

IN RE DISQUALIFICATION OF KELLER.

REHPCO PROPERTIES ET AL. v. BABB.

**[Cite as *In re Disqualification of Keller*, 170 Ohio St.3d 1218,
2022-Ohio-3881.]**

Judges—Affidavits of disqualification—R.C. 2701.03 and 2701.031—Affiant failed to properly identify date of next scheduled hearing, as required by R.C. 2701.03(B)(4)—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety—Disqualification denied.

(No. 22-AP-102—Decided August 31, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Shaker Heights Municipal Court Case No.
22CVG00538.

O’CONNOR, C.J.

{¶ 1} Plaintiff E. Henry Schoenberger has filed an affidavit pursuant to R.C. 2701.03 and 2701.031 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Anne Walton Keller from the above-referenced case.

{¶ 2} Mr. Schoenberger alleges that Judge Keller is biased against him as a pro se litigant. As evidence, he claims that the judge has failed to comply with the Rules of Civil Procedure and the court’s local rules. Mr. Schoenberger also claims that Judge Keller mischaracterized a letter he sent to the court and improperly gave the defendant an opportunity to respond to the letter.

{¶ 3} For the reasons explained below, no basis has been established to order the disqualification of Judge Keller.

{¶ 4} First, Mr. Schoenberger failed to comply with R.C. 2701.03(B)(4), which requires that an affidavit of disqualification include “[t]he date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement

that there is no hearing scheduled.” Mr. Schoenberger’s affidavit does not include an averment indicating the date of the next scheduled hearing or a statement that no hearings are scheduled. Attached as Exhibit E to the affidavit is a notice indicating that a pretrial hearing is scheduled for September 2022. Mr. Schoenberger, however, provided no context for this exhibit. Nor did he aver that the September pretrial was the date of the *next* hearing. In a cover letter—which Mr. Schoenberger appears to have written after he signed his affidavit and after he first attempted to file his affidavit—he suggested that Exhibit E shows that he complied with R.C. 2701.03(B)(4). But again, merely attaching an entry without any further explanation is not sufficient. And a litigant cannot identify the date of the next scheduled hearing in an unsworn letter; the litigant must include the date of the next hearing in the affidavit. *In re Disqualification of Rapp*, 157 Ohio St.3d 1248, 2019-Ohio-4812, 136 N.E.3d 534, ¶ 4-5; *see also In re Disqualification of O’Leary*, 156 Ohio St.3d 1280, 2019-Ohio-1729, 128 N.E.3d 248, ¶ 4-5 (the chief justice cannot consider an unsworn document indicating that there were no new hearings scheduled in the case); *In re Disqualification of Daugherty*, 145 Ohio St.3d 1208, 2015-Ohio-5668, 47 N.E.3d 859, ¶ 3 (an “unsworn document cannot cure [the affiant’s] mistake” regarding the date of the next scheduled hearing). Mr. Schoenberger therefore has not properly identified the date of the next scheduled hearing, as required by R.C. 2701.03(B)(4).

{¶ 5} Second, even if Mr. Schoenberger had complied with the statutory filing requirements, he failed to set forth adequate grounds for Judge Keller’s 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.

{¶ 6} Mr. Schoenberger has not established that Judge Keller has hostile feelings toward him or that the judge has formed a fixed anticipatory judgment on any issue in the underlying case. Nor has Mr. Schoenberger set forth a compelling argument for disqualifying Judge Keller to avoid an appearance of partiality. “An affidavit of disqualification addresses the narrow issue of the possible bias or prejudice of a judge” and “is not a vehicle to contest matters of substantive or procedural law.” *In re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 4. Therefore, it is outside the scope of this proceeding to determine whether Judge Keller properly applied the civil and/or local rules. Nor has Mr. Schoenberger proved that Judge Keller somehow mischaracterized the letter he sent to the court. Even if—as Mr. Schoenberger claims—the letter was not an ex parte communication, he has not sufficiently explained how Judge Keller demonstrated bias by providing the defendant an opportunity to respond to the letter. *See* Jud.Cond.R. 2.9(B).

{¶ 7} The affidavit of disqualification is denied. The case may proceed before Judge Keller.
