

Matter of Sunny Sky v GE Capital Assignment Corp.
2017 NY Slip Op 32600(U)
December 12, 2017
Supreme Court, Kings County
Docket Number: 518573/17
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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**In the Matter of the Petition of SUNNY SKY
Approval Transfer of Structured Settlement Payment
Rights In Accordance with New York
Gen. Oblig. Law §5-1701,**

Petitioner,

**DECISION/ORDER
Index No. 518573/17
Submitted: 12/7/17**

-against-

**GE CAPITAL ASSIGNMENT CORP., GENWORTH
LIFE INSURANCE COMPANY OF NY and ANDRE
EDWARDS,**

Respondents.

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HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's petition for approval of the transfer of structured settlement payments.

Papers	Numbered
Order to Show Cause, Affirmation and Exhibits Annexed.....	<u>1-10</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Petitioner Sunny Sky brings this special proceeding pursuant to the Structured Settlement Protection Act (GOL §5-1701 et seq.), seeking an order approving an agreement to transfer certain structured settlement payments to it from respondent Andre Edwards (Edwards). Specifically, Edwards proposes to transfer to Petitioner part of his remaining monthly payments, that is, remaining after a prior transfer, which are valued at approximately \$699,603.00, for which petitioner has proposed to pay Edwards \$240,000.00. Petitioner calculates the current value of the payments, using

the federal standards for calculating annuities, as \$481,555.00. The petition is denied, after a hearing, and dismissed.

BACKGROUND

This proceeding arises out of a structured settlement reached by the parties to a lawsuit in 2000. Other than the Infant Compromise Order, the petitioner has not included any information concerning the underlying matter in the petition. At oral argument, Mr. Edwards informed the court that the settlement was for the brain damage he sustained as a child, due to lead poisoning.

Edwards is 27 years of age. He is unmarried and has one child. He has never finished high school. The child lives with his mother in Brooklyn. In his affidavit in support of the contemplated transaction, he states that he believes that it would be beneficial to himself and his family if he were permitted to transfer and assign his right to receive the monthly payments he has been living on, to petitioner, in order to enable him to purchase investment real property in Orlando, Florida. However, in court he stated the funds were to purchase a home in Florida and a car so he could be an Uber driver. In 2016, another judge in this court approved a similar transaction and the affidavit in this application states he used those funds to purchase a home in Queens. If the court were to approve the petition, Mr. Edwards would receive monthly payments of \$500 commencing October 1, 2017 through and including August 1, 2025. After that, there would be no funds left.

Stating that he has been provided with, and that he has read, the disclosure statement, Edwards joins in the application herein, and, further states that the assignment is in his best interests, and requests that the court approve it.

DISCUSSION

Personal injury litigation sometimes concludes with the plaintiff becoming entitled to a stream of future payments known as a structured settlement. The “structure” may be voluntary or required by statute. The payments, which can be over many years, are funded by an annuity contract purchased from an insurance company. However, structured settlement payees sometimes find that their financial needs or desires are inconsistent with the protracted pay-out period. Thus, companies known as vectoring companies, may offer such payees the opportunity to sell all or part of the payment stream for an immediate but reduced lump sum payment. The discount rate can be substantial, which results in a relatively small payment to the payee. As a consequence, the “Structured Settlement Protection Act” (SSPA), General Obligations Law §§ 5-1701 et seq., was enacted out of concern that structured settlement “payees,” such as Andre Edwards, are especially prone to being victimized, and to prematurely dissipating their awards. See *Matter of Cabrera*, 196 Misc 2d 329, [2003].

The SSPA protects payees from being taken advantage of by businesses seeking to acquire the payees' structured settlement payment rights and discourages such transfers by requiring would-be transferees to commence a special proceeding for the purpose of obtaining judicial approval of the transfer contemplated. General Obligations Law §§ 5-1705 and 5-1706. Prospective transferees bear the attendant filing fees and costs and may not recoup them if the application is denied. General Obligations Law § 5-1704[c]. Any purported transfer without court approval is unenforceable. General Obligations Law § 5-1706. Payees may not waive their rights under the SSPA. General Obligations Law § 5-1708[a]. Transferees are barred from incorporating certain provisions in the transfer agreements. General Obligations Law §

5-1704. They are required to fully apprise the payee of the terms of the transfer.

General Obligations Law § 5-1703.

