Medina Cty. Bd. of Commr's* (1985), 24 Ohio App.3d 59, 63 ("An award should be vacated where undisclosed relationships create an impression of possible bias."). The mere imaginative appearance or suspicion of partiality does not sufficiently establish "evident partiality," within the meaning of R.C. 2711.10(B). *Furtado v. Hearthstone Condo. Assn.* (May 19, 1987), 10th Dist. No. 86AP-1003, 1987 WL 11606, at *2. "Evident partiality" must be "more than a mere suspicion or appearance of partiality." Id. citing *Merit Ins. Co. v. Leatherby Ins. Co.* (C.A.7, 1983), 714 F.2d 673, 681–82; *Internatl. Produce, Inc. v. A/S Rosshavet* (C.A.2, 1981), 638 F.2d 548, 551.

{¶11} In this case, Shayne's allegations of Leach's partiality simply lack substance, and are largely based on the inflammatory statements that Leach's former firm

made against him in a separate lawsuit. Furthermore, as the trial court noted, Shayne ignores key, undisputed facts, such as the time that lapsed between the arbitration hearing in 2007, and Leach's move to the new law firm in mid-2008.

{¶12} The trial court further noted that it is not uncommon for prominent lawyers to become "disenchanted" with their jobs. Sometimes lawyers leave their jobs, hoping to find what they are looking for at other firms. Some lawyers leave their firms to go into business for themselves. These things routinely happen. Especially in the case of lawyers, when they leave one job for another, they do not abandon their professional responsibilities along with their old firms. The Rules of Professional Conduct prohibit this, and perhaps more importantly, a lawyer who handled his business in this fashion would run the risk of seriously damaging his reputation. See, e.g., Ohio Prof.Con.R. 1.17 (obligations to existing clients prior to the sale of a law practice).

{¶13} In sum, we find that Shayne ultimately fails to allege specific facts or circumstances that, even if true, constitute an actionable bias on the part of the arbitrator. Taking all of the aforementioned factors into consideration, the record fails to demonstrate evident partiality within the meaning of R.C. 2711.10(B). Although we gave the trial court's decision no deference in our review of this issue, the trial court's opinion is well-reasoned, and appears to address thoroughly each of Shayne's arguments. We are accordingly of the opinion that the trial court was correct in finding that arbitral immunity bars Shayne's claims against Leach and Buckingham.

{¶14} The first and second assignments of error are overruled.

{¶15} The third assignment of error is specific to the trial court's finding that Shayne's counterclaim was barred by the three-month limitation period in R.C. 2711.13.

{¶16} In situations where a party to an arbitration alleges that the award was "procured by corruption, fraud, or undue means," R.C. 2711.10 is the exclusive remedy by which the aggrieved party may seek redress with the courts. See *Galion v. Am. Fedn. of State, Cty. & Mun. Emp., Ohio Council 8, AFL-CIO, Local 2243* (1995), 71 Ohio St.3d 620, syllabus. The relevant portion of R.C. 2711.13 provides that: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties[.]" We note that this filing requirement is expressly different from the time limitation for filing an application to confirm an arbitration award pursuant to R.C. 2711.09, discussed infra.

{¶17} This court is not aware of any circumstance under which the three-month limitation period in R.C. 2711.13 would not apply, or could even be relaxed. Based on our interpretation of *Galion*, supra, we believe that parties must strictly comply with Chapter 2711, no matter what the circumstances are. We need only to turn to the facts in *Galion* to better illustrate this point: Roughly four months after the arbitrator issued his award, the parties jointly requested clarification from the arbitrator as to what was meant by certain language in the decision. (See *Galion* at 622, fn.1.) The arbitrator failed to respond to the parties' request for two years, and the city of Galion argued that the clarification request tolled the statute of limitations in R.C. 2711.13. But the Supreme Court of Ohio flatly rejected that argument, holding that: "The statutory language contained within R.C. 2711.13 contains no provision allowing for the tolling of the limitations period." Id.

{¶18} In this case, Leach presided over the arbitration in September 2007, and rendered his decision on November 12, 2007. (See Decision, at 2.) Thus, under R.C.

2711.13, Shayne had until approximately February 12, 2008 to file (and serve) his motion to vacate or modify the arbitration award. Shayne did not file his case, however, until September 12, 2008, some ten months after Leach issued his decision. Clearly, Shayne filed his challenge to the arbitration decision outside of the three-month window provided by R.C. 2711.13 and, as a matter of law, and under *Galion*, the trial court lacked jurisdiction over the application to vacate, even at that time.

{¶19} A few weeks after filing his complaint, Shayne voluntarily dismissed the case, under Civ.R. 41(A)(1)(a), but attempted to reassert the claim(s) after Greenwald filed his application to confirm the arbitration award, in November 2008, pursuant to R.C. 2711.09 ("At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award.").

{¶20} Based on our previous analysis, Shayne's claims were barred even before he attempted to reassert them after voluntary dismissal. Thus, they could be no less barred in December 2008 than they were two months prior. Shayne argued below, and now argues to this court, that Leach fraudulently concealed the facts that gave rise to his complaint, and that under *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, the discovery rule and/or the principles of equitable tolling should bar the application of the three-month limitation period in R.C. 2711.13. Citing *Galion*, the trial court correctly rejected Shayne's argument that the limitation period should not apply under these circumstances.

{¶21} As we have already stated, the Supreme Court of Ohio left little, if any, room for interpretation of when the three-month limitation period in R.C. 2711.13 applies.

Given the circumstances in that case, and the court's disposition, we certainly cannot carve out an exception in this case. Furthermore, even if this court had such jurisdiction, based on our previous discussion—citing the fact that Shayne has failed to produce any specific evidence of fraud or evident partiality—the facts of this case are not such that would dictate this court creating any exceptions.

{¶22} The General Assembly created the remedy in R.C. Chapter 2711, and the Supreme Court of Ohio issued a strict interpretation of that law. If the General Assembly deemed the court's prior interpretation of R.C. 2711.13 as too strict, then it would be up to the General Assembly to change the law, or amend it to include one or more exceptions to the limitation period. We note, however, that in the 15 years since *Galion*, the General Assembly has made no changes to R.C. 2711.13.

{¶23} Because Shayne failed to file his application to vacate the arbitration award and serve the parties therein within three months, as required by R.C. 2711.13, we overrule the third and final assignment of error.

{¶24} Having overruled all assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur in part separately.

KLATT, J., concurring in part separately.

{¶25} I concur with the majority opinion's assessment of the applicable law and its application of the law to the facts presented. I write separate`ly to add an additional

reason for overruling Shayne's first and second assignments of error and affirming the trial court's judgment.

{¶26} Appellees, Leach and Buckingham, point out that AAA Commercial Rule 48 applies to the arbitration at issue here. Appellant does not dispute that Rule 48 applies. Rule 48 states in relevant part:

> (d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

{¶27} Shayne's alleged claims against Leach and Buckingham arose directly from Leach's work in arbitrating a dispute between Shayne and Greenwald under the rules of the AAA. Therefore, Shayne sought to recover damages for acts or omissions "in connection with an[ ] arbitration under these rules." By agreeing to conduct the arbitration pursuant to the rules of the AAA, Shayne is contractually barred from asserting the claims alleged in his third-party complaint. Shayne offers no argument to rebut this conclusion.

{¶28} Accordingly, for this additional reason, I would overrule Shayne's first and second assignments of error and affirm the judgment of the trial court.