

**Matter of Northeastern Capital Funding, LLC v
Burton**

2007 NY Slip Op 32917(U)

September 10, 2007

Supreme Court, Nassau County

Docket Number: 3028-07/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x
**In the Matter of the Petition of
NORTHEASTERN CAPITAL FUNDING, LLC
for the Approval of Transfer of Structured
Settlement Payment Rights
In Accordance with GOL §5-1701,**

Petitioner,

-against-

**MEAGHAN R. BURTON a/k/a MEAGHAN
BURTON, ALLSTATE ASSIGNMENT COMPANY
and ALLSTATE LIFE INSURANCE COMPANY OF
NEW YORK,**

Respondents.
_____ x

Index No. 013028/07

Motion Dated: 7/30/07

Motion Submitted: 9/04/07

Motion Sequence: 001

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Petitioner Northeastern Capital Funding, LLC brings this proceeding to seek approval of the Transfer of Structured Settlement Payment Rights. Meaghan R. Burton a/k/a Meaghan Burton, the Payee seeks to transfer one lump sum payment, in the amount of \$80,000.00 due on April 1, 2012 and monthly payments of \$656.11, increasing by 3% every May 1st, commencing on September 1, 2007 through and including April 1, 2017. There was no opposition, and in fact, Ms. Burton appeared in support of the application.

The Structured Settlement Protection Act (SSPA), General Obligations Law §5-1701

et seq. was enacted “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, 769 N.Y.S.2d 817 (Sup. Ct., Queens Co., 2003); *Matter of 321 Henderson Receivables, L.P., [Martinez]*, 11 Misc.3d 892, 816 N.Y.S.2d 298 [Sup.Ct., N.Y.Co., 2006]). The Legislature, was concerned about the allure of quick and easy cash. (Sponsor’s Mem. Bill Jacket L2002, Ch. 537). The Statute, as set forth in Title 17 of the GOL, requires Petitioners to follow a specific procedure and the Court to review the statutory criteria and make specific findings that the terms are fair and reasonable and that the transaction is ultimately in the best interests of the Payee. Courts should not be mere rubber stamps for the proposed sale of structured settlement payments. (*Matter of Settlement Capital Corp. [Ballos]*, *supra*; *Matter of 321 Henderson Receivables, L.P., [Martinez]*, *supra*). A review of reported opinions reflect that when the Court applies the statutory criteria most applications fail because inevitably the terms favor the factoring company rather than the Payee.

The Courts and Legislature are cognizant of the fact that an adult is generally capable of determining what is in their best interests. While that is true of their structured settlement payment rights as well, the Legislature has mandated that the Court examine the transaction to ascertain whether it is truly in the Payee’s best interest. 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 unforeseen change in circumstances that would justify the sale of rights to future payments. (*Id.*).

PROCEDURE

Initially, the Court will review whether this Petition is procedurally sound. Petitioner correctly commenced a special proceeding seeking approval of a transfer of a structured settlement in this Court, the Supreme Court of the County in which the Payee resides.

A copy of the Notice of Petition and Petition shall be served upon all interested parties at least twenty (20) days before the time the Petition is noticed to be heard. Here the Petition was served with an Order to Show Cause to be heard on August 31, 2007. Oral argument was heard on September 4, 2007. An affidavit of service establishes that the Payee was served on August 7, 2007. Allstate Insurance Company of New York and Allstate Assignment Company were served on August 6, 2007.

Pursuant to GOL §5-1705(d)(I) a copy of the Transfer Agreement was included as Exhibit D. Lacking, despite counsel's affirmation that it was annexed, however, was proof of notice pursuant to GOL §5-1703. A copy of the Disclosure Statement was provided as Exhibit A, but there was no affidavit of service by first class mail and certified mail, return receipt requested or United States Postal Service Priority Mail. The document appears to be signed by the Payee, who supports and joins in this application.

The Payee was advised in writing by the Transferee to seek independent professional advice regarding the transfer and has received such advice. GOL §5-170(c). The Payee acknowledged speaking with an attorney, who did not provide an affidavit in support of this application, did not represent her in the underlying action and apparently advised the Payee that she was 'giving up a lot of money'. Under the circumstances, I do not find that the independent advisor endorsed the proposed sale. (See generally: *Matter of Settlement Funding of NY, [Asproules]*, 1 Misc.3d 910(A), 781 N.Y.S.2d 628 (Sup.Ct., Ontario Co., 2003) citing *Matter of Settlement Funding of N.Y., [Cunningham]*, 195 Misc.2d 721, 761 N.Y.S.2d 816 [Sup.Ct., Rensselaer Co., 2003]).

