

1991 WL 180263

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United States District Court, E.D. Pennsylvania.

Barbara O'Hara BIRSTER, Plaintiff,

v.

O'HARA SANITATION CO., INC., et al., Defendant.

Civ. A. No. 90-2786.

|
Sept. 10, 1991.

Attorneys and Law Firms

[Paul R. Rosen](#), Spector, Gadon & Rosen, P.C., Philadelphia, Pa., for Barbara O'Hara Birster and Thomas Birster.

[Richard E. Miller](#), Philadelphia, Pa., for Barbara O'Hara Birster.

[Thomas B. Rutter](#), Philadelphia, Pa., [Brian S. North](#), [Brian P. Kenney](#), [Mark J. Schwemler](#), Elliott, Bray & Riley, Philadelphia, Pa., for all defendants except Browning-Ferris Industries, Inc.

[Arthur H. Kahn](#), Dale P. Schomer, Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., [Eric J. Lobenfeld](#), [Robin D. Adelstein](#), [Lawrence V. Brocchini](#), New York City, for Browning-Ferris Industries, Inc.

MEMORANDUM OF DECISION

[McGLYNN](#), District Judge.

*1 Before this Court is plaintiff Barbara O'Hara Birster's and third-party defendant Thomas Birster's motion to enforce the settlement agreement with the O'Hara defendants.¹ Specifically, the Birster's (also referred to as plaintiff) seek an order stating that they may take any position they choose before the Orphan's Court of Montgomery County. Further, plaintiff seeks an order permitting discovery regarding the Harrisburg settlement,² including a full and complete accounting of the settlement.

For a detailed background of this case, see the Memorandum of Decision for this Court's December 21,

1991 Order enforcing a settlement agreement between the plaintiff and the O'Hara defendants. The settlement agreement was enforced through two orders of this Court, dated December 21, 1991 and January 11, 1991. These orders were affirmed by the United States Court of Appeals for the Third Circuit on June 21, 1991.

In the settlement agreement, the parties agreed that "Mrs. Birster and her issue would relinquish all right, title and interest in the O'Hara Sr. and Birster trusts." It was further agreed that "[t]hese relinquishments were required to be approved by the Orphan's Court of Montgomery County, with minors and unborn issue being represented by a Guardian *ad litem*."

Because the trusts were subject to the jurisdiction of the Orphan's Court Division of The Court of Common Pleas of Montgomery County approval of the changes in the trusts by that court was necessary to the consummation of the settlement. This Court did not in any way mean to suggest that the Orphan's Court *must* approve the relinquishments. As stated in the December 21, 1991 memorandum the parties must submit the issue to the Orphan's Court for adjudication. Presumably, the Orphan's Court will render a decision based on the facts and the principles of law applicable in such circumstances. This Court has neither the power nor the desire to dictate the outcome of the Orphan's Court proceeding. It should be noted, however, that plaintiff has agreed to relinquish her *own* rights in these trusts. It is up to the Orphan's Court to determine whether relinquishment on behalf of the minor and unborn issue of Mrs. Birster would be in their best interest.

The second request by the plaintiff is a request to conduct discovery on a settlement agreement between co-defendants Browning-Ferris Industries (BFI) and O'Hara Sanitation concerning an unrelated matter, the "Harrisburg Action." The Birsters' interest in the Harrisburg Action arises from part of the settlement agreement, which states in paragraph 11:

Mrs. Birster will receive 9.7% of any BFI stock received wit [sic] respect to the first \$6,000,000 worth of value ascribed to the Harrisburg cause of action, and 4.85% of any BFI stock received with respect to value ascribed to the Harrisburg cause of action in excess of \$6,000,000.

In a letter dated July 29, 1991, sent from defendants' attorney to plaintiff's attorney, the Birsters were informed of their share of the final settlement of the Harrisburg Action. Defendant's attorney wrote, "I trust that this letter and its contents are self-explanatory. If, however, any further explanations are required, please do not hesitate to let me know." Enclosed with the July 29 letter was an explanation of the settlement, including such items as legal fees and administrative costs.³ The Birsters allege in their complaint that they have not received any stock. However, this stock is part and parcel of the Settlement Agreement, and so the Birsters are not entitled to receive any stock until the Settlement Agreement, in its entirety, goes into effect. The Birsters claim that the accounting they received was insufficient, and demand both a full accounting and discovery regarding the negotiations conducted to reach the settlement of the Harrisburg cause of action. The defendant responds that the Birsters have not sought further explanations, as offered in defendant's the July 29 letter.

*2 Paragraph 10 of the Settlement Agreement noted that the value of the Harrisburg Action was being determined by arbitrators. The Birsters' percentage of that action was described in paragraph 11. Further, paragraph 11 identified those who would participate in the arbitration and who would receive reasonable fees and expenses. These three were Steven E. Speece, a defendant, described as the attorney in charge; Nicholas J. Caramenico, a settling defendant, as a consultant; and William J. O'Hara,

another settling defendant, as a witness and consultant. Plaintiff agreed both to the participation of these three defendants and to the possibility of these three receiving reasonable expenses for their work. If the Birsters feared that the O'Hara defendants would not be conducting the arbitration in good faith, the Birsters should have included something in the settlement agreement entitling them to a full accounting. Or, alternatively, the Birsters could have objected to the participation of any or all three defendants if they feared bad faith in assessing the value of the Harrisburg cause of action. The Birsters have not offered any legal basis for conducting the discovery they desire.

Accordingly, plaintiff's "Motion to Enforce the Settlement Agreement with the O'Hara Defendants" shall be denied.

ORDER

AND NOW, this 10th day of September, 1991, upon consideration of plaintiff's motion to enforce the Settlement Agreement with the O'Hara defendants, and upon consideration of the O'Hara defendants response thereto, it is hereby ORDERED that plaintiff's motion is DENIED.

All Citations

Not Reported in F.Supp., 1991 WL 180263

Footnotes

1 The "O'Hara Defendants" includes all defendants save defendant Browning-Ferris Industries, Inc.

2 A settlement between co-defendants O'Hara Sanitation Co. and Browning-Ferris Industries, Inc.

3 Paragraph 11 of the Settlement Agreement had stated:

In determining the amount to be received by Mrs. Birster, O'Hara Sanitation shall first deduct from the value of the shares received from BFI, all expenses incurred and approved to be paid by it since November 30, 1989, in either preserving the Harrisburg cause of action or in preparing and placing before the arbitrators O'Hara Sanitation's position regarding valuation of the Harrisburg cause of action and obtaining and enforcing a final award. These expenses will include the reasonable fees and expenses of attorneys, accountants and consultants.