Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

In the Matter of the Petition of J.G. WENTWORTH ORIGINATIONS, LLC, f/k/a 321 HENDERSON RECEIVABLES ORIGINATION, LCC,

Petitioner,

- and-

ALLIA RAHMAN, METROPOLITAN LIFE INSURANCE COMPANY and METROPOLITAN PROPERTY & CASUALTY INSURANCE COMPANY,

As Interested Persons Pursuant to GOL §5-1701 (c)..

Index No. 21636 2011

Motion Date November 9, 2011

Motion Cal. No. 9

Motion Seq. No. 1

Papers Numbered

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Allia Rahman is the owner of payment rights to a structured settlement. Petitioner commenced this special proceeding pursuant to New York General Obligations Law, Article 5, Title 17, known as the Structured Settlement Protection Act (SSPA), seeking approval of the sale and transfer of certain structured settlement payment rights to it from Allia Rahman, the payee. For reasons set forth herein, the application is denied, and the court respectfully suggests that the issues raised herein deserve Legislative attention.

The SSPA was enacted, as it had been in other jurisdictions at the time, "to protect the recipients of long-term structured settlements from being victimized by companies aggressively seeking the acquisition of their rights" (*Matter of Settlement Capital Corp. (Ballos)*, 1 Misc 3d 446 [Sup Ct Queens County 2003]). "[F]actoring companies were using aggressive advertising, plus the allure of quick and easy cash, to induce settlement to cash

out future payments, often at substantial discounts, depriving victims and their families of the long-term financial security their structured settlements were designed to provide" (*Matter of Settlement Funding of New York, LLC*, 31 Misc 3d 1229[A] [2011] [citations omitted]). As such, the SSPA (GOL § 5-1701 *et seq.*) requires this court to make certain procedural and substantive determinations when deciding whether to approve an intended transfer.

Petitioner has demonstrated that it has complied with GOL § 5-1705 (governing the procedure for approval of transfers) by annexing, along with the petition, *inter alia*, a copy of the transfer agreement, a copy of the disclosure statement and proof of notice of that statement pursuant to section 5-1703, a statement that Rahman is single and has no dependents, and a copy of an order and decision of the Honorable Charles J. Markey, said decision having denied a prior application made in Supreme Court, Queens County, for a transfer of certain future payments due to Rahman (under Index No. 1573/2011). The petition was denied without prejudice so as to permit petitioner, if so advised: (1) to demonstrate why a 14.99% discount rate is "fair and usual"; (2) to cite comparative cases approving or disapproving a transfer agreement where the transferee applied a similar discount rate; (3) to show why the attorney's fee of $2,000.00 was fair and reasonable; and (4) to adequately address whether Rahman indeed received independent professional advice.

Having also determined, after a review of the submissions, that the other procedural prerequisites have been met, this court must now – perhaps most importantly – make a substantive determination as to whether the transfer is in Rahman's best interest, "taking into account the welfare and support of the payee's dependants [sic]; and whether the transaction, including the discount rate used to determine the gross advance amount and the fees and expenses used to determine the net advance amount, are fair and reasonable" (GOL § 5-1706 [b]).

As per the subject structured settlement, Rahman became entitled to receive certain payments beginning on November 20, 2010, in the amount of $135.00 per month for life, compounded at the rate of 4% per year, and guaranteed for 30 years from November 20, 2010 (being paid to her estate in the event that Rahman should die prior to completion of full payment).

Pursuant to the disclosure statement, the aggregate amount of the transferred payments would be $89,237.76. The discounted present value of such payment is $62,097.77, using the federal interest rate of 2.20%. The net advance amount Rahman would receive pursuant to the transfer agreement would be $12,500.00, using an annual discount rate of 17.78%.

Per Rahman's affidavit, she states that she is currently unemployed and is attending Hunter College of New York, and avers that she plans to use the cash received from the sale to pay for the next two years of tuition and for school books. Rahman states that she does not have any other assets or credit resources to finance her schooling. Rahman also presented, prior to submission of the application, semester bills for the years 2010 and 2011, demonstrating that yearly tuition is approximately $6,000.00.

A "global consideration" of the facts (*see e.g. Matter of Settlement Capital Corp. (Ballos)*, 1 Misc 3d at 454) yields the determination that petitioner has failed to demonstrate that the transfer is in Rahman's best interest or that it is fair and reasonable, considering, *inter alia*, the annual discount rate of 17.78%,[1] the fact that the current cost of purchasing a comparable annuity is $52,162.00, the fact that Rahman would be selling her right to guaranteed payments for a fraction of their value (receiving a staggering 20% of what these payments are worth, using the present discounted value), and the fact that Rahman has not consulted independent legal counsel.