It does not appear that the transfer contravenes any applicable Statute or the Order of any Court or other government authority. (GOL §5-1706(d). The Transfer is written in plain language and in compliance with GOL §5-1706(e)).

BEST INTERESTS

Turning now to the substance of the Petition, the Court must find that the transfer is in the best interest of the Payee and whether the transaction, including the discount rate used to determine the gross advance amount and fees and expenses used to determine the net advanced amount are fair and reasonable. GOL §5-1706(b).

Such findings are made on a case by case basis. (*Matter of Barr, 321 Receivables Henderson LLP v. Hartford Life Insurance Co.*, 4 Misc.3d 1021A, 798 N.Y.S.2d 342, 2004 N.Y. Slip Op. 50980(U) (Sup.Ct., Nassau Co., 2004); *Matter of Settlement Capital Corporation, [Ballos], supra*). Developing case law and the intent of the statute suggest the Court consider (1) the Payee's age, mental capacity, physical capacity, maturity level, independent income and ability to support dependents; (2) purpose of the intended use of funds; (3) potential need for future medical treatment; (4) the financial acumen of the Payee; (5) whether Payee is in a hardship situation to the extent that he or she is in dire straits; (6) the ability of the Payee to appreciate financial consequences based on independent legal and financial advice; and (7) the timing of the application. (*Matter of Settlement Funding of*

N.Y., [Platt], 2 Misc.3d 872, 774 N.Y.S.2d 635 (Sup.Ct., Lewis Co., 2003); *Matter of Settlement of N.Y., [Ballos]*, *supra*; *Matter of Barr, 321 Henderson Receivables LLP v. Hartford Life Insurance Co., supra*).

The affidavit of Payee established that she is twenty (20) years old, single and without children. She is unemployed and residing with her mother. Her father is deceased. She indicated that no further medical treatment would be necessary.

The Payee plans to pay off her mother's debt and help with the expenses for her mother's house, which is in "pre-foreclosure". She expressed an earnest desire to help her mother because in her mind, there is no one else to do so. (See, *Matter of 321 Henderson Receivables, L.P., [Martinez]*, *supra*). While Ms. Burton impressed the Court as a loving and devoted daughter, she seemed young for her age, shy, unsophisticated and perhaps caught up in the lure of fast money and quick solutions to problems that will outlast the \$96,000.00 pre-tax proceeds.

In addition to helping to pay her mother's debt, Ms. Burton wants to use the proceeds to pay tuition. She has been accepted to school and plans to become a medical assistant. Ms. Burton also wants to buy a car to commute to school due to the lack of public transportation. There is no indication that the Ms. Burton researched the rates for education loans or car loans or explored any other option to accomplish her stated goals.

The Courts have consistently declined to approve transfers in similar cases. Payee's plan to invest in recording equipment was not approved because the Court found that he would have to more than double his initial investment in order to break even, an event the Court did not consider likely. (*Matter of Settlement Funding of N.Y., [Cunningham]*, *supra*). Conclusory statements that the money was needed to improve familial living status, consolidate debt and provide funeral arrangements for his dying mother-in-law were insufficient to justify a transfer. (*Matter of Settlement Capitol Corp., [Ballos]*, *supra*). Payee's desire to pay cash for a used car, pay old debts, furnish his mobile home and open a savings account did not convince the Court that the proposed transfer was in the Payee's best interest. (*Matter of Settlement Funding of N.Y., [Asproules]*, *supra*). Conclusory statements that Mr. DeMallie wanted to "take advantage of currently low mortgage rates" without sufficient clarification of his financial situation to support his choice failed to satisfy the Court that the transaction is appropriate. (*Matter of 321 Henderson Receivables Ltd. Partnership, [DeMallie]*, 2 Misc.3d 463, 769 N.Y.S.2d 859 [Sup.Ct., Monroe Co., 2003]). Absent a pressing hardship or a level of understanding of the financial ramifications that an immediate sale of a future stream of payments in exchange

for a short term windfall, the Court declined to approve the transfer. (*Matter of Settlement Capital Corp [Yates]*, 12 Misc.3d 1198 (A), 824 N.Y.S.2d 770 [Sup.Ct., Kings Co., 2006]).

