

Matter of Emerald Funding Corp. v Buchanan

2008 NY Slip Op 30542(U)

February 15, 2008

Supreme Court, Nassau County

Docket Number: 8373-06/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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TRIAL TERM PART 48

**In the matter of application of
EMERALD FUNDING CORP.,**

INDEX NO.: 8373/06

Petitioner,

MOTION DATE: 11-13-07

-against-

SUBMIT DATE: 1-24-08

SEQ. NUMBER - 002

**For Approval of a Transfer Of A Structured
Settlement Payment Right of
LIVINGSTON L. BUCHANAN, JR.
To EMERAL FUNDING CORP.**

MOTION DATE: 1-10-08

SUBMIT DATE: 1-24-08

SEQ. NUMBER - 003

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The following papers have been read on this motion:

- Notice of Petition, dated 10-11-07.....1**
- Order to Show Cause, dated 12-19-08.....2**
- Brief in Opposition, dated 1-16-08.....3**
- Reply Affirmation, dated 1-23-08.....4**

The motion by Emerald Funding Corp. pursuant to CPLR 2211 and CPLR Article 51 for an order enforcing a prior order of the Court dated July 5, 2006 is denied. The motion by proposed intervenor Settlement Capital Corporation to vacate the prior order dated July 5, 2006 and thereupon to intervene is granted. The caption of the proceeding shall henceforth include "Settlement Capital Corporation, Intervenor." The intervenor shall answer or move with regard to the petition as set forth in this order.

By way of order dated July 5, 2006 ("2006 order"), this Court approved the sale of the right to collect certain annuity payments by Livingston Buchanan, Jr., beneficiary of the

[* 2] .
annuity policy, to petitioner Emerald Funding Corp. (“Emerald Funding”), for the sum of \$49,688. This was the result of an application made under the Structured Settlement Protection Act, codified as General Obligations Law § 5-1701 *et seq.*

The annuity contract that lies at the heart of this matter had been issued by Executive Life Insurance Company of New York (“ELNY”), and is owned by Insurance Company of the State of Pennsylvania. The annuity had been purchased on behalf of defendants in a personal injury action under a 1986 infant compromise order in favor of Buchanan, who was then not of legal age.

The order provided, among other things, that annuity payments should be \$1000 per month for life, compounded at 3% annually, and a series of nine (9) lump sum payments, three of which (for \$50,000 [October 2008], \$100,000 [October 2013] and \$100,000 [October 2018]) have not yet come due. The 2006 order granted by the undersigned approved a sale of a portion of the monthly payments due through 2018, and a portion of the lump sum payment due in 2018.

The file containing the papers submitted in support of the 2006 application, of which the Court takes judicial notice, includes among other documents affidavits of service and a “Structured Settlement Questionnaire.” Buchanan knew that this would be submitted to the Court, as he was served with a copy of this and all papers, and signed a receipt for the same. The other parties stated to have been served were the Insurance Company of the State of Pennsylvania and ELNY. There is no affidavit of service on Settlement Capital Corporation (“SCC”).

At question 17b, Buchanan was asked if he had any outstanding judgments. He

answered "No". At question 23, he was asked, "Have you ever sold or assigned any of your structured settlement payments(including pledging the payments as collateral to repay a loan)?" He answered "No". The Court also notes that in response to question 25, Buchanan gave his occupation as "Paralegal."

On this application, the petitioner submits an affidavit from Buchanan in which he states that beginning October 12, 2006 his monthly payments were reduced from \$1,304.77 to \$843.92, as he had sold the right to collect the difference to Emerald Funding. He states that he has been advised by Emerald Funding that it has not received the deducted amount, and as a result the transaction approved by the Court had not been completed and he had not received his lump-sum payment. He indicates that this is important to him as a means of clearing up debts, and that he is now in default on student loans. Petitioner also has submitted the affidavit of one Alexander M. Michelini, the President of Emerald Funding. Michelini confirms that although the owner of the annuity, Insurance Company of the State of Pennsylvania, acknowledged receipt of the 2006 order and consented to having the annuity issuer direct the payments as indicated therein, there has been no payment to Emerald Funding made. Petitioner thus seeks the assistance of the Court in enforcing the 2006 order.

This the Court will not do. By way of order to show cause and documentary evidence, the proposed intervenor, SCC, which like Emerald Funding also purchases rights in annuity contracts from beneficiaries thereof, has demonstrated the existence of facts that render any enforcement of the 2006 order inappropriate, and supports the vacatur of that order pursuant

to CPLR 5015(a)[4] (“lack of jurisdiction to render the judgment or order”) and CPLR 5015(a)[3] (“fraud, misrepresentation, or other misconduct of an adverse party”). Those facts also support SCC’s intervention.