Moreover, though given a second opportunity to explain certain issues, which Justice Markey found were necessary in order to determine whether the transfer was in Rahman's best interest and whether the transaction was fair and reasonable, those issues were not addressed herein. While it is noted that petitioner has not charged Rahman attorneys' fees in this transaction, petitioner has increased the discount rate from 14.99% to 17.78% and has

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1. The argument set forth in the affirmation of petitioner's attorney regarding the rate being "considerably better than industry standards for these types of transfers and is comparable to major credit card rates" is without merit. The comparison counsel makes to major credit card rates is inapposite, as credit card companies grant a line of credit to the cardholder with the latter's promise to repay along with added interest of a certain percentage. The difference with respect to within scenario is clear. The affidavit of Randy Parker, Vice President of Sales Operations of petitioner, which expounds counsel's contentions, is similarly irrelevant to the court's determination (*see e.g. In re Prudential Ins. Co. of America*, 29 Misc.3d 1203(A) [2010] ["Having a recipient of a significant structured settlement borrow against his own award at credit card-type rates may be a boon to Petitioner, but it cannot possibly be considered fair and reasonable to [the payee] under any rational interpretation of the best interest standard. While Petitioner has gone to great lengths in its attempt to rationalize the high discount rate offered to [the payee], it has failed to explain adequately why the guaranteed nature of the annuity payout and the minimal risk involved for Petitioner justifies such an exorbitant interest rate. Moreover, that Petitioner incurs what it considers to be significant administrative and legal costs when entering into these transfer agreements is of little concern to the Court. The General Obligations Law, as well as the statutory intent of the SSPA, require this Court to protect the best interests of the recipient of a structured settlement award, not the profit margins of a company seeking access to its proceeds" [internal citations omitted]).

failed to show any comparable cases approving or disapproving a transfer agreement with the same or a similar rate.

The court is faced with a difficult dichotomy. On the one hand, it is the payees' usual position in these applications that they are adults of sound mind, who are entitled to certain structured settlement payments and who wish to enter into a transaction to sell those payments at a certain price, who have been advised to seek independent counsel regarding same, and who believe that the transaction is in their best interest.[2]

On the other hand, it has been the intent of the Legislature (as evidenced by the reasons for enacting the SSPA, noted above) to place the court in a position of *in loco parentis* to these payees, so as to ensure that the transactions are, *inter alia*, fair and reasonable, reason being that the Legislature was dissatisfied with transfer market rates, requiring judicial intervention to the extent that courts were not "to be mere rubber stamps" (*Matter of Settlement Capital Corp. [Ballos]*, 1 Misc 3d at 461). However, while the Legislature has outlined factors for courts to take into account (*see* GOL § 5-1705 [b] [the court must expressly find that "the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependants [sic]; and whether the transaction, including the discount rate used to determine the gross advance amount and the fees and expenses used to determine the net advance amount, are fair and reasonable. Provided the court makes the finding as outlined in this subdivision, there is no requirement for the court to find that an applicant is suffering from a hardship to approve the transfer of structured settlement payments under this subdivision"]), it has not set forth any parameters to determine whether these transactions are, in fact, fair and reasonable. Though case law in this area has developed since the SSPA's enactment due to the hundreds of applications of this nature, unless there are bright-line rules or, for example, prohibitions against using annual discount rates above a certain percentage point, it appears, in many cases, that the transaction rates currently being used (along with other factors) are inherently not fair and reasonable, nor in the payees' best interests.

Comparatively, the Legislature has outlined such a limitation with respect to the assignment of lottery winnings. Tax Law § 1613 (d) (1) (ii) provides that a court may issue an order approving a voluntary assignment to an assignee if the court finds, *inter alia*, that "[t]he purchase price being paid for the payments being assigned represents a present value of the payments being assigned, discounted at an annual rate that does not exceed ten percentage points over the Wall Street Journal prime rate published on the business day prior

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2. Notably, it is the Legislature that has required payees to receive their damages in a structured manner, depending upon the amount of the damages award (*see* CPLR Article 50-A and 50-B).

to the date of execution of the contract." A similar provision may very well be appropriate under the SSPA, especially considering the fact that: (1) the unequal bargaining power of these payees as compared to the transferees is palpable; (2) it appears that persons in financial distress may be disproportionately targeted by transferees simply because of their financial position, thereby forcing the former to accept pennies on the dollar on AAA-rated annuities; and (3) there is little, if any, risk on the part of transferees yet payees nevertheless receive a small portion of what their annuities are presently worth.

Under the circumstances of this case, the court finds that petitioner has failed to show that the terms of the transfer are fair and reasonable and in the best interest of the payee.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the application is denied and the petition is dismissed.

Dated: December 14, 2011

J.S.C.