

**Matter of Warner**

2007 NY Slip Op 32455(U)

August 3, 2007

Supreme Court, Broome County

Docket Number: 0013092/0071

Judge: Ferris D. Lebus

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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in City of Binghamton, New York, on the 26<sup>th</sup> day of July, 2007.

PRESENT: HON. FERRIS D. LEBOUS  
JUSTICE PRESIDING

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF BROOME

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In the Matter of Michele Warner a/k/a Michele M. Warner, Ohio Casualty Insurance Company and AXA Equitable Life Insurance Company f/k/a Equitable Life Assurance Society of the US,

**DECISION AND ORDER**

Index No. 2007-1309  
RJI No. 2007-0702-M

Interested Parties,

Regarding the Transfer of Structured Settlement Proceeds to Settlement Funding of New York, LLC,

Petitioner.

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APPEARANCES:

COUNSEL FOR PETITIONER: TREVETT, CRISTO, SALZER & ANDOLINA, P.C.  
KARL F. SALZER, ESQ., OF COUNSEL  
OFFICE & POST OFFICE ADDRESS:  
2 STATE STREET, SUITE 1000  
ROCHESTER, NY 14614

INTERESTED PARTIES: MICHELE WARNER a/k/a MICHELE M. WARNER  
POST OFFICE ADDRESS:  
11 COLFAX AVENUE, APT. 1  
BINGHAMTON, NY 13905-2106

OHIO CASUALTY INSURANCE COMPANY  
OFFICE & POST OFFICE ADDRESS:  
9450 SEWARD ROAD  
FAIRFIELD, OHIO 45014

AXA EQUITABLE LIFE INSURANCE COMPANY  
f/k/a EQUITABLE LIFE ASSURANCE SOCIETY OF  
THE US  
OFFICE & POST OFFICE ADDRESS:  
260 SOUTH BROAD STREET, SUITE 1200  
PHILADELPHIA, PA 19102

**HON. FERRIS D. LEBOUS, J.S.C.**

Petitioner, Settlement Funding of New York, LLC, moves for judicial approval of the proposed transfer of a certain future payment rights of Michele Warner under a structured settlement agreement in exchange for the present payment of a discounted lump sum (General Obligations Law § 5-1701 *et seq.*).

Ms. Warner, currently age 35, obtained a structured settlement arising out of litigation for emotional injuries suffered from witnessing an automobile accident that occurred on June 10, 1984, in which her brother was injured and subsequently died. Due to her status as a minor at the time, said litigation was settled on Ms. Warner's behalf by her parents as follows:

\$ 6,000	paid on 3-25-1990
\$ 10,000	paid on 3-25-1993
\$ 15,000	paid on 3-25-1997
\$ 15,000	paid on 3-25-2002
\$ 20,000	paid on 3-25-2007
\$ 35,000	to be paid on 3-25-2012

Petitioner seeks approval of a "Transfer Agreement" with Ms. Warner whereby she would transfer her right to the remaining lump sum payment of \$35,000 due on March 25, 2012, in exchange for petitioner's present payment to her of \$14,209.53, less \$2,200 for legal and processing fees, for a net payment of \$12,009.53. This record indicates that petitioner is using a discount rate of 19.99% and a quotient of 44.93% (Petition, Exhibit B).

## LAW

General Obligations Law § 5-1701 *et seq.*, also known as the "Structured Settlement Protection Act" or "SSPA", was enacted in 2002 due to the concern that structured settlement payees, such as Ms. Warner, are particularly prone to being victimized and quickly dissipating their assets and to protect them from the growing number of companies using "[a]ggressive advertising, plus the allure of quick and easy cash, to induce settlement recipients 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' (Mem. in Support, N.Y. State Assembly, 2002 McKinney's Session Laws of N.Y., at 2036)" (*Singer Asset Finance Co., LLC v Melvin*, 822 NYS2d 68 [2006]). This legislation "[d]iscourages such transfers by requiring would be transferees to commence special proceedings for the purpose of judicial approval of the transfer" (*Settlement Funding of New York, LLC [Cunningham]*, 195 Misc 2d 721, 722 [Rensselaer County 2003]). "The SSPA clearly reflects the Legislature's dissatisfaction with the structured settlement transfer market rates and its conclusion that payees cannot protect their best interest and thus require judicial supervision" (*Settlement Funding [Cunningham]*, 195 Misc 2d at 724; *Settlement Funding of New York, LLC [Asproules]*, 1 Misc 3d 910 (A) [Ontario County 2003]). "Clearly, the New York State Legislature in enacting [the] SSPA and in empowering the courts with the discretion to determine whether the terms of a proposed transfer of future payments are fair and reasonable did not intend for the courts to be mere rubber stamps" (*Settlement Capital Corp. [Ballos]*, 1 Misc 3d 446, 461 [Queens County 2003]). As such, this court's judicial function under the SSPA requires an evaluation of a variety of factors, but particularly: (1) whether the transaction is fair and reasonable, including the

discount rate used to determine the gross advance amount and the fees and expenses used to determine the net advance amount; and (2) whether the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents.

In determining whether the transaction is fair and reasonable, the court should examine the discount rate used to determine the gross advance amount and the fees and expenses used to determine the net advance amount. Here, petitioner determined the gross advance amount of \$14,209.53 by applying an annual discount rate of 19.99%. By way of comparison, however, similar rates have been deemed unreasonable (*Cunningham*, 195 Misc 2d 721 [15.46%]; *Settlement Capital Corp. ["Y"]*, 194 Misc 2d 711 [2003] [18.621%]). Further, the \$12,009.53 in net advance funds Ms. Warner stands to receive represents only 33% of the \$35,000 future payment that she would transfer to petitioner. The court finds said transaction is not fair and reasonable.

The next consideration is whether the proposed transfer is in Ms. Warner's "best interest." Ms. Warner submits an affidavit in support of this petition indicating she is 35 years old, and has three children who reside with her (ages 3, 5 and 6). Ms. Warner indicates she is unemployed, but seeking employment. However, Ms. Warner provides no details regarding her employment history or employment prospects. Further, she states she is currently residing, rent free, with her boyfriend's family. If the proposed transaction were approved, Ms. Warner avers that she plans to use the money as follows:

[I] would like to use approximately \$2,000 from the proceeds of this transaction to repair my vehicle so that I can seek and maintain employment, and care for the needs of my children. I would like to establish and *[sic]* independent living situation for my children and I, therefore, I would like to use the remaining funds of approximately \$10,000.00 to pay the required deposits and move in fees for an apartment, including the utility deposits. I will then pre-pay my rent for six months, thereby ensuring that my children and I have a home, while I seek employment.

(Warner Affidavit , ¶ 10).

Notable, however, is Ms. Warner's explanation on the "Structured Settlement Court Order Application" included with her papers of what happened to the \$20,000 payment she received only four months ago on March 25, 2007.<sup>1</sup> The form includes a series of three questions requesting information on structured settlement payments received in the past 12 months. Apparently Ms. Warner responded to a question asking what she did with that payment of \$20,000 as follows: "Used it to get her previous boyfriend out of debt and once she did, he left her" (Petition, Ex C). Although the court acknowledges Ms. Warner's candid response to that inquiry, the court finds no showing here that there would be a real advantage or gain to Ms. Warner in receiving only \$12,009.53 of the \$35,000.00 she is due to receive in 2012. The court finds the proposed transaction is not in Ms. Warner's best interest.

A final comment is warranted regarding the fact that this application is technically

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<sup>1</sup>There is nothing in the papers explaining what happened to the other four payments she received from 1990 to 2002 totaling \$46,000.

unopposed. Obviously, in cases such as these the lack of opposition is the very reason for the need for judicial oversight in the first instance. In other words, the legislature recognized that these matters involve adults who join in the request, but because of the concern of overreaching require the courts to serve as the overseer of the financial deal. Consequently, this court's disapproval is in accordance with the standards set forth in the statute to determine whether the proposed transaction should be approved, despite the fact that both petitioner and Ms. Warner agree and request that the transaction be approved.

Based on the foregoing, the court finds that petitioner has failed to demonstrate to the court's satisfaction that the transaction is fair and reasonable and that the transfer is in Ms. Warner's best interest (GOL § 5-1706 [b]). Consequently, the Petition is denied.

Dated: August 3, 2007  
Binghamton, New York

s/ Ferris D. Lebous  
Hon. Ferris D. Lebous  
Justice, Supreme Court