IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GREGORY A. YETTER,	)	**CASE NO. CV 10 721025**
	)	
Plaintiff	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JOURNAL ENTRY**
	)	
JOHN D. CLUNK, *et al.*,	)	
	)	
Defendants	)	

***John P. O'Donnell, J.*:**

STATEMENT OF THE CASE

Plaintiff-applicant Gregory A. Yetter filed his application to confirm an arbitration award on March 11, 2010. The defendant-respondent John D. Clunk on March 19 filed a brief in opposition to the application with a separate motion to vacate the arbitration award. The motion to vacate is now fully briefed and this entry follows.

STATEMENT OF THE FACTS

Defendant-respondent Sovereign Title Agency, LLC, is a limited liability company formed in 2002 by respondent John Clunk as its sole member. In 2003, applicant Gregory Yetter became a minority member of the limited liability company, acquiring one-third of the membership interest. In connection with Yetter becoming a member, Sovereign, Clunk and Yetter entered into a membership interest restriction agreement.

The provision of the agreement pertinent to this case is that the company is required to buy back the membership interest of a member-employee who is terminated. Yetter was an employee and was terminated on January 5, 2009. The parties were then unable to agree on the

appropriate price to buy out his membership, and about five months later Sovereign[1] initiated an arbitration pursuant to Section 8.5 of the agreement. The issue for decision by the arbitration panel was a valuation of Yetter's membership interest.

Yetter's response to the arbitration demand included counterclaims against Sovereign; he also added Clunk as a party to the arbitration to assert claims against him. Yetter set forth ten different causes of action against Sovereign and Clunk – most of them based on alleged unauthorized and unlawful conduct by Clunk – and sought joint and several liability.

Ultimately, the arbitration panel found in favor of Yetter on three of his claims. Upon stipulation by the parties, the panel found in favor of Yetter and against Sovereign on a claim for business expense advances in the total amount of $1,235.00.

On the second claim, the panel found that Clunk breached a fiduciary duty to Yetter by terminating him without a legitimate business reason. On this claim the panel awarded Yetter $131,259.24.

On the third claim, the panel found that various conduct by Clunk in 2009 – including loading unnecessary expense onto Sovereign from other entities controlled by Clunk, spending $280,000 on basketball season tickets, entering an agreement for Sovereign to pay referral fees to Clunk's law firm, and withholding payment from his law firm of a substantial receivable owed to Sovereign – breached Clunk's fiduciary duty to Yetter, but the arbitrators specifically found that the breach did not proximately cause damage to Yetter. The panel concluded that Clunk's breaches after Yetter's termination in the first week of 2009 did not impair the value of his membership interest as of December 31, 2008, and that the valuation of that interest calculated more than a year later, at arbitration, could be "normalized" to eliminate any negative effect on the value caused by Clunk's post-termination breaches of fiduciary duty.

[1] Clunk filed the arbitration demand in his name but later substituted Sovereign as the claimant at arbitration.

The panel found that the price of the mandatory buy-back of Yetter's membership interest under the restriction agreement was $2.85 million. Despite finding that Clunk's breach of fiduciary duty by his post-termination actions did not proximately cause damages by decreasing the value of Yetter's membership interest, the panel made the award of $2.85 million against Sovereign and Clunk jointly and severally. In doing so, the panel reasoned as follows:

> Despite our finding of breach, we do not find that Yetter established that he had suffered "injury proximately resulting" from the alleged breaches of fiduciary duty in 2009 . . . Nonetheless, the panel recognizes the potential for injury to Yetter from Clunk's breaches of fiduciary duty, because Clunk retains the power to manage his commonly owned businesses to increase Sovereign's costs or reduce its cash to the benefit of companies in which Yetter has no interest, and to cause Sovereign to be unable to pay the amounts that this Award requires Clunk's having caused Sovereign to accrue a liability for referral fees to the Clunk Law Firm may also have exposed Sovereign and its owners to a claim for a violation of state law, if not federal law. (footnote omitted) In our view, the agreed injunction against referral fees described at I B above is not sufficient to protect Yetter, nor is it practical for us to specify additional constraints for the management of Sovereign during the period before Yetter is paid. Therefore, in the exercise of our authority under R-43(a) of the AAA Commercial Arbitration Rules, we order that:
>
> 1. Clunk have joint and several liability, with Sovereign, to pay the sum we award for Sovereign's wrongful termination of Yetter's employment and for the purchase of Yetter's share of Sovereign;
>
> 2. Clunk will indemnify and hold Yetter harmless against loss, cost and expense, including attorney's fees, from any claim arising from the EBA or from any other action that Clunk has caused or does cause Sovereign to take, from January 5, 2009, until this Award is paid.

Accordingly, the panel made a total award of $2,982,494.96 in favor of Yetter and against Sovereign and Clunk, jointly and severally.