“The heart of the SSPA’s protection lies in the courts’ independent discretionary determination [of] 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 the fees and expenses used to determine the net advance amount, are fair and reasonable.’” (*Matter of Settlement Funding of New York, L.L.C.* 195 Misc 2d 721 [2003], quoting General Obligations Law § 5-1706[b]). In this regard, the court notes that “the express legislative intent of the enactment was to limit ‘transfers of structured settlement payments to true hardship cases.’” (*Matter of Settlement Capital Corporation [Ballos]*, 1 Misc 3d 446, 450, quoting Legislative Mem in Support, 2002 McKinney’s Session Laws of NY, at 2036). Although General Obligations Law § 5-1706 was amended in 2004 to provide that “a court need not make a finding that an applicant is suffering from a hardship before the court is able to approve the transfer of structured settlement payments,” the requirement under General Obligations Law § 5-1706 that a reviewing court ascertain whether the transfer is in the best interests of the transferor necessitates, in this court’s view, an assessment of the transferor’s current financial circumstances, his needs and probable future financial situation.

Indeed, although New York courts generally have declined to fashion a “best interests” test predicated solely on a finding of economic hardship or “dire straits,” the existence of such hardship weighs heavily in favor of determining that a transfer of structured settlement rights is in the best interests of the payee. (See, e.g., *Matter of Ford*, NYLJ, April 14, 2004, at 20, col 1; *Matter of Settlement Funding of New York*

[*Cunningham*], 195 Misc 2d at 721 [2003]; *Matter of 321 Henderson Receivables Limited Partnership* [*DeMallie*], 2 Misc 3d 463 [2003]; *Matter of the Petition of Settlement Funding of New York LLC* [*Platt*], 2 Misc 3d 872, 876 [2003]. *Matter of the Petition of Settlement Capital Corporation* [*Ballos*], 1 Misc 3d at 455).

Conversely, courts generally will not find that such a transfer is in the best interests of the payee where the payee intends to use the proceeds of the transfer for an investment or purchase. (See, *Matter of Barr v Hartford Life Ins.*, 4 Misc 3d 1021(A) [2004]; *Matter of Settlement Funding of New York L.L.C.* [*Cunningham*], 195 Misc 2d at 725; *Matter of 321 Henderson Receivables Limited Partnership* [*DeMallie*], 2 Misc 3d at 466). Courts generally do not find that such a transfer is in the best interests of the payee where the purpose is to ease financial problems which do not rise to the level of "hardship." (See, *Matter of Talierco v Aetna Casualty & Surety Co.*, NYLJ, February 20, 2004, at 21, col 3; *Matter of Petition of Settlement Funding of New York, Inc.* [*Asproules*], 1 Misc 3d 910A [2003]; *Matter of Petition of Settlement Capital Corporation* [*Ballos*], 1 Misc 3d at 456).

Accordingly, "the 'best interest' standard under the 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 the financial security afforded to the payee and his or her dependents by the periodic payments." (*Matter of Settlement Capital Corporation* [*Ballos*], 1 Misc 3d at 455).

In regard to the "fair and reasonable" element of the required analysis, there has been little agreement as to what constitutes a proper discount rate or what amount of

fees and costs are allowable. Courts have also reached different conclusions with regard to the fairness and reasonableness of the fees and costs associated with the transaction. (See, *Matter of Settlement Funding of New York, L.L.C. [Cunningham]*, 195 Misc 2d at 724; *Matter of Petition of Settlement Funding of New York, LLC*, 1 Misc 2d at 910). Additionally, the payee's willingness to engage in the transfer may not affect the courts' determination of whether the transaction is "fair and reasonable." (*Matter of Settlement Funding of New York, L.L.C. [Cunningham]*, 195 Misc 2d at 724.)

One consideration that has emerged, however, as a factor in determining the fairness and reasonableness of the transaction is, once again, the level of financial or other hardship affecting the prospective assignor. (See, *Matter of Barr*, 4 Misc 3d 1021(A) [Sup Ct Nassau Co 2004]). Accordingly, "the more pressing the need, the more reasonable it may be for a payee to obtain immediate cash at a steep discount rate." (*Matter of 321 Henderson Receivables L.P. [DeMallie]*, 2 Misc 3d at 465).

Finally, the SSPA also requires that the proposed transferee advise the payee "in writing" "to seek independent professional advice regarding the transfer" and the payee must either seek such advice or sign a written waiver of the opportunity to seek independent advice. (General Obligations Law §5-1706[c]). Thus, a legal consultation by the payee is not a requirement thereunder. In the instant case, Mr. Edwards stated that he waived the opportunity to seek independent professional advice.

Thus, the "best interest" standard under the 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 the financial security afforded to the payee and his or her dependents by the periodic

payments. Specific consideration should be given to the payee's age; the payee's ability to show sufficient income that is independent of the payments sought for transfer; the payee's capacity to provide for the welfare and support of his dependents; and the demonstrated ability of the payee to appreciate the financial terms and consequences of the proposed transfer based upon truly independent legal and financial advice. (See, *In re Settlement Capital Corp. [Ballos]*, 1 Misc 3d 446 [2003]; *Matter of Settlement Funding of New York L.L.C. [Platt]*, 2 Misc 3d 872, 876).

At a hearing conducted on December 7, 2017, Mr. Edwards testified that he intended to use the proceeds to buy a home in Florida and a car. He indicated that he pays the mother of his child \$500 per month for child support from the \$3,000 per month he receives. He could not explain why he wanted to give up \$2,500 per month in tax free income so he could have a rental property with taxable income and potentially insurmountable maintenance obligations. He could not explain why the papers state he wants to buy an investment property but he testified he wanted to buy himself a home.

Based upon the petition and exhibits, after a brief hearing, and after consideration of all of the foregoing factors, the court is unable to find that the contemplated transaction, whereby Edwards would surrender most (\$2,500) of his monthly income of \$3,000 and all of his future lump sum payments for one heavily discounted lump sum payment, serves him or his family's best interests. His proposed use for the immediate lump sum payment is not compelling. Of concern is that the record provides only the most minimal evidence of Edwards' circumstances. Not only is there no information about the seriousness of the injuries Edwards sustained, there is no information about his background, employment history, ability to work, or indeed anything to assist the court in evaluating the petition's merits. As such, Edwards fails to

adequately demonstrate that approving this application would be in his best interests. See, *Matter of Taliercio*, NYLJ February 20, 2004 at 21, col 3. Further, he failed to adequately demonstrate any level of understanding of the financial ramifications that an immediate transfer of the future payments, in exchange for a short-term windfall, would pose to his future and that of his family. Clearly, his best interests and those of his family are more appropriately served by denying his request to transfer the structured settlement payments.

As part of its review, the court is also required to make a finding that the proposed discount rate used in calculating the gross advance amount is fair and reasonable. See, General Obligations Law § 5-1706[b]. The court notes that there is no statutory guidance, and very little consistent case law concerning the fairness and reasonableness of the proposed discount rate and related costs and fees. Many courts have rejected proposed transactions with discount rates similar to that proposed herein.

Furthermore, this is not the first petition filed by a vectoring company seeking to purchase Mr. Edwards' income stream. Mr. Edwards, in his affidavit, admits to three prior efforts. On June 9, 2017, only four months before this petition was filed, Justice Edgar Walker denied a petition by JG Wentworth (97/2017) to purchase \$764,000 worth of respondent's future payments, with a discounted present value of \$570,299.93, for \$270,000; this is relief that is virtually identical to that at issue in the instant matter.

In addition, the court notes that, in addition to the prior application already noted, respondent also admits to a prior petition with the index number of 507987/2017, which was denied in June 2017 by Justice Baynes, and another prior application (404/2016) by J.G. Wentworth, in 2016, where Mr. Edwards was permitted by Justice Baynes to sell \$506,000 of future payments for a \$250,000 lump sum payment so that he could

purchase a home in Queens. There is no evidence in this application that he actually used the funds to purchase a home.

The court notes that in addition to the monthly payments which started when Mr. Edwards turned 21, and in addition to the lump sum of \$250,000 he received in 2016 following the court's approval of a partial transfer of his payments, Mr. Edwards received a lump sum of \$140,000 by 2010, which was intended to pay for his college education, and a lump sum of \$100,000, which was payable in 2014. There is nothing in the papers which explains what Mr. Edwards has done with these funds.

In conclusion, petitioner has failed to meet its burden of establishing that the proposed transaction in is the best interests of Andre Edwards and that the terms of the proposed transaction are fair and reasonable. Accordingly, the petition is denied.

Any future application by any company seeking to purchase the structured settlement payments due to Andre Edwards must be made returnable to the undersigned and not to any other court or justice.

The foregoing constitutes the Decision, Order and Judgment of this court.

Dated: December 12, 2017

ENTER:



Hon. Debra Silber J.S.C.

Hon. Debra Silber
Justice Supreme Court