

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

ALLEN L. DAVIS,	:	APPEAL NO. C-090182
	:	TRIAL NOS. A-0501565
Plaintiff-Appellee,	:	A-0809101
vs.	:	<i>JUDGMENT ENTRY.</i>
CNG FINANCIAL CORPORATION,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellee Allen L. Davis entered into a Close Corporation Agreement (“the CCA”) with defendant-appellant CNG Financial Corporation and his two sons. The CCA named Davis and his sons as the “Original Shareholders.”

Among other provisions, the agreement contained an arbitration clause. The clause contained the following: “If the Original Shareholders dispute any matter arising out of or relating to this Agreement * * *, then each Original Shareholder shall designate a representative (a ‘Committee Member,’ or collectively, the ‘Committee’). The Committee shall meet at least once and attempt to resolve the dispute. * * * If the matter has not been resolved within 20 days of the first meeting of the Committee * * * by the unanimous decision of the Committee, the controversy will be settled by arbitration in accordance with the commercial rules of the American Arbitration Association then in effect. * * * Each arbitration may be conducted by one impartial arbitrator unanimously selected by the Committee or by

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

three arbitrators if the Committee determines that this is necessary for any reason. If three arbitrators are used, then a majority of the members of the Committee shall select one arbitrator and the minority of the members of the Committee shall select one arbitrator from the panel. The two arbitrators selected shall mutually designate the third arbitrator from that panel. * * * All fees and costs of the arbitration other than any award of monetary damages and all fees and costs of the Corporation and the Committee, including reasonable attorneys' fees, travel and sustenance expenses of the Original Shareholders shall be paid by the non-prevailing party.”

At the same time that the CCA was signed, Davis signed an Amended and Restated Option Agreement. Davis and CNG were the only two parties to that agreement.

When Davis later exercised his cashless option under the Option Agreement, CNG determined that the transaction would be treated as compensatory income to Davis. Taking issue with this determination, Davis filed a complaint against CNG seeking declaratory and other relief. Shortly after the suit was filed, CNG sought to have the case removed to federal court. The federal court declined to take the case. Two days after the case was returned to the common pleas court, CNG sought to stay the proceedings pending arbitration. The trial court denied that motion.

In one assignment of error, CNG argues that the trial court improperly denied its motion to stay the case pending arbitration. To establish that a case is subject to arbitration, the party seeking it must establish that the parties contractually agreed

to arbitrate the dispute.² The question whether a dispute is subject to arbitration is a legal one.³

In this case, the parties to the CCA did not agree to arbitrate the dispute. Even though CNG was a party to the CCA, the only parties listed in the arbitration provision were Davis and his sons. There was no mechanism in the agreement to allow anyone other than the Original Shareholders to participate. By specifically naming only some of the parties to the agreement, the parties implied their desire to exclude all others not named.⁴ The doctrine *expressio unius est exclusio alterius* "justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence."⁵

CNG argues that its participation in arbitration was contemplated because the arbitration clause said that "all fees and costs of the Corporation * * * are to be paid by the non-prevailing party." But this does not require us to reach the conclusion that CNG is entitled to arbitrate. There are many ways in which a dispute among the Original Shareholders could generate costs for CNG—record production, employee time, etc.—that would have to be reimbursed by the losing party.

CNG also argues that the "real" dispute in this case is between Davis and his sons, and that Davis should not be allowed to avoid arbitration by not naming them in the complaint. But the suit involves the Option Agreement, and the only parties to that agreement are Davis and CNG. We do not see how Davis could have sued his

² *Acad. of Med. v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶11, citing *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 1998-Ohio-172, 687 N.E.2d 1352.

³ *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, at ¶9.

⁴ *Bank One, N.A. v. Pic Photo Finish, Inc.*, 2nd Dist. No. 1665, 2006-Ohio-5308, at ¶23.

⁵ *Barnhart v. Peabody Coal Co.* (2003), 537 U.S. 149, 168, 123 S.Ct. 748.

children over a document to which they were not parties. We also note that CNG did not argue below that Davis had failed to join necessary parties.

Since there is no provision in the agreement that would allow CNG to participate in arbitration, the trial court properly denied the motion to stay the proceedings. We reject CNG's sole assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on January 20, 2010

per order of the Court _____.

Presiding Judge