

IN RE DISQUALIFICATION OF BROWN.

CLINE v. WEDGEWOOD HILLS HOA ET AL.

[Cite as *In re Disqualification of Brown*, 170 Ohio St.3d 1204, 2022-Ohio-3057.]

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant waived objections based on events that allegedly occurred in August 2021—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety or to substantiate claim of improper ex parte communication—Disqualification denied.

(No. 22-AP-082—Decided July 14, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Franklin County Court of Common Pleas,
General Division, Case No. 21-CV-004359.

O’CONNOR, C.J.

{¶ 1} Plaintiff Santana Cline has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Kimberly J. Brown from the above-referenced matter, now pending on a counterclaim seeking to have Ms. Cline declared a vexatious litigator.

{¶ 2} Ms. Cline avers that Judge Brown is biased against her and that the judge’s impartiality might be reasonably questioned. In support, Ms. Cline primarily claims that in August 2021, the case docket was altered and Judge Brown decided some of the defendant’s motions before they had been docketed. Ms. Cline suggests that defense counsel must have had an ex parte communication with the judge, her staff, and/or the clerk’s office. Ms. Cline also argues that in May 2022, defense counsel sent her an email stating that he had “made sure” Judge Brown will rule in the defense’s favor.

{¶ 3} Judge Brown submitted a response to the affidavit and denies any bias against Ms. Cline. Judge Brown asserts that she does not control the clerk’s electronic filing system and that Ms. Cline’s bias allegations are untimely and inadequate.

{¶ 4} For the reasons explained below, Ms. Cline has not established that Judge Brown’s disqualification is warranted.

{¶ 5} First, “[a]n affidavit of disqualification must be filed as soon as possible after the incident giving rise to the claim of bias and prejudice occurred,” and failure to do so may result in waiver of the objection, especially when “the facts underlying the objection have been known to the party for some time.” *In re Disqualification of O’Grady*, 77 Ohio St.3d 1240, 1241, 674 N.E.2d 353 (1996). The affiant has the burden to demonstrate that the affidavit is timely filed. *In re Disqualification of Capper*, 134 Ohio St.3d 1271, 2012-Ohio-6287, 984 N.E.2d 1082, ¶ 11. Ms. Cline has not adequately explained why she waited until June 30, 2022—merely 12 days before the scheduled bench trial—to seek Judge Brown’s disqualification based on events that allegedly occurred in August 2021. Because nothing in the record justifies the delay, Ms. Cline has waived the right to disqualify Judge Brown based on those alleged events. *See In re Disqualification of Corrigan*, 91 Ohio St.3d 1210, 741 N.E.2d 137 (2000) (affiant waived objections to judge’s participation when incidents giving rise to the claim of bias had occurred several months prior to the filing of the affidavit and the affidavit had been filed less than three weeks before the scheduled trial); *In re Disqualification of Dezso*, 134 Ohio St.3d 1223, 2011-Ohio-7081, 982 N.E.2d 714, ¶ 6 (“[the affiant’s] delay in filing the affidavit of disqualification constitutes an independent ground for denying his disqualification request”).

{¶ 6} Second, even if Ms. Cline had not waived her objections to Judge Brown’s participation, Ms. Cline has failed to set forth an adequate ground for disqualification. In disqualification requests, “[t]he term ‘bias or prejudice’

‘implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.’ ” *In re Disqualification of O’Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. “The proper test for determining whether a judge’s participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge’s impartiality.” *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8. In addition, a “presumption of impartiality” is accorded all judges in affidavit-of-disqualification proceedings. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7.

{¶ 7} Ms. Cline has not established that Judge Brown has hostile feelings toward her or that the judge has formed a fixed anticipatory judgment on any issue in the underlying case. Nor has Ms. Cline set forth a compelling argument for disqualifying Judge Brown to avoid an appearance of partiality. “An alleged ex parte communication constitutes grounds for disqualification when there is ‘proof that the communication * * * addressed substantive matters in the pending case.’ ” (Ellipsis sic.) *In re Disqualification of Forsthoefel*, 135 Ohio St.3d 1316, 2013-Ohio-2292, 989 N.E.2d 62, ¶ 7, quoting *In re Disqualification of Calabrese*, 100 Ohio St.3d 1224, 2002-Ohio-7475, 798 N.E.2d 10, ¶ 2. “The allegations must be substantiated and consist of something more than hearsay or speculation.” *Id.* Ms. Cline’s allegation that Judge Brown or her staff engaged in an improper ex parte communication is based on speculation. Therefore, Ms. Cline has failed to substantiate her claim.

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{¶ 8} Further, Judge Brown says that she has no record of any communication with defense counsel, that she has no idea what defense counsel meant in his May 2022 email to Ms. Cline, and that she has issued all her decisions in the case based on her understanding of the law and the facts. Judge Brown will not be disqualified based on a vague comment made in an email between the parties without any apparent involvement of the judge.

{¶ 9} The affidavit of disqualification is denied. The case may proceed before Judge Brown.