By way of an affidavit of its Chief Financial Officer, Jean Litzler, and annexed documents, SCC has presented uncontradicted proof that 1) in 2001 and 2002 Buchanan made four agreements with SCC under which he sold rights to payment under the same annuity described above, which included a portion of the monthly payments due through March of 2012 and a portion of the \$50,000 payment due in October, 2008; 2) gave a first priority security interest in “any and all” money due under the annuity; 3) SCC filed UCC Financing Statements with regard to the foregoing with the New York State Secretary of State; 4) after May of 2004 SCC did not receive payments under its purchase agreements, and alleges that Buchanan had diverted payments away from SCC; 5) SCC began litigation against Buchanan in Texas, which resulted in a 2005 judgment against him for money damages and declaratory relief, the latter of which included a declaration by the Texas Court that SCC was entitled to enforce its security interest in accord with the UCC, and to collect what was owed directly from ELNY and/or the separate administrator of the annuity (stated to be Met Life), and that such security interest “is hereby foreclosed”; 6) at the request of ELNY the judgment was amended to make it clear that SCC was entitled to collect from any and all payments due under the annuity; and 7) it is presently owed \$27,250, which it has been unable to collect.

SCC never was served with the application that led to the 2006 order, although under the annuity it clearly had either “continuing rights or obligations under such structured

settlement”, requiring such service. General Obligations Law §§ 5-1701(f), 5-1705(c). Claiming that Buchanan and Emerald proceeded in violation of its rights, it asks for vacatur of the 2006 order and intervention in the proceeding.

While it appears from a review of the documents that Buchanan did not sell any particular payment twice, in that sufficient value exists in both the monthly payment stream and in the lump sums due to him to cover the sales to both SCC and Emerald, it also is apparent that SCC is correct in complaining that its rights were violated and that it should be given an opportunity to protect the same. In that regard, the Court need not rule on Emerald’s contention that the UCC provisions upon which SCC relies for its security interest are inapplicable to the present annuity payments. For purposes of intervention, which is one of the two branches of SCC’s motion before this Court, the doctrine of Full Faith and Credit is sufficient in that a sister state court, whose jurisdiction over Buchanan is not disputed, ruled that such security interest existed and held that such interest could be enforced. *See generally, Buckeye Retirement Co., LLC v Lee*, 41 AD3d 183 (1st Dept. 2007); *Cadle Co. v Tri-Angle Assoc.*, 18 AD3d 100 (1st Dept. 2005). Under these circumstance, SCC has standing to assert its rights as an “interested party” under General Obligations Law § 5-1701(f), and thus under this statute is a “necessary party” to this proceeding. *See*, CPLR 1012(a). Intervention is therefore appropriate.

Further, as noted above SCC also had to be served with the petition but was not, requiring vacatur pursuant to CPLR 5015(4) as a matter of jurisdiction and due process. *See, Hall Dickler Kent Goldstein and Wood, LLP v McCormick*, 36 AD3d 758 (2d Dept. 2007); *Ismailov v Cohen*, 26 AD3d 412 (2d Dept. 2006). In addition, the misrepresentations made


[6]
by Buchanan in his application to Emerald, which he knew or should have known was destined for court review – especially given the fact that he has worked as a paralegal – renders the 2006 subject to vacatur for that reason as well. CPLR 5015(a)(3); *see Eng v Sichenzia*, 7 AD3d 754 (2d Dept. 2004). The 2006 order is therefore vacated.

Finally, the Court notes that it cannot agree with SCC that in view of the proceeding envisioned by the General Obligations Law no proposed pleading needs to be submitted, as is required of an intervenor by CPLR 1014. While the proceeding clearly is designed to lead to a rapid adjudication, the underlying statute itself calls for the matter to be processed as a special proceeding. Responses are to be made within periods established by the General Obligations Law. General Obligations Law § 5-1705(a). While this affects certain time periods found in Article 4 of the CPLR, it does not rule out the need for answer or motion, as contemplated by this Article – especially where, as here, the papers submitted do not articulate the ultimate relief being sought by the intervenor. As the 2006 order must be vacated, SCC will be given an opportunity to serve an answer or make a motion addressed to the petition pursuant to CPLR 403 or CPLR 404. Such answer or motion must be served no later than **March 7, 2008**. After these papers and any reply are submitted, the Court will rule on the petition.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 15, 2008

ENTERED 
HON. DANIEL PALMIERI
Acting Supreme Court Justice
FEB 20 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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