LAW AND ANALYSIS

Section 2711.10 of the Ohio Revised Code requires a court, upon timely motion pursuant to §2711.13, to vacate an arbitration award only if: A) the award was procured by corruption, fraud, or undue means; B) there was evident partiality on the part of the arbitrators, or any of

them; C) the arbitrators were guilty of misconduct or other misbehavior by which the rights of a party were prejudiced; or D) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Sovereign has not asked to vacate the arbitration award or opposed its confirmation. Clunk has moved to vacate the arbitration panel's order that the entire award is joint and several against him and Sovereign. In support of his motion, he argues that the arbitration panel exceeded its powers by making a joint and several award.

Clunk supports his contention that the arbitration panel exceeded its powers by arguing that: Yetter never sought a joint and several award; the panel was never asked to pierce the corporate veil and that, in any event, there was no evidence supporting piercing the corporate veil to hold Clunk personally liable; joint and several liability is only available in tort actions and the panel did not award damages for a tort; and that Clunk personally had no duty under the membership interest restriction agreement to buy out Yetter's interest.

An arbitration panel will not be found to have exceeded its powers where its award draws its essence from the agreement that includes the arbitration provision.[2] An arbitration award is not drawn from the essence of the agreement when it conflicts with the express terms of the agreement or lacks rational support.[3] Conversely, an award is drawn from the essence of an agreement where there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful.[4] As noted by the Ohio Supreme Court:

> Once it is determined that the arbitrator's award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award pursuant to R.C. 2711.10(D) is at an end.[5]

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[2] *Professionals Guild of Ohio v. Franklin County Childrens Services*, 180 Ohio App. 3d 91, 2008-Ohio-6682, ¶13.
[3] *Id*.
[4] *Id*., ¶14.
[5] *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, 132-133.

In this case, the parties agreed to arbitrate a variety of contract and tort claims against the limited liability company and Clunk personally. The possibility of an award against Clunk was clearly contemplated by the parties. The panel's award was premised on its conclusion that Clunk breached his fiduciary duties toward his co-member, Yetter. For these reasons, there is no question that there is a rational nexus between the agreement to arbitrate the various claims and the award itself. Indeed, it would be irrational if the panel were empowered to hear the causes of action submitted to it but not to enter an award on those causes of action.

It also cannot be said that the panel's award was arbitrary or capricious. A decision is arbitrary or capricious where it is made randomly and without any support in the evidence. The decision here was not arbitrary or capricious. The panel found that Clunk breached the fiduciary duty he owed not just to Yetter, but to the limited liability company itself. Although the panel declined to find that Clunk's breach proximately caused an impairment to the value of Yetter's membership interest, the panel did set forth a rationale, based upon the evidence, for holding Clunk personally responsible. Since the award was made with reference to reasonable conclusions based upon the evidence, it was not arbitrary or capricious.

This court's final obligation – and the issue to which Clunk directs most of his arguments – is to consider whether the decision was unlawful. Clunk claims that Yetter never demanded a joint and several judgment. This is incorrect. Yetter's counterclaim explicitly requests a joint and several judgment.[6] Clunk's argument that a joint and several award was not legally possible also misses the mark. Joint liability may be imposed where the separate conduct of two parties contributed to cause the same injury. Here the evidence supported a finding by the arbitration panel that Clunk's breach of fiduciary duty to Yetter included his refusal as the company's

[6] See, *e.g.*, page 23: WHEREFORE, Respondent Gregory A. Yetter demands judgment in his favor and against [Sovereign and Clunk] jointly and severally.

controlling member to have the company honor its contractual obligation to buy back Yetter's membership interest within 90 days of the termination. After 90 days Sovereign was in breach of its contract, but the damages were the same: the value of Yetter's membership interest. A fact finder could reasonably conclude that if Clunk had not breached his fiduciary duty, Sovereign would have bought back Yetter's interest as required by the contract, so that Clunk's tort and Sovereign's breach of contract both contributed to cause the same damage.

It is also obvious that, contrary to Clunk's assertion, the panel did award tort damages. The panel specifically found that Clunk breached his fiduciary duty as a majority member not to fire Yetter without a legitimate business reason. This is a tort claim, for which the arbitrators awarded $131,259.24. If anything, the panel may have erred by making this award joint to include Sovereign, since it was Clunk who committed the tort. However, the panel may have reasoned that Clunk acted in the capacity of controlling member of the limited liability company when committing the tort, the agency relationship thereby justifying a joint award.

Clunk's core argument, though, seems to arise from the panel's specific finding that Yetter did not prove the proximate cause element of his breach of fiduciary duty claim with regard to the value of the membership interest, therefore, as a matter of law, no damages could have been awarded against Clunk individually for the impairment of that value. This court agrees that, ordinarily, a failure to prove the element of proximate cause will prevent a tort plaintiff from getting a judgment against a defendant. However, the arbitration panel did not conclude that proximate cause wasn't proven but then proceed to enter a judgment against Clunk as if it had been. Instead, the arbitrators fashioned an equitable remedy to prevent Clunk – a person with a demonstrated history of misusing his control of corporate entities for his own purposes – from using his continued control over Sovereign to eliminate Yetter's ability to

collect on a judgment against Sovereign only. To determine whether the fashioning of that remedy was unlawful, it is useful to examine the remedies that the arbitration panel or a court could have ordered under the circumstances.

The arbitration panel's decision cites Rule R-43(a) of the American Arbitration Association's commercial arbitration rules as a basis for making the $2.85 million and $1,235 awards joint. That rule allows an arbitrator to grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the parties' agreement.[7] The scope of the agreement to arbitrate, as discussed above, was broad. The parties submitted a variety of claims, with a variety of possible remedies, to the arbitration panel. Thus, the only constraint imposed by the rules of arbitration on the panel's award is that it be "just and equitable."

This court cannot say the award is not just and equitable. The panel found that Clunk breached his fiduciary duty to Yetter. A fiduciary duty requires a person to act in good faith, defined as "honesty in fact."[8] Having found that Clunk breached that duty, the panel, in effect, found that Clunk was dishonest. However, because Clunk's dishonest conduct happened after the date that his membership interest was valued under the buy-back agreement, the panel could not find strict proximate cause. Yet the arbitrators were clearly concerned that the combination of Clunk's demonstrated bad faith and his continued complete control of the limited liability company would render meaningless an award against the company alone. In this sense, the award was akin to, although not exactly the same as, a constructive trust, one of the remedies sought by Yetter.

A constructive trust has been described as:

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[7] The rule is not in evidence, but the court takes judicial notice of its provisions. The rule, as of July 30, 2010, can be found at http://www.adr.org/sp.asp?id=22440#R43.

[8] See, *e.g.*, *Micro Experts, Inc. v. Edison Technologies, Inc.* (1997), 122 Ohio App. 3d 394.

> A trust by operation of law which arises . . . against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice.[9]

The arbitration panel found that Clunk enriched himself and companies he controls at the expense of Sovereign and Yetter. It was not unreasonable for the panel to fear that he would continue to do so and to fashion a remedy imposing personal responsibility on Clunk to prevent him from transferring Sovereign's assets to himself and leaving Yetter with an uncollectible award. The remedy, therefore, was just and equitable and not in violation of the rules governing the arbitration.

As to whether the judgment against Clunk could have been imposed by a court, because an arbitrator's decision will not be disturbed except upon a showing of one of the four types of serious misconduct described in Section 2711.10, this court's focus should not be on whether the award against Clunk was justified by the panel's specific factual findings – *i.e.*, a breach of duty without causation – but whether it was among the range of possible outcomes. Seen this way, it is easy to conclude that a money judgment against Clunk was undoubtedly a possible lawful outcome.

CONCLUSION

For the reasons given, defendant-respondent John Clunk's motion to vacate the arbitration panel's award against him is denied.

The Cuyahoga County Court of Appeals has ruled on at least two separate occasions that a hearing is not mandatory on an application to confirm an arbitration award pursuant to O.R.C.

[9] *Ferguson v. Owens* (1984), 9 Ohio St.3d 223, 225.

2711.09.[10] Additionally, neither party has requested a hearing. Therefore, Clunk's motion to vacate the award against him having been denied, the court grants Yetter's application to confirm the arbitration award and hereby enters judgment:

1) in favor of Gregory A. Yetter and against Sovereign Title Agency, LLC and John D. Clunk in the total amount of $2,982,494.96;

2) that article 8.6 of the membership interest restriction agreement is unenforceable as of the date of the arbitration award;

3) that until this judgment is paid in full, Sovereign is ordered not to reinstate its exclusive business agreement with John D. Clunk and neither accrue nor pay any compensation to the Law Offices of John D. Clunk or to John D. Clunk for the referral of business; and

4) that John D. Clunk is ordered to indemnify and hold Gregory A. Yetter harmless against loss, cost and expense, including attorneys' fees, from any claim arising from the exclusive business agreement or from any other action that Clunk has caused, or does cause, Sovereign to take from January 5, 2009 until this judgment is paid.

The court hereby also confirms those portions of the arbitration panel's award in favor of Sovereign and Clunk on Yetter's other claims, and its award pertaining to the division of responsibility for administrative fees and expenses.

IT IS SO ORDERED:

_____ Date: _____
JUDGE JOHN P. O'DONNELL

[10] *Environmental Consulting Group, Inc. v. Swank* (Sept. 17, 1998), Cuyahoga App. No. 74123 and *Davis v. Bd. of Education* (Dec. 20, 1984), Cuyahoga App. No. 48373.

SERVICE

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