

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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MASTER IN CHANCERY

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Final Report: May 5, 2017

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Re: *David Lawrence, et al. v. Seth M. Forster, Trustee*
C. A. No. 12458-MZ
Date Submitted: February 28, 2017

Dear Counsel:

This case began when David Lawrence (“Lawrence”) petitioned to enforce a mediation agreement. He and the defendant, Seth Forster (“Forster”), attempted to resolve Lawrence’s petition. Forster then moved to enforce what he contends was a settlement agreement on the terms of the original mediation agreement. For the reasons that follow, I find there is no enforceable settlement agreement because the parties do not agree on all the essential terms. I therefore recommend the Court deny Forster’s motion to enforce.

I. Background

In March of 2016, Lawrence and Forster executed a mediation agreement designed to settle a dispute regarding life insurance policies in an estate matter, *Forster v. Estate of Kramen*, C.A. No. 9452-MZ (“the 2016 Agreement”). The agreement provided Forster would cash out certain life insurance policies and distribute them equally to himself and Lawrence. Lawrence would pay certain tax liability incurred by Forster as a result of the distribution. When the time came to perform under the 2016 Agreement, Lawrence and Forster could not agree on the timing and mechanics of the distributions and tax payment. Among other concerns, Forster did not want to disclose any financial records, including a tax bill or tax returns, to Lawrence or counsel. Lawrence petitioned to enforce the 2016 Agreement. I held a hearing on December 7, 2016, and entered an oral final report that day, which I further memorialized in a letter on December 8.

Forster filed a notice of exceptions to my report and the parties submitted a briefing schedule. Through December, 2016, and January, 2017, the parties worked toward resolving the matter. On February 17, 2017, Forster filed a motion to enforce a settlement agreement based on those negotiations. Forster also seeks attorneys’ fees incurred after January 27, 2017, in encouraging settlement and bringing his Motion. The exceptions were stayed pending Forster’s motion.

Lawrence responded to Forster's motion on February 28, 2017. Forster did not reply.

II. Analysis

After my report on the 2016 Agreement, Lawrence and Foster reached an independent agreement on the amount of money to be disbursed, the mechanics of disbursement, and that each party would pay for half the cost of a Certified Professional Accountant ("CPA") for the purpose of preparing and filing necessary tax returns. They disagree as to the selection process for the CPA and whether Lawrence was required to provide his social security number to the CPA, which Lawrence refuses to do. The question before me is whether those terms are essential to the settlement agreement.

Delaware courts encourage negotiated resolutions to contested cases, and for that reason, among many others, settlement agreements are enforceable as a contract.¹ As the person seeking to enforce the parties' alleged agreement, Forster bears the burden of proving the existence of a contract by a preponderance of the evidence.² In determining whether Forster has met his burden, I must inquire:

whether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms that the

¹ *Schwartz v. Chase*, 2010 WL 2601608, at *4 (Del. Ch. Jun. 29, 2010); *Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *1 (Del. Ch. Sept. 23, 1999).

² *Schwartz*, 2010 WL 2601608, at *4.

parties themselves regarded as essential and thus that that agreement concluded the negotiations.³

The parties agreed upon initial payment terms by January 12, 2017.⁴ They continued to refine the terms of payment and began negotiating the rest of the terms. The first draft written agreement provided that the parties would split the cost of the CPA but that Forster would choose that CPA.⁵ It did not address the use of Lawrence's social security number. On January 25, 2017, Lawrence indicated he required either a cap on the CPA's cost or an equal say in selecting the CPA.⁶ On January 26, Lawrence's counsel reiterated the CPA selection issue and requested restrictions on using and sharing Lawrence's social security number.⁷ On January 27, Forster's counsel responded with a draft agreement to address those concerns, providing Lawrence was to provide Forster his social security number for only limited purposes and removing language giving Forster the choice

³ *Id.*

⁴ Mot. Exs. C, D.