As previously indicated, Payee did consult an attorney, but did not consult a tax specialist or financial analyst to determine the tax implications of this proposed transfer. She is not required to do so by statute. The Court, however, is not convinced that the proposed transfer is the best alternative available to Payee or that she has a full appreciation of the future impact on her finances if the transfer is approved. (See, *Matter of 321 Henderson Receivables, L.P., [Martinez], supra*). Indeed, she looked to her mother for information regarding the attorney, as well as the status of the mortgage on her mother's property, when questioned by the Court. The proposed transfer will eliminate all payment to Ms. Burton until 2012 at which time she will receive the balance of the \$125,000 lump sum, which is being reduced by the proposed transfer to \$45,000.00, followed by a final payment of \$125,000.00 on April 1, 2017.

FAIR AND REASONABLE

Focusing attention now on the financial aspects of the proposed transaction the Court must determine whether the terms 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. Here, Petitioner alleges the applicable discount rate is 5.6%. Petitioner claims the present value of the \$167,634.28 in structured payments to be transferred is \$127,305.77. There is no proof in admissible form, by an independent source, to establish that the discount rates are fair and reasonable

The Disclosure Statement states that Allstate Life Insurance Company of New York will not provide a quote so Petitioner set forth the cost of similar annuities from ING Golden Select and Lincoln Benefit Life, which as of June 15, 2007 cost \$130,103.84 and \$135,551.73, respectively. The actual quotes from ING and Lincoln were not provided, nor was there an affidavit from Allstate indicating that they refused to provide a quote. (See, *Matter of 321 Henderson Receivables, [Fontana]*, 13 Misc. 3d 1216(A), 824 N.Y.S.2d 759 [Sup Ct., Suffolk Co., 2006]). The Disclosure Statement is signed only by Ms. Burton. (*Matter of Settlement Funding of N.Y., LLC v. Utica Mutual Insurance Co.*, 16 Misc.3d 1124(A), 2007 N.Y. Slip Op. 51563(U) [Sup.Ct., Suffolk Co., 2007]).

While the rate of 11.7% is more favorable than some others cited in reported cases

it is still comparable to credit card rates. Credit cards are unsecured and the Court finds that this is a fairly secure investment and should not be equated with an unsecured revolving credit card. (*Matter of 321 Henderson Receivables Ltd. Partnership, [DeMallie], supra; Matter of Rapid Settlements, Ltd., [Phillips]*, 6 Misc.3d 1030(A), 800 N.Y.S. 355 [Sup.Ct., Courtland Co., 2004]). It is noted that education loans and car loans are generally provided at lower rates and the payee's monthly income could be used for her car payments, while the education loan would be deferred until she completes her schooling. No proof was offered regarding the Payee's mother's financial difficulties, but it is her responsibility to address those needs without negatively impacting on her daughter's financial future and security.

This structured settlement was approved on March 8, 2006 and there was no proof of any significant change in circumstances, which would warrant selling the future payments at a substantial discount just over a year after the settlement was found to be in the Payee's best interest.

This Court does not find, therefore, that the terms are fair and reasonable.

For the foregoing reasons the Court finds the Petition to be procedurally deficient; that the Petitioner has failed to establish that the proposed transfer is in the Payee's best interest and further Petitioner failed to establish that the transaction is fair and reasonable.

A copy of this Decision and Order shall be annexed to any future application by Ms. Burton to transfer her structured settlement funds.

This constitutes the Decision and Order of the Court.

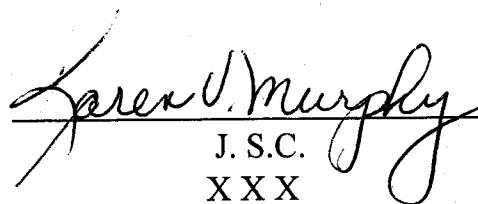
Accordingly, it is hereby:

ORDERED AND ADJUDGED, that the petition is in all respects denied and the proceeding is dismissed.

Dated: September 10, 2007
Mineola, N.Y.

ENTERED

SEP 14 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE


J. S.C.
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