

**Matter of Settlement Funding of New York, L.L.C. v
New York Life Ins. & Annuity Corp.**

2008 NY Slip Op 31311(U)

April 14, 2008

Supreme Court, New York County

Docket Number: 0116827/2007

Judge: William J. Davis

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

**In the Matter of the Petition of
SETTLEMENT FUNDING OF NEW YORK, L.L.C.,
for Judicial Approval of Absolute Assignment and
UCC Article 9 Security Agreement with Lizette M.
Baptiste a/k/a Lizette Baptiste, pursuant to Article 5
Title 17 of the New York General Obligations Law,**

**DECISION AND
ORDER**

Index No. 116827/07

Petitioner,

-against-

**NEW YORK LIFE INSURANCE & ANNUITY
CORPORATION and NEW YORK LIFE
INSURANCE COMPANY**

Respondents.

FILED

MAY 01 2008

**COUNTY CLERK'S OFFICE
NEW YORK**

WILLIAM J. DAVIS, J.:

In this special proceeding brought by Notice of Petition, the petitioner Settlement Funding of New York, L.L.C. ("petitioner" or "Settlement Funding") seeks judicial approval pursuant to General Obligations Law § 5-1701, *et seq.*, known as the Structured Settlement Protection Act ("SSPA"), of the transfer and sale to it of a portion of Lizette M. Baptiste's structured settlement annuity issued by respondents. Respondents have not opposed the relief requested. At issue on this application is whether approval of the proposed transfer would be consistent with the letter and spirit of the SSPA.

In an order dated March 11, 2008, the matter was set down for a hearing in Part 33 of this Court on April 8, 2008. At the hearing, petitioner appeared by its attorney Ian M. Chaikin, Esq. Ms. Baptiste also appeared and testified thereby providing the court with an opportunity to evaluate her credibility, maturity and financial acumen and the extent to which she understood the full import of the transfer transaction. Mr. Chaikin made a statement on the record in support of the application contending, not surprisingly, that the purchase price of the instant transaction was fair, reasonable and consistent with the applicable market rate. Decision was reserved.

Factual Background

The hearing testimony together with the petition and its supporting documents establish the following facts. Pursuant to the terms of an infant's compromise order, dated May 23, 2001, a personal injury action commenced on Ms. Baptiste's behalf by her mother and natural guardian to recover damages for injuries Ms. Baptiste suffered in a motor vehicle accident when she was nine years old was settled for the total present value of \$100,000. In accordance with the settlement agreement, an annuity was purchased from respondent New York Life Insurance and Annuity Corporation with settlement proceeds with a present value of \$66,279.25 to fund the following guaranteed annuity payments to Ms. Baptiste: commencing August 17, 2007 and continuing through August 17, 2010 annual lump sum payments of \$10,000.00; commencing August 17, 2007 and continuing for 46 months until June 17, 2011, monthly payments of \$400.00; a lump sum payment of \$20,000.00 on June 17, 2011; a lump sum payment of \$30,000.00 on January 21, 2014; and a lump sum payment of \$19,032.00 on January 21, 2019.

The proposed transfer and sale for which petitioner seeks judicial approval consists of 3 annual payments of \$5,000.00 each due from August 17, 2008 through August 17, 2010 (*i.e.*, half of the proceeds of each of the annual payments due); \$10,000.00 lump sum payment due June 17, 2011 (*i.e.*, half of the lump sum payment due); \$15,000.00 lump sum payment due January 21, 2014 (*i.e.*, half of the lump sum payment due); and \$9,516.00 lump sum payment due January 21, 2019 (*i.e.*, half the lump sum payment due) for an aggregate total of \$49,516.00. The alleged present value of the payments to be transferred, discounted at 5.20%, is \$38,286.03. The annual discount rate for the transaction is stated to be 15.00%, compounded monthly. Applying this rate, the gross advance amount for which approval is sought is \$25,912.00, which petitioner reduces further by legal fees in the sum of \$2,000.00 and processing fees in the sum of \$200.00, leaving a net advance amount of \$23,712.00. This constitutes 47.88% of the total aggregate value of the payments to be transferred and, if petitioner's own figures are used, 61.93% of the discounted present value.