⁵ Mot. Ex. E.

⁶ Mot. Ex. F. ("I will pay up to 1k, and that's it, or the accountant will be a person mutually agreed upon or of our choice.").

⁷ Mot. Ex. G. ("If Seth and Dave can't agree on an accountant, Seth can select and pay the bill. [] Is it possible to provide the SS number to the accountant rather than Seth and have the 1099 issued by the accountant? If not, we will need the language about purpose of providing the SSN (that may be in the agreement – I can't recall as I write this[.])").

of CPA.⁸ Lawrence's counsel responded later that day: "Dave still has an issue with giving Seth his SS number. Can this only be given to the accountant and have the accountant prepare the 1099?"⁹ The record before me does not contain any response from Forster.

On January 30, 2017, Lawrence's financial advisor emailed an accountant for advice as to whether Forster required Lawrence's social security number to complete tax documents.¹⁰ The advisor explained this was a "very contentious situation" and that "[Lawrence] does not want [Forster] to have this information as

⁸ *Id.* ("Please see the attached agreement that should address these concerns.") The draft contained the following provisions, referring to Lawrence as Rosenberg:

1. ... Rosenberg shall also provide his social security number to Forster prior to the execution of this Agreement for the express and limited purpose of Forster, as Trustee of the Louis B. Rosenberg Irrevocable Trust dated January 31, 1980 ("the Trust"), 1) to issue any applicable tax form(s) to Rosenberg for his one half (1/2) portion of the taxable gain caused by the cashing in of the life insurance policies referenced in the Mediation Agreement and the subsequent Disbursement to him, with said taxable gain to be determined by a Certified Professional Accountant ("the CPA"), as identified in Section 6 below; and 2) to make any necessary tax filing(s) or return(s) on behalf of the Trust, as prepared by the CPA, necessitated by cashing in the life insurance policies referenced in the Mediation Agreement.

...

6. The Settling Parties shall also be responsible for one half (1/2) each of the costs associated with hiring (NAME) as Certified Professional Accountant The Settling Parties shall escrow the sum of \$1,000.00 each towards the aforesaid costs Should the actual costs exceed the amount escrowed, each Party shall remit their additional obligation

⁹ Mot. Ex. G, Email from M. Plankinton to W. Brady dtd January 27, 2017 at 7:15 pm.

¹⁰ Ans. Ex. A.

he's fearful of future misdealings if [Forster] has it."¹¹ The accountant responded that he did not believe Forster needed Lawrence's social security number.¹²

I conclude that the provision of Lawrence's social security number was essential to this agreement. Lawrence raised the issue in response to the first draft settlement agreement, and Forster modified the agreement in response to Lawrence's concern. Lawrence expressed his continued disagreement, but it does not appear that Forster responded. This exchange occurred in the broader context of contentious litigation between distrustful parties, in which Forster himself did not wish to provide Lawrence with private financial information. I conclude the provision and handling of Lawrence's social security number was essential to the parties, and the parties did not agree on that issue.

I also conclude that the selection and cost of a CPA was an essential term to the parties. Forster proposed that he select the CPA; Lawrence required a mutual selection process or a cap on the cost; and Forster responded with a proposal that was silent as to the means of selection and did not include a cap on costs. The record does not indicate whether Lawrence agreed to that proposal. Forster has failed to meet his burden of proving the parties agreed on this term.

¹¹ *Id.*

¹² *Id.*

I therefore find that a reasonable negotiator would not have concluded that the January 12, 2017, agreement on payment terms constituted agreement on all of the terms that the parties regarded as essential. Negotiation continued on the CPA's selection and cost, and the provision of Lawrence's social security number. The parties did not reach agreement on those terms. I recommend the Court deny Forster's motion to enforce a settlement agreement, including his request for attorneys' fees.

This is a final report pursuant to Court of Chancery Rule 144.

Sincerely,

/s/ Morgan T. Zurn

Master in Chancery