

**Matter of Settlement Funding of N.Y., LLC v
American Home Assur. Co.**

2008 NY Slip Op 31574(U)

June 6, 2008

Supreme Court, New York County

Docket Number: 0100497/2008

Judge: Shirley W. Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. SHIRLEY WERNER KORNREICH

PRESENT: _____

PART 54

Index Number : 100497/2008
SETTLEMENT FUNDING OF NY, LLC
vs
AMERICAN HOME ASSURANCE CO.
Sequence Number : 001
OTHER

INDEX NO. 100497/08
MOTION DATE 2/27/08
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on the motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 6/6/08

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
In the Matter of the Petition of

SETTLEMENT FUNDING OF NEW YORK, LLC,
for Judicial approval of Absolute Assignment and
UCC Article 9 Security Agreement with ROBERTO
OLIVAREZ a/k/a ROBERT OLIVAREZ pursuant to
Article 5 Title 17 of the New York General
Obligations Law

Petitioner,

Index No.: 100497/08

-against-

DECISION
and ORDER

AMERICAN HOME ASSURANCE COMPANY
and AMERICAN INTERNATIONAL LIFE ASSURANCE
COMPANY OF NY,

Respondents.

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is a special proceeding, pursuant to General Obligations Law § 5-701, *et seq.* known as "The Structured Settlement Protection Act" (SSPA), where petitioner Roberto Olivarez, a/k/a Robert Olivarez (Olivarez) seeks judicial approval to assign a portion of the structured settlement annuity he received from a personal injury action in 1991 to petitioner Settlement Funding of New York, LLC (Settlement Funding). Respondents do not oppose.

I. Background

Olivarez is the recipient of a structured settlement annuity (Settlement Annuity) issued by respondents pursuant to the settlement of a 1991 personal injury action. The Settlement Annuity called for Olivarez to receive \$750 per month in guaranteed annuity payments from May 1, 1992 through April 1, 2017, and lump sum payments due as follows: \$10,000 on May 1, 1997;

\$15,000 on May 1, 2002; \$25,000 on May 1, 2007; \$50,000 on May 1, 2012; and \$80,000 on May 1, 2017.

In his affidavit in support of this petition, Olivarez avers the following. He resides at 570 Grand Street, Apt. 2003H, New York, New York with his wife and 2 year old son. Olivarez is employed as a Network Engineer assigned to jobs on a temporary contractual basis. As of December 28, 2007, his last employment contract had expired and he was receiving \$1,755 a month in unemployment benefits. His wife is a Travel Consultant with American Express and earns approximately \$50,000 per year.

In 1999, prior to enactment of the SSPA, Olivarez sold a significant portion of his Settlement Annuity to a third party in return for a quick infusion of cash. Specifically, he executed two transactions assigning his guaranteed monthly annuity payments of \$750 from some point in 1999 through August of 2014, and lump sum payments of \$15,000 on May 1, 2002, \$25,000 on May 1, 2007, and \$50,000 on May 1, 2012, for an undisclosed amount of cash. Olivarez avers he used this cash to fund his education and training as a Microsoft Certified Systems Engineer.

On December 17, 2007, Olivarez entered into an Absolute Assignment and UCC Article 9 Security Agreement with Settlement Funding (the "Settlement Agreement"). Pursuant to the Settlement Agreement, Olivarez agreed to assign Settlement Funding one monthly payment of \$502.61 due him on August 1, 2014, 32 monthly payments of \$750 due him from September 1, 2014 through April 1, 2017, and one lump sum payment of \$75,000 due him on May 1, 2017. In return for this assignment of \$99,502.61, Settlement Funding promised to pay Olivarez \$29,084.72. However, the Settlement Agreement also calls for Olivarez to pay \$2,000 in legal

fees and a processing fee of \$200. Therefore, Olivarez would actually only receive \$26,884.72 in funds at the execution of this transaction. Olivarez avers he intends to use these proceeds to pay off: \$3,200 in credit card debt; \$2,000 in delinquent car payments; an \$8,000 judgment owed his prior landlord; and \$3,000 in back taxes. Olivarez further avers that paying off these debts will improve his credit score so he can obtain a mortgage to finance the purchase of a new home. He states that there are several first time home buyer programs which provide down payment assistance to applicants who demonstrate the ability to manage their finances and have a sufficient credit rating and income level. Therefore, he intends to allocate the remaining \$10,000 he receives from Settlement Funding towards buying a home.

II. *Conclusions of Law*

Title 17 of New York's General Obligations law, known as The Structured Settlement Protection Act, requires judicial approval before an injured plaintiff can sell their rights to future structured settlement payments to a third party. *321 Henderson v. Martinez*, 11 Misc 3d 892, 893 (Sup Ct, New York County 2006). The SSPA was designed to protect recipients of long-term structured settlements from being exploited and deceived by companies assertively seeking to acquire their guaranteed structured settlement payments. *Settlement Funding of New York, LLC v. Allstate Assignment Co.*, 2007 NY Slip Op 51708U, *2 (Sup Ct, Kings County 2007), citing *321 Henderson*, 11 Misc 3d at 893. To ensure such protection, the court must find that "the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependants; 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." *321 Henderson*, 11 Misc 3d at 894, quoting General Obligations Law

5-1706(b). *See also Allstate*, 2007 NY Slip Op at *3 (best interest determination involves broad consideration of payee's facts and circumstances including his age, mental capacity, maturity level, ability to show sufficient income independent of sought after payments, capacity to support his dependents, and stated purposes for transfer request).

To properly apply the best interest standard, courts must be cognizant of how these types of cases function procedurally. *See 321 Henderson*, 11 Misc 3d at 894. The proceeding begins when the company attempting to purchase the structured settlement, called the "Factoring Company," files a notice of petition requesting court approval of its proposed structured settlement purchase. *Id.* The petition is then made returnable in the Motion Submission Part of the Supreme Court. *Id.* The Factoring Company complies with the service requirements of General Obligations Law § 5-1705 by serving the party currently receiving the structured settlement payments (payee/injured plaintiff in the personal injury action) and the structured settlement obligor responsible for distributing the payments. *Id.* at 894-895. Although this proceeding is not technically adversarial, Motion Submissions marks it as being submitted on default. *Id.* at 895. The petition is usually accompanied by an affidavit from the payee consenting to the proposed assignment having been captivated by "the allure of quick and easy cash." *Id.* The structured settlement obligor, who is usually an insurance company, has no reason to oppose the petition since it does not matter to them whether payments go to the payee or a subsequent third party. *Id.*

When the Legislature enacted the SSPