

<b>Matter of Settlement Capital Corp. (Illescas)</b>
2003 NY Slip Op 30241(U)
December 22, 2003
Supreme Court, New York County
Docket Number: 103992103
Judge: Bruce Allen
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Bruce Allen, Justice

PART 50B

SETTLEMENT CAPITAL CORPORATION

**SCANNED**

**DEC 30 2003**

INDEX NO. 103992103

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

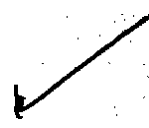
The following papers, numbered 1 to ~~3A~~ were read on this petition for approval of the assignment of payments pursuant to the Structured Settlement Protection Act.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits...  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Papers Numbered	
①	(A) (B) (C)
②	(2A)
③	(3A)

Cross-Motion:  Yes  No

Upon the foregoing papers,



The petition is granted for the reasons set out in the accompanying memorandum.

Ordered that the agreement to transfer of the right to receive payments through February 2010 from Maria Illescas to Capital Settlement Corporation, as adjusted to reflected intervening payments, is approved.

This constitutes the decision and order of this court.

Dated 12/22/03

ENTER: Bruce Allen, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK PART 50B

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IN THE MATTER OF THE PETITION OF SETTLEMENT  
CAPITAL CORPORATION FOR APPROVAL OF TRANSFER  
OF STRUCTURED SETTLEMENT PAYMENT RIGHTS OF  
MARIA S. ILLESCAS IN ACCORDANCE WITH GENERAL  
OBLIGATIONS LAW, §5-1701, ET SEQ.

Index No. 103992/03

..... x

For Petitioner: Jeffrey Calabrese  
For Respondent AIG American Home: Joseph Holden and Bruce Shapiro  
JUSTICE BRUCE ALLEN:

In June 2002, Maria Illescas and National Union Fire Insurance entered an agreement in settlement of a claim arising from injuries suffered by Ms. Illescas in an automobile accident. Under the agreement, Ms. Illescas received a lump sum payment of \$260,000. The agreement also provided for periodic payments of \$612 per month for life, with the first ten years guaranteed. The liability for these payments was to be assigned through a “qualified assignment” to respondent American Home. With regard to the periodic payments, the settlement agreement stated: “Said payments cannot be accelerated, deferred, increased or decreased by the Payee nor shall the Payee have the power to sell or mortgage or encumber same, or any part thereof, nor anticipate the same, or any part thereof, by assignment or otherwise.”

Petitioner Settlement Capital Corporation now seeks approval pursuant to the Structured Settlement Protection Act (“SSPA”), General Obligation Law 555-1701 et seq., for a purchase agreement under which Ms. Illescas would transfer to petitioner the right to receive her monthly payments through February 2010. The total of the transferred payments would be approximately \$51,000, with a present value of approximately \$44,000. In exchange, petitioner would pay Ms

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Illescas approximately \$27,000. In court, petitioner indicated that it would waive attorney's fees and processing costs. The arrangement would be equivalent to a loan with an interest rate of 20%.

A hearing was held before me at which **Ms. Illescas** and her daughter, Irwina, testified. I found each to be credible. Ms. Illescas testified that she was fully aware of the terms of the proposed agreement. She said that she had a pressing need for the money to avoid foreclosure on a house she shares with her mother in the Dominican Republic into which she intends to move.

Based on the testimony and the papers submitted, I find that the proposed agreement has met the criteria for approval listed in GOL §5-1706: the transfer complies with the requirements of the Act, it is in the best interest of the payee, the discount rate is fair and reasonable, the payee was advised to seek independent advice and knowingly waived such advice in writing, the transfer does not contravene any statute or government order, and the agreement is written in plain language.

However, the issue remains whether the restrictive language of the settlement agreement precludes any transfer of the payments. Prior to enactment of the Structured Settlement Protection Act, New York courts have held that language in a structured settlement agreement that denied the payee the right to assign future payments did not invalidate such an assignment, though it did leave the payee personally liable for breach of contract. However, language such as that in the instant agreement, which denies the payee the power to make such an assignment, could be enforced to invalidate an assignment of future payments. C.U. Annuity Service Corp. v. Young, 281 AD2d 292 (1<sup>st</sup> Dept. 2001); Singer Asset Finance Co. v. Bachus, 294 AD2d 818 (4<sup>th</sup> Dept 2002).

Petitioner contends that the SSPA was intended to change the law to allow transfer of the right to payment, regardless of any restrictive language in the agreement, so long as the criteria of §5-1706 were met. Several courts have considered and rejected petitioner's position. Matter of Emerald Funding Ind. No. 3376/03, NYLJ 6/12/03 (Sup. Ct., Monroe County; Siracuse, J.); Matter of Ovation Capital, Ind. No. 2459/03 (Sup. Ct., Erie County; Maroche, J.); Matter of Thomas A. Declemente, Ind. No. 7662/03 (Sup. Ct., Queens County; Grays, J.); Matter of Settlement Capital Comoration, Ind. No. 34729/03 (Sup. Ct., Wyoming County; Dadd, J.); Coggins and Settlement Capital Comoration v. Travellers Ins. Co., Ind. No. 858/02 (Sup. Ct., Dutchess County; Pagonis, J.).

I agree with the reasoning of those cases that the language of the SSPA was not intended to invalidate anti-transfer provisions. The legislative memorandum accompanying the act noted:

... Although transfers of structured settlement payments are generally prohibited by contract (and often prohibited under applicable state law) factoring companies have built a rapidly expanding business around circumventing these prohibitions.

This market in the buying and selling of injured individuals' payment Streams can pose a hazard to existing recipients of structured settlements ... This legislation seeks to curtail this practice by limiting transfers of structured settlement payments to true hardship cases. The Act does this by requiring full disclosure of the costs of any factoring transaction, advance notice to interested parties, and court approval of any transfer....

The act itself makes two references to prohibitions on transfer. §5-1072(d) requires the proposed transferee to initially disclose to the claimant if the transfer of payments is prohibited by the terms of the structured settlement agreement. §5-1707(b)(i) provides that following a transfer of payment rights under the act, if the transfer contravenes the terms of the structured settlement, the

transferee shall be liable to the obligor for any taxes incurred as a consequence.

This language does not indicate any specific intention to change the common law with respect to the enforceability of anti-transfer provisions. Rather, it appears that the legislature took a more neutral view. Recognizing that courts might or might not enforce such provisions, it added protection for the claimant and the obligor in either case.

However, passage of the **SSPA** does change the context in which such provisions should be considered. **As** a restraint on alienability, they should only be enforced if they are reasonable. In the past, cases such as C.U.Finance, supra, and Singer Asset, supra, have found them to be so. Under the **SSPA**, there can be no transfer, even in the absence of an anti-assignment provision, unless the criteria of §5-1706 are met. Thus, now the only instances in which such a provision will be relevant are those in which the criteria have been met – presumably “true hardship cases”.

Respondent American has cited three interests that the anti-assignment provision was intended to protect. With respect to the first two, as respondent admits, the **SSPA** offers specific protection. §5-1707(a) insures that the obligor shall not face double liability for the transferred payments. **As** noted, §5-1707(b)(i) makes the transferee liable for any **tax** consequences arising from the transfer. The third interest cited by respondent was the administrative burden of locating, altering, and insuring the accuracy of records to reflect the proper party and address for payments. However, this too would appear to be covered. §5-1707(b)(ii) provides that the transferee is to be liable to the obligor for “any other liabilities or costs, including reasonable costs and attorneys’ fees, arising from compliance by such parties with the order of the court ...”. In some instances there may be a question whether the transferee will be able to comply with such requirements; presumably the court could consider such questions in determining whether to


approve the transfer. In this case, respondent has not raised such a question and has not indicated what its expected administrative costs would be.

In upholding enforcement of the anti-assignment provision in C.U. Annuity v. Scott, supra, the First Department noted that to do otherwise would be to “relegate the payor to an uncertain remedy for breach of promise not to assign”. Here, however, the obligor is entitled to its remedy as a condition of the transfer.

Respondent concedes that the vast majority of insurers have not chosen to try to enforce similar provisions with regard to transfers under the SSPA. It is true that respondent bargained for such a provision and that Ms Illescas freely agreed to it. However, given respondent’s failure to advance any material unprotected interest in preventing the transfer, and the court’s finding of extreme need on the part of Ms. Illescas, I find that enforcement of the anti-transfer provision would be an unreasonable restraint.

Accordingly, the transfer agreement (as adjusted to reflect the amount of payments received by Ms. Illescas in the interim) is approved.

December 22, 2003



J.S.C.