

L.W.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 260551/2009

In the Matter of the Petition of
SETTLEMENT FUNDING OF NEW YORK, LLC

DECISION/ ORDER
Present: Hon Norma Ruiz

Petitioner,

- against-

Hartford Comprehensive Employee
Ben. Svc. Co., and Hartford Life
Insurance Co.,

Respondent.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Petition
to: Papers Numbered
Notice of Motion and Affidavits Annexed
Order to Show Cause and Affidavits Annexed
Answering Affidavits and Cross Motion.....
Replying Affidavits
Exhibits
Other:

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

Petitioners have brought the instant proceeding for an order pursuant to the Structured Settlement Protection Act (hereafter SSPA) codified under General Obligation Law, Title 17, approving the transfer to Settlement Funding of New York, LLC of a portion of periodic payments otherwise payable to Melissa Feliciano.

Pursuant to this Court's prior short form order dated January 27, 2010 a hearing was scheduled wherein Ms. Feliciano was directed to provide the court with documentary proof of her financial circumstances, including monthly rent with a copy of her lease, bills showing household expenses, credit card payments and proof of employment for the proceeding five years, among other things.

N/A

Hartford Comprehensive Employee Ben. Svc. Co., and Hartford Life Insurance Co., interested parties to this action, did not submit opposition to the Petition and did not appear for this noticed hearing. Thus, the Court heard from the only witness, Melissa Feliciano.

Although directed to provide the Court at the hearing with copies of the underlying matter which served as the predicate for the subject structure, Petitioner did not. As such, the Court is at a loss as to the nature of the action and injuries sustained by Ms. Feliciano, other than the information relayed to the Court by Ms Feliciano at the hearing. Nor did the Court receive a copy of the actual structure to evaluate the manner in which it was structured, the pay-outs disbursed, if any, and the future pay-outs.

At the instant hearing, Ms. Feliciano did not have a vivid memory of the facts surrounding her action, other than she was a passenger in a cab which was involved in an accident. She sustained a torn meniscus which required surgery, in November of 2008. She offered no further information with regard to that condition, such as any residual pain or follow-up medical treatment.

She further testified that she has been working for the past eight years. Her most recent employment, since December of 2007, is with an oral surgeon for whom she does billing. She has a 15 year old daughter and a 9 year old son, whose father does not provide any financial assistance. Notwithstanding the information contained in her affidavit, Ms. Feliciano is not engaged. Prior to her current leasehold, from May 1, 2009 through April 30, 2010, she had lived with her children in her grandparents apartment.

As per her affidavit, testimony and documents proffered at the hearing, she is the sole support of her children. She is employed by Riverdale Oral Surgery, P.C., in the Bronx, New York, where she earned approximately \$28,694.00 in 2008, as per her Social Security Statement. It is unclear from the payroll check statement offered by Ms. Feliciano covering the 10/11/09 - 10/24/09 pay period, what her gross weekly wages are since there are two checks reflecting a net direct deposit in the amounts of \$588.53 and \$383.09, with a year to date gross earnings of \$27,005.71. She currently lives with her children in an apartment located at 1412 Fteley Avenue in the Bronx, for which she pays \$1,200.00 per month, as reflected on the first page of her one year lease (covering May 1, 2009 - April 30,2010).

Ms. Feliciano sets forth her reasons for the sale of her structure are: to purchase a used vehicle in the amount of \$11,000.00 for transportation to work and other day-to-day necessities, \$6,000.00 to pay off her Visa credit card (a collections notice on a Bank of America credit card account - statement covering billing due date of 10/31/07, reflecting a total balance of \$6,056.15 and a Target Credit Card Account Summary with a payment due date of 5/4/08, reflecting a balance of \$579.55, on a \$500.00 credit limit) and the remaining \$1,200.00 to pay off a Capital One bill (no such designated bill was proffered) .

She also provides the Court with a collection notice on her Verizon account in the amount of \$339.00 dated 12/17/09. She also submits outstanding medical bills: Lincoln Medical Center in the amount of \$1,091.86 dated 9/26/09 and a final notice from Montefiore Medical Center for payment of \$1,753.66, for medical services provided to her for treatment unrelated to her personal injury case.

At paragraph 6 of Ms. Feliciano's annexed boilerplate affidavit, prepared by the Petitioner, she acknowledged receipt of the Disclosure Statement detailing the terms of the agreement, which she "carefully reviewed ...and fully and completely under(stood) all terms...". Ms. Feliciano placed her initials at paragraph 7A, indicating that although advised in the Disclosure Statement to seek professional advice from an attorney/accountant/actuary regarding the legal, tax and financial implications of said transfer, she waived her right to avail herself of such advice.

The Court notes that nowhere on the Disclosure Statement, in particular at paragraph J, is there any information relative to financial or legal advice which can be provided either pro bono or at reduced rates for individuals who are in dire financial straits, such as Ms. Feliciano. The paragraph only reflects that the advisor is "engaged by you" and not compensated by the Petitioner.

Since the Petitioner failed to annex the underlying facts, circumstances and structured settlement for the Court's perusal. It is troubling to the Court that no information is forthcoming with regard to the initial settlement award and the amount which funded the structure. The Court is constrained to assume that the representation made by Ms. Feliciano at the hearing - that she has already received a \$30,000.00 lump sum payment - is correct. The Court is also unaware of the exact date such payment was received, nor the purpose and the time frame in which this money was utilized by Ms. Feliciano.

Pursuant to the SCHEDULE OF BENEFITS AND PREMIUMS (Exh. A) annexed to the Petition, Ms. Feliciano is scheduled to receive "Income Payments of \$1,011.29 Monthly Beginning 04/28/2015 - Last Payment 03/28/2020". This would have resulted in 60 monthly payments of \$1,011.29. The ABSOLUTE ASSIGNMENT AGREEMENT executed by Ms. Feliciano on September 2, 2009 proposes the sale of all of the 60 monthly payments. Pursuant to the NEW YORK TRANSFER DISCLOSURE statement (Exh. C) annexed hereto, the aggregate amount to be transferred is \$60,677.40. The purported current cost of purchasing a comparable annuity for the aggregate amount to be transferred from two other annuity issuers is: \$58,538.25 and \$55,646.65. However, there is no documentary proof submitted by the Petitioner in support of such a conclusion. The discounted present value of the transferred payments is listed as \$46,085.89, utilizing a 3.40% discount rate, published as of August 21, 2009. The annual discount rate of 14.99% was utilized in calculating the gross advance amount of \$19,540.00. Once processing fees (\$200.00) and legal fees (\$2,000.00) were deducted, the net amount payable Ms. Feliciano would be \$17,340.00.

Notwithstanding that the parties to this agreement have both signed on the proverbial dotted line, this Court must ascertain the propriety of this contract within the framework of the SSPA.

In an effort to protect recipients of personal injury structured settlements (which were designed to provide future tax-free funds for medical care, education, housing, etc.) from the abuses of financial companies which purchase the future payments in exchange for sharply discounted advances, the New York State Legislature enacted Title 17 of the General Obligations Law, in 2002.

DISCUSSION

Initially, the Court must consider whether the instant Petition comports with all of the procedural requirements set forth in the SSPA. A perusal of the submission establishes that the Petitioner properly served all interested parties within the statutory period. Also annexed were copies of the transfer agreement, disclosure statement for New York State transfers, the name and ages of Ms. Feliciano's 15 year old daughter, Tianna Santana and her 9 year old son, Mason Santana and the transfer documentation is written in plain language.(GOL §5-1706(A)(C)(D)(E).

The next and most important consideration is assessing whether the proposed transfer

“would be consistent with the letter and spirit of SSPA” (*Matter of Settlement Capital Corp. (Ballos)*, 1 Misc.3d 446 [2003]). In this regard, before the Court can approve an otherwise procedurally conforming transfer application, the Court must determine that:

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. GOL§5-1706(b)

Turning first to the “fair and reasonable” analysis of this transfer: utilizing the financial computations of Petitioner included in the annexed paperwork, the discounted present value of \$60,677.40 with a net payout of \$17,340.00 would result in a final discount rate of 71.40%. Such a discount rate is more than double that which banks are currently charging and more than even the steepest credit card rates of 29%.

The lack of any accompanying financial expert affidavits indicating that the financial, tax or legal implications of such a transfer would not adversely affect Ms. Feliciano is suggestive of the unsoundness of this transaction.

Moreover, this Court's paramount concern is not the financial viability of factoring companies such as Petitioner's, but the intended protection of Payees, such as Ms. Feliciano, envisioned by the Legislature when it enacted Title 17.

In *Settlement Funding of New York L.L.C. (Cunningham)*, 195 Misc.2d 721 (Kings Sup.Ct., 2003) and *Settlement Funding of New York L.L.C. v Solivan*, 8 Misc.3d 1006 (Kings Sup. Ct. 2005), the discounted interest rates of 15.46% and less than 13% were not found to be fair and reasonable, especially when the legal and administrative fees were added to those discounted rates. This Court finds that the Petitioner's have not supported their burden of showing that this transfer rate is fair and reasonable (see, *Ballos*, supra)

Even with the finding by the Court that the inordinately high interest rate does not comport with the statute's standards of fairness and reasonableness, the Petition might be salvaged if it were determined to be in the “best interest” of the payee. Under this analysis, compelling factors include: the need to obtain cash for life-sustaining medical treatment for a family member, (*Cunningham*

supra), preventing foreclosure of a family home, or paying off significant debt (see, *Matter of Ford [Stone Street Capital, Inc.]* NYLJ, April 14, 2004, p 20, col1) * No Official Cite*.

However, alleged claims of desperate straits or financial hardship must rise to a level consistent with the intent of the statute, which is to provide emergency assistance to those in immediate financial need (*321 Henderson Receivables v. D'Amore*, 9 Misc.3d 1110(A), [Kings Sup. Ct. 2005]).

Even where a professed claim of desperate straits is made, Petitions have been dismissed where there was no unforeseeable need for housing or showing that the payee was incapable of self support (see *Matter of 321 Henderson Receivables International Partnership (DeMallie)*, 2 Misc. 3d. 463 [Monroe Sup. Ct. 2003]). Nor was the Petition of a disabled payee who was living at home with his mother, seeking to sell his structure to pay off debts, buy a used car and get a job, among other things, sufficient proof of a desperate circumstance justifying approval of the transaction (see *Settlement Funding of New York, L.L.C. (Asproules)*, 1 Misc.3d 910 (A) (N.Y. Sup. Ct., December 2003]).

Similarly, Payees who sought transfers for the purpose of: taking advantage of modest mortgage rates to buy a home, reduce credit card debt and buy a professional truck, all with the view toward improving their respective financial circumstances and that of their dependents, were denied transfers since they failed to explore or exhaust other options for resolving their financial predicaments (see, *Barr v. Hartford Insurance Company*, 4 Misc.3d 1021(A) [N.Y. Sup. Ct. 2004]; *In Re Rapid Settlements Ltd. (Phillips)*, 6 Misc.3d 1030(A) (N.Y. Sup. Ct., 2004), *321 Henderson Receivables, LP v. D'Amore*, 9 Misc. 3d 1110(A), [N.Y. Sup. Ct., 2005]). Indeed, in the majority of these cases, Courts found that allowing the sales would have promoted future financial hardships which was not in the best interest of any of the payees.

The Court is not unmindful of the difficult financial situation in which Ms. Feliciano and her family find themselves. However, it can not be said that the Petitioner has demonstrated any compelling reasons warranting this Court's approval of this proposed transfer. Such approval would fly in the face of this Court's mandate to "protect recipients of structured settlement awards from aggressive factoring companies who promise instant cash to the detriment of the long-term security that structures often provide", *Matter of Taliercio v. Aetna Casualty & Surety Co.* N.Y.L.J. 2/20/04

p. 21 col.3.

Moreover, as the Court in *DeMallie* (supra) noted the “(payment structure) was presumed to be the best compensation for the payee’s injuries at the time of the ...settlement. To overcome this presumptive validity ... there must be a showing, by clear and convincing evidence, of an unforeseeable change in circumstances that would justify the sale of rights to future payments”, at 468. As noted, since Petitioner failed to provide the Court with any medical information of the payees subject injuries, the Court can not evaluate what, if any, residual effects Ms. Feliciano’s injuries may have which could warrant future medical attention and their skyrocketing associated costs. The structured payments were set aside for that distinct possibility, one which this Court is disinclined to set aside on the instant Petition.

The Court also notes that the payee declined to seek financial or legal advice with regard to the implications of such a waiver, both as revealed in the agreement and at the hearing. She likewise testified that she understood the transfer would result in the loss of more than half of the aggregate payments. Regrettably, in her opinion financial circumstances left her without alternatives. She had no response to the Court’s suggestion that had she availed herself of expert advice, a financial advisor might have provided financial options to this drastic measure of losing more than half of the aggregate payments.

Apparently, there is a growing proliferation of late night and cable television commercials by factoring companies promoting these transfers, utilizing catchwords such as “It’s your money and you should have it now”. These commercials leave desperate viewers with the purposeful impression that they will actually receive up-front, dollar-for-dollar exchanges as soon as they apply. Such disingenuous marketing serves to promote the financial gain of these factoring companies while undermining the integrity and legitimate purpose of structured settlements. Payees such as Ms. Feliciano, discover after they’ve applied for these transfers, that the illusion of receiving *all* of their money up-front, rather than later, is not the reality. Payees faced with difficult financial circumstances often relinquish the greater part of their structured payments because they believe they have no alternative.

One of the unfortunate lessons learned from the near collapse of the financial markets following the residential mortgage foreclosure crises of 2008, is that many consumers do need to

be informed of the consequences of their financial choices. Indeed, to quote another popular commercial, "A knowledgeable consumer is our best customer"¹. Ms. Feliciano could realize that objective, if she is so inclined, by seeking either reduced cost or free financial advice by , among other options: calling New York City's "311" phone line for lists of financial counseling for debtors who are unable to pay, or by speaking with representatives of CLARO (Civil Legal Advice and Referral Office) who are available to provide legal advice to debtors who have been sued in Civil Court by their creditors. While these volunteer lawyers and law students provide legal advice to litigants in Civil matters, they will also provide advice to anyone with debt issues, **even if they do not have a pending case in Civil Court**. Ms. Feliciano should bring all paperwork relating to her debt. CLARO is available in Bronx Civil Court, located at **Bronx Supreme Court**, 851 Grand Concourse, Room B-128A, Basement level on Thursdays between 4 p.m. - 6 p.m., no appointment is necessary. They can also be reached by calling (212) 636-7671.

Accordingly, this Court is constrained to find that the evidence demonstrates that the proposed transfer is not fair and reasonable and, as noted above, certainly not in the best interest of Ms. Feliciano. The petition is therefore dismissed.

This constitutes the decision and Order of the Court.

Dated: 5/20/10
BRONX, NEW YORK



Hon. Norma Ruiz

¹ Sym's Clothing Store.