Ms. Baptiste is presently 19 years old and single with no dependents. At the hearing, she testified that she is fully emancipated from parental support and lives alone in a studio apartment in Manhattan for which she pays monthly rent of \$500.00. In her affidavit in support of the petition, sworn to on November 21, 2007, Ms. Baptiste indicated that she was employed as a hostess in a

Staten Island restaurant earning \$1,560 per month (@ 18,720.00 annually). She used her first lump sum structured settlement payment of \$10,000, issued on August 17, 2007, to purchase an automobile for commuting to her job on Staten Island. She planned to use \$12,000.00 of the proceeds of the transfer and sale to pay her tuition at the College of Staten Island, which she testified was \$1,400 per semester plus expenses for books, and the remaining approximately \$11,700.00 to obtain an apartment, pay the security deposit and prepay rent for 1 year in advance. Ms. Baptiste stated that she intends to look for an apartment on Staten Island to be closer to her job and school. She claimed that she had applied for financial aid, but was denied because her mother claimed her as a dependent and had income in excess of the eligible level. Ms. Baptiste had not applied for any student loans as she did not want to incur debt. She further stated that she considered the transfer to be an "efficient use" of her money because it would enable her to improve her standard of living through obtaining a college degree in hospitality and, thereafter, securing employment in the hotel and restaurant industry. Ms. Baptiste indicated that paying rent in advance would enable her to concentrate on her studies rather than worrying about meeting her obligation to pay rent. However, she acknowledged at the hearing that upon receiving cash for the transfer she would bank the proceeds and pay her monthly rent as it came due. In addition to the proceeds that are the subject of this transaction, Ms. Baptiste will continue to receive guaranteed monthly payments and periodic lump sum payments under the remaining portion of the structured settlement as indicated above. Because she is not transferring all of the guaranteed payments under the structured settlement, Ms. Baptiste contended that she had an alternative source of income in addition to her income from employment so that the transfer would not harm her in any way. Stating that she was provided with and read the disclosure statement, Ms. Baptiste joined in the application on the ground that it would be in her best interest.

In an apparent effort to satisfy the statutory requirement that petitioner advise the payee to seek "independent professional advice" regarding the transfer, the petition was accompanied by an unsworn letter from Andrea M. Arrigo, Esq. indicating that she had discussed the details of the proposed transaction with Ms. Baptiste and rendered advice concerning the legal, tax and financial implications thereof. Ms. Baptiste stated at the hearing that petitioner had provided her with a list of attorneys she could consult and Ms. Arrigo was one of the names on the list. Ms. Baptiste

indicated that she chose Ms. Arrigo simply because her name was first on the list rather than due to any knowledge of Ms. Arrigo's qualifications to provide relevant advice with respect to the transaction.

Discussion

The SSPA was enacted in 2002 in response to the growing number of finance companies using aggressive tactics and the allure of quick cash to induce structured settlement payees, like Ms. Baptiste, to cash out future payments at substantial discounts and thereby prematurely dissipate their awards with the effect of depriving the payees and their families of the future financial security their structured settlements were intended to provide (*see, Singer Asset Finance Co. v Melvin*, 33 AD3d 355, 357 [1st Dept. 2006]). The statute requires petitioners to follow a specific procedure as a condition precedent to judicial approval of an application for transfer of a structured settlement . It further mandates that the Court conduct a two-prong inquiry and make specific findings as to whether 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 the fees and expenses used to determine the net advance amount, are fair and reasonable (GOL § 5-1706 [b]).

In order to determine whether a transfer meets the best interest standard, courts have been guided by the expressed legislative intent which was to limit transfers to true hardship cases (*see, Matter of Settlement Capital Corp. [Yates]*, 12 Misc3d 1198 [A] [Sup. Ct., Kings Co., 2006]; *Matter of 321 Henderson Receivables [Martinez]*, 11 Misc3d 892, 894 [Sup. Ct., N.Y. Co., 2006]; *Matter of Settlement Capital Corp. [Ballos]*, 1 Misc3d 446, 450 [Sup. Ct., Queens Co., 2003]).

1. *Procedure*

Initially, the Court finds that petitioner properly commenced this special proceeding seeking approval of a transfer of a structured settlement in this Court, the Supreme Court of the County in which the payee presently resides and in which the original structured settlement agreement was approved. The record establishes that the petition and supporting papers were served upon all interested parties at least twenty days before January 15, 2008, the time at which the petition was noticed to be heard (GOL § 5-1705 [c]). Pursuant to GOL § 5-1705 [d][i], the petition contained a copy of the transfer agreement, the disclosure statement and the requisite proof of 10-days notice

of that statement, and a statement by Ms. Baptiste that she has no dependents. Given that the procedural requirements have been satisfied, the Court will proceed to examine the substance of the petition applying the two-pronged “best interest” and “fair and reasonable” test.

2. *Best Interest Standard*

The best interest standard under the SSPA necessitates a case-by-case analysis to determine whether the proposed transfer of structured settlement payments will provide the needed financial relief without irreparably impairing or jeopardizing the financial security provided to the payee by the periodic payments (*see, Matter of Settlement Capital Corp [Ballos]*, 1 Misc3d *supra* at 455; *see also, Matter of Settlement Capital Corp. [Drew]*, 2007 WL 2174917 [Sup. Ct., Queens Co., 2007]; *Matter of 321 Henderson Receivables [Fontana]*, 13 Misc3d 1216 [A] [Sup. Ct., Suffolk Co., 2006]; *Matter of Settlement Capital Corp. [Yates]*, 12 Misc3d 1198 [A], *supra*). Neither the SSPA nor the Legislature defined the best interest standard. Decisional law and the intent of the statute suggest that the Court in making a best interest determination consider such factors as the payee’s age; mental and physical capacity; maturity level; ability to show sufficient income that is independent of the payments sought for transfer; potential need for future medical treatment; the financial acumen of the payee; whether the payee is in a hardship situation; the ability of the payee to appreciate financial consequences based on truly independent legal and financial advice; and the timing of the application (*see, Matter of Settlement Capital Corp. [Ballos]*, *supra.*; *Matter of Settlement Funding of N.Y. [White]*, 2007 WL 4562630 [Sup. Ct., Nassau Co., 2007]). In spite of the express legislative intent that transfers of structured settlement payments be limited to true hardship cases, New York courts have been reluctant to fashion a best interest standard predicated solely on a finding of economic “dire straits” (*see, Matter of Settlement Funding of N.Y. [Platt]*, 2 Misc3d 872, 876 [Sup. Ct., N.Y. Co., 2003]; *Matter of Settlement Capital Corp. [Ballos]*, *supra*). Rather, hardship is simply one factor to be considered.

Applying the foregoing factors to the instant case, I am constrained to find that the proposed transfer is not in Ms. Baptiste’s best interest. Although Ms. Baptiste presented as an intelligent, well-spoken young woman without any apparent mental disability or physical incapacity, exhibited a maturity level appropriate for her age, and reported being gainfully employed, the Court is not

satisfied that Ms. Baptiste appreciates the financial terms and ramifications that the immediate sale of the future payments under the proposed terms in exchange for a short-term windfall would pose to her future. The Court commends Ms. Baptiste's independence and desire to further her education and improve her employment opportunities. Conversely, her decision to use her first lump sum payment to purchase an automobile with all of its attendant expenses rather than apply the monies toward her education reflects questionable judgment and an absence of mature financial planning including researching other options that would further her stated educational goals for the subject transfer monies without depleting her future guaranteed payments. There is no indication that Ms. Baptiste having become fully emancipated from her parents would not now be eligible for financial aid based upon need or that she has researched the rates for educational loans to determine whether that would make greater financial sense than selling her future guaranteed payments at a substantial discount.

The timing of this application is also significant and the record does not adequately explain the reason Ms. Baptiste could not wait a few months (August 17, 2008) and apply her next lump sum payment (\$10,000) to her college tuition. Given the modest yearly tuition of about \$2,800 this sum would more than adequately cover both tuition and books and provide additional monies to assist with rent. Although her present monthly income of \$1,560 from her employment and the \$400.00 guaranteed structured settlement payment is modest, it is sufficient to cover Ms. Baptiste's monthly rent at her current residence with a monthly surplus of \$1,460. Thus, her circumstances do not demonstrate financial hardship sufficient to warrant approval of the transaction.

As previously noted, Ms. Baptiste consulted a lawyer obtained from a list of attorney's provided to her by petitioner. However, the court does not find either Ms. Baptiste's testimony in this regard or the *pro forma* unsworn letter of such attorney, Ms. Arrigo, adequate to satisfy the "independent advice" requirement of the statute. There is no foundational showing that Ms. Arrigo possessed the qualifications to properly evaluate whether the discount rate and fees and expenses were fair and reasonable and, given Ms. Baptiste's particular circumstances, whether the transfer was in her best interest. Ms. Arrigo indicated that she encouraged Ms. Baptiste "to explore all alternative forms of financial arrangements available" which this Court finds equivocal on the question of whether Ms. Arrigo endorses the transfer. Indeed, as other courts have held, "unless a proposed

transferor's advisor submits an affidavit expressly stating that he or she endorses the transfer and gives specific reasons for doing so, a proposed transfer should be treated as if it had no independent advisor's endorsement at all" (321 *Henderson Receivables [Fontana]*, 13 Misc3d 1216 [A], *supra*; *Matter of Settlement Funding [Cunningham]*, 195 Misc2d 721, 723 [Sup. Ct., Rensselaer Co., 2003]). What this Court also finds disquieting is that Ms. Arrigo as the purported independent professional adviser did not continue to represent Ms. Baptiste in this application; rather, Ms. Baptiste appeared at the hearing with petitioner's attorney who is certainly not an impartial or disinterested advocate for Ms. Baptiste.

In sum, the Court determines that Ms. Baptiste's best interests are more appropriately served by denying the application to transfer a portion of the structured settlement. Although the Court's inquiry could end here, I will proceed to consider the second prong of the analysis, to wit, whether the 15.00% 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]).

2. *Fair and Reasonable Standard*

There is no statutory guidance and little consistent caselaw upon which to determine whether the terms of a proposed transfer, specifically the discount rate and related costs of the transfer, are fair and reasonable. Here, the disclosure statement fails to list a price quote from respondent, the original annuity issuer. Instead the statement simply lists two other amount, \$46,905.78 and \$39,083.31, presumably from other annuity issuers, without providing any information identifying who provided these price quotes, how these numbers were derived, or any other information that might assist the court in evaluating this information. On this basis, petitioner has failed to satisfy the requirement of GOL § 5-1703 (d). Nor does the disclosure statement or other supporting documents to the petition show how the 15.00% discount rate was determined or demonstrate that it is fair and reasonable.

Other courts of this State have rejected proposed transactions with similar discount rates as not fair and reasonable (*see, Matter of Settlement Capital Corp. [Drew]* 2007 WL 2174917, *supra* [15.901%]; *Matter of Settlement Capital Corp. [Yates]*, 12 Misc2d 1198 [A], *supra* [15.049%]; *Matter of Settlement Capital Corp. [Ballos]*, 1 Misc3d 446, *supra* [15.591%]; *Matter of Settlement*

Funding [Cunningham], supra [15.46%]). Here, the Court similarly finds that petitioner has failed to establish that the discount rate at issue is fair and reasonable.

Lastly, the Court finds that the imposition of attorney's fees in the sum of \$2,000.00 and a processing fee of \$200.00 to be unreasonable. GOL § 5-1703 (f) requires the disclosure statement to set forth "an itemized listing of all commissions, fees, costs, expenses and charges payable by the payee or deductible from the gross amount otherwise payable to the payee and the total amount of such fees." In the disclosure statement, petitioner simply makes a blanket statement of fees being charged to the payee, but fails to itemize either the legal fee or processing fee or to provide other evidence such as an attorney's affirmation to support how these fees were calculated or what they were comprised of. Under these circumstances, the Court is unable to make a finding that the fees and expenses are fair and reasonable (*see, Matter of 321 Henderson Receivables [Fontana]*, 13 Misc3d 1216 [A], *supra*; *Matter of Settlement Capital Corp. [Yates]*, 12 Misc3d 1198 [A], *supra*; *Settlement Funding of N.Y. [Ocasio]*, 11 Misc3d 1061 [A] [Sup. Ct., Bronx Co., 2006]; *Matter of Settlement Funding of N.Y. [Cunningham]*, 195 Misc2d *supra* at 724-725).

Conclusion

Based upon the foregoing discussion, this Court finds that petitioner has failed to meet its burden of establishing that the subject transaction is in Ms. Baptiste's best interest or that the terms of the transaction are fair and reasonable.

This constitutes the decision, order and judgment of the Court.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is in all respects denied and the proceeding is dismissed; and it is further

ORDERED that petitioner shall serve a copy of this order and judgment with notice of entry upon all interested parties and upon the Clerk within 30 days of entry.

DATED: April 14, 2008

