

Matter of Seneca One, LLC v Hall

2011 NY Slip Op 32278(U)

August 18, 2011

Supreme Court, Nassau County

Docket Number: 8769/11

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

In the Matter of the Petition of SENECA ONE, LLC,

Petitioner,

TRIAL/IAS PART 13
NASSAU COUNTY

INDEX NO. 8769/11

For Approval of the Sale and Transfer of Structured
Settlement Payment Rights of ERNEST HALL
In Accordance with Gen. Oblig. Law §5-1701, et seq.

X X X

MOTION SUBMISSION
DATE: 7/11/11

- against -

MOTION SEQUENCE
NO. 1

ERNEST HALL, NEW YORK LIFE INSURANCE
COMPANY, and NEW YORK LIFE INSURANCE
AND ANNUITY CORPORATION,

Respondents.

The following papers read on this motion:

Order to Show Cause and Affidavits.....	<u>X</u>
Affirmation in Opposition.....	<u>N/A</u>
Reply Affirmation.....	<u>N/A</u>

Relief Requested

The petitioner initiates this special proceeding, by way of Order to Show Cause, for an order approving the transfer of structured settlement payment rights from Ernest Hall, (hereinafter referred to as "Hall"), to petitioner, Seneca One, LLC., (hereinafter referred to as "Seneca").

Seneca provides that it is a limited liability company organized and existing under the laws of the State of Maryland. Seneca seeks approval of the transfer of certain structured settlement payment rights under the New York Structured Settlement Protection Act, (hereinafter referred to as "SSPA"). Hall, a resident of the State of New York, County of Nassau, currently resides at 229 Benson Avenue, Elmont, New York. Hall is the beneficiary of a structured settlement that provides that Hall was entitled to two million four hundred fifty thousand and 00/100 dollars, (\$2,450,000.00), in the following manner. Hall was entitled to an up-front cash payment of one million four hundred fifty thousand and 00/100 dollars, (\$1,450,000.00), and future periodic payments of one million and 00/100 dollars, (\$1,000,000.00), beginning on December 1, 2006, of six thousand six hundred ten and 00/100 dollars, (\$6,610.00), per month for the life of Hall with fifteen (15) years certain.

[* 2] 1

Hall, under the terms of the Transferred Assignment Agreement with Seneca intends to transfer and sell his rights to fifty-nine (59) monthly payments in the amount of one thousand four hundred and 00/100 dollars, (\$1,400.00), beginning on or about January 1, 2017 through on or about November 1, 2021.

In consideration for selling these payments, Seneca agrees to pay Hall the sum of twenty thousand six hundred seventeen and 36/100 dollars, (\$20,617.36).

Applicable Law

The SSPA was enacted as a result of concern that the structured settlement payees are especially prone to being victimized and quickly dissipating their awards. (*In re Petition of Settlement Funding of New York, LLC*, 761 NYS2d 816). "The SSPA protects payees from being taken advantage of by businesses seeking to acquire the payee's structured settlement payment rights" and discourages such transfers by requiring special proceedings seeking judicial approval of the transfer. (*Id.*, General Obligations Law §§5-1705 and 5-1706). A proposed transfer of a portion of payee's structured settlement for less than half its present discounted value was found not to be in the payee's "best interest", as required by the Structured Settlement Protection Act (SSPA). (*Id.*, McKinney's General Obligations Law §5-1706(b)). The payee's willingness to transfer the settlement "has no bearing on the court's determination of whether the interest rate paid by the transferee is 'fair and reasonable' within the meaning of Structured Settlement Protection Act, (SSPA)." (*Id.*)

General Obligations Law §5-1703, effective July 1, 2002, provides the following required disclosure:

- (a) the amounts and due dates of the structured settlement payments to be transferred;
- (b) the aggregate amount of such payments;
- (c) the discounted present value of the payments to be transferred, which shall be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities", and the amount of the applicable federal rate used in calculating such discounted present value;
- (d) the price quote from the original annuity issuer, or, if such price quote is not readily available from the original annuity issuer, then a price quote from two other annuity issuers that reflects the current cost of purchasing a comparable annuity for the aggregate amount of payments to be transferred;
- (e) the gross advance amount and the annual discount rate, compounded monthly, used to determine such figure;
- (f) an itemized listing of all commissions, fees, costs, expenses and charges payable by the payee or deductible from the gross amount otherwise payable to the payee and the total amount of such fees;
- (g) the net advance amount including the statement: "The net cash payment you

receive in this transaction from the buyer was determined by applying the specified discount rate to the amount of future payments received by the buyer, less the total amount of commissions, fees, costs, expenses and charges payable by you”;

(h) the amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and

(i) a statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, no later than the third business day after the date the agreement is signed by the payee.

General Obligations Law §5-1706 provides that the transfer must be in the best interest of the payee, the transaction is fair and reasonable, and the payee has been advised in writing to seek independent professional advice regarding the transfer and has either received such advice, or knowingly waived such advice in writing. “[D]iscounted present value” means the present value of future payments, as determined by discounting such payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.” (General Obligations Law §5-1701(c)).

“The primary purpose of the SSPA is to protect recipients of long-term structured settlements from being victimized by companies aggressively seeking the acquisition of their rights to guaranteed structured settlement payments.” (*321 Henderson Receivables Origination, LLC v. Lugo*, 889 NYS2d 508). The Court must independently determine, in its discretion, whether “the transfer is in the best interest of the payee, taking into account the welfare and support of the payee’s dependents, and whether the transaction, including the discount rate used to determine the gross advance amount and fees and expenses used to determine the net advance amount, are **fair and reasonable**”. (emphasis added.) (*In re Petition of Settlement Funding of New York, LLC, supra*, citing General Obligations Law §5-1706[b]). “This is a two pronged test to be applied in evaluating the parties’ agreement.” (*321 Henderson Receivables Origination, LLC, supra*).

The best interests determination, at the Court’s discretion, involves consideration of several facts and circumstances concerning the payee, including the payee’s age, mental capacity, maturity level, “ability to show sufficient income that is independent of the payments sought for transfer”, and ability to provide for payee’s dependents. (*321 Henderson Receivables Origination, LLC, supra*). “The best interest prong should be assessed on a case by case basis giving specific consideration to such factors as the payee’s age; mental and physical capacity, maturity level; ability to show sufficient income that is independent of the payments sought for transfer; capacity to provide for the welfare and support of the payee’s dependents; the need for medical treatment; the stated purpose for the transfer; and the demonstrated ability of the payee to appreciate the financial terms and consequences of the proposed transfer based upon independent legal and financial advice.” (*Whitney v. LM Property*, 3375/2011 NYLJ June 24, 2011; citing *Matter of Settlement Capital Corporation, [Ballos]*, 1 Misc3d 446). The “best interest” consideration is separate and independent of the consideration of whether the transfer is “fair and reasonable”. (*In re Petition of Settlement Funding of New York, LLC, supra*). A Payee who desperately needed cash to obtain “life sustaining medical treatment for a love one” in the face of having no other alternative means of raising money would serve a payee’s best interest in the face of a “life and death emergency”. (*Id.*) The Court found the

transfer was not in a 21 year old payee's best interest when the payee had a dependent, without any information concerning the putative father, and the request for funds to purchase a vehicle were not explained. (*321 Henderson Receivables Origination, LLC, supra*).

"The 'best interest' standard under SSPA requires a case by case analysis to determine whether the proposed transfer of structured settlement payments, which were designed to preserve the injured person's long-term financial security, will provide needed financial rescue without jeopardizing or irreparably impairing financial security afforded to the payee and his or her dependents by the periodic payments." (*In re Settlement Capital Corp.*, 769 NYS2d 817). An explanation as to why the payee has an immediate need for the transfer of funds, or lump sum, is taken into consideration. (*Whitney, supra, citing In re Settlement Capital Corp.*, 194 Misc2d 711).

A payee who had not "enjoyed the benefits of wise and unbiased counsel in the management of her financial affairs" and waived her right to consult with an independent professional, confirmed the court's impression that the payee did not fully appreciate the consequences of her transfer. (*Whitney v. LM Property, supra*).

The proposed transfer of the portion of the payee's structured settlement which would result in the transferee paying "less than half of settlement's present discounted value" was not fair and reasonable as required by SSPA. (*In re Petition of Settlement Funding of New York, LLC, supra*). The interest rate paid for the transfer of a structured settlement of "no more than 8% would be fair and reasonable" under SSPA whereby the transferee does not charge counsel fees and costs to the payee as a transfer expense. (*Id.*, citing General Obligations Law §5-1701(5)).

Discussion

In the case at bar, the proposed transfer involves the transfer of fifty-nine (59) monthly payments of one thousand four hundred and 00/100 dollars, (\$1,400.00), commencing on or about January 1, 2017 and ending on or about November 1, 2021. The aggregate amount of payments sold to Seneca is eighty-two thousand six hundred and 00/100 dollars, (\$82,600.00), at a discounted present value of sixty-four thousand eight hundred fifty-nine and 07/100 dollars, (\$64,859.07), with a net payment to the payee, of twenty thousand six hundred seventeen and 36/100 dollars, (\$20,617.36).

Here, the payment of twenty thousand six hundred seventeen and 36/100 dollars, (\$20,617.36), is less than half of the discount present value, and therefore, is not "fair and reasonable". Additionally, this Court finds the annual discount rate of 19.130% excessive.

The second prong of this test requires this Court to determine whether the transfer is in the payee's "best interest". Hall, who avers that he is married with no children, submits that he intends to use the lump payment of twenty thousand six hundred seventeen and 36/100 dollars, (\$20,617.36), from Seneca to eliminate a high interest credit card debt. However, Hall, does not provide any documentation to substantiate his submissions. Hall does not indicate what, if any, hardship, he is enduring.

Hall provides that he had previously transferred portions of his structured settlement on three prior occasions. In 2009, Hall received a lump sum of twenty-nine thousand and 00/100 dollars, (\$29,000.00), which he used for home repairs. In 2010, he received a lump sum of fifty-one thousand and 00/100 dollars, (\$51,000.00), and used the funds to pay off a credit debt and purchase a car. In January of this year, 2011, he received a lump sum of twenty-six thousand six hundred seventy-two and 25/100 dollars, (\$26,672.25), and used the funds to improve his home. This Court is concerned with Hall's decision to waive independent professional advice regarding this transaction under these circumstances. This Court is not satisfied that Hall fully appreciates the consequences of the proposed transaction. As this is Hall's fourth request to transfer funds from his structured settlement, which appears to be a habitual practice at a significant loss, given the totality of these circumstances, this Court cannot approve the transfer.

Additionally, service on Hall is defective. As per the directives of the instant Order to Show Cause, the petitioner was directed to serve Hall by personal service. The submitted purported affidavit of service on Hall provides that Hall was served by "nail and mail".

"Service pursuant to CPLR §308(4), commonly known as 'nail and mail' service, may be used only where service under CPLR §301(a) or 308(2) cannot be made with 'due diligence'. (*Waterman v. Jones*, 46 AD3d 63). A mere showing of several attempts at service may not satisfy "due diligence" before resorting to "nail and mail" service, (*Id.*, citing *County of Nassau v. Long*, 35 AD3d 787; *County of Nassau v. Yohaman*, 34 AD3d 620; *Earle v. Valente*, 302 AD2d 353, and *Annis v. Long*, 298 AD2d 340), "given the reduced likelihood that a summons served pursuant to [nail and mail service] will be received." (*Id.*, citing *County of Nassau v. Letosky*, 34 AD3d 414).

The instant affidavit of service provides that the process server attempted service on three different week days at or around the time when one can reasonably be expected to be going to and from work, without an indication as to how the process server attempted personal service upon the defendant pursuant to CPLR §308(1) or §308(2), before resorting to nail and mail services. Therefore, the affidavit of service is deficient on its face.

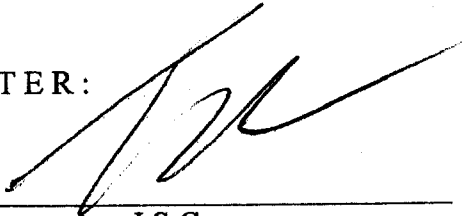
The Appellate Division, Second Department has addressed this very same issue. The "due diligence" requirement pursuant to CPLR §308(4), "nail and mail", is not met when the process server attempts to serve a defendant on three weekdays prior to resorting to "nail and mail". Attempts made on weekdays during hours when it could reasonably have been expected that the defendant was either working, or in transit to or from work, did not satisfy the "due diligence" requirement for "nail and mail" service under CPLR §308(4). (*County of Nassau v. Long, supra*). It has been held that three attempts to make service of a summons and complaint upon a defendant at his residence at different times and on different days, including a Saturday, were sufficient to constitute due diligence, (*Johnson v. Waters*, 291 AD2d 481), while three attempts to effect service on a closed professional office during morning hours on a day after Thanksgiving did not constitute due diligence as the efforts were "perfunctory, rather than diligent". (*Claerbaut v. East Long Island Hospital*, 117 AD2d 772).

In light of the forgoing, as the purported affidavit of service indicates that the process server attempted to serve Hall on two prior occasions on weekdays before resorting to nail and mail on the third attempt, also on a weekday, at times one could reasonably be expected to be going to and from work, or be at work, service is defective.

Conclusion

In light of the foregoing, as the proposed transfer of a portion of the payee's rights and interests in his structured settlement does not meet the "best interest" requirement, or the "fair and reasonable requirement" under SSPA, the motion is denied and the petition is dismissed.

ENTER:



J.S.C.

Dated: August 12, 2011

cc: Sacco & Fillas, LLP
Ernest Hall
New York Life Insurance and Annuity Corporation
New York Life Insurance Company

ENTERED
AUG 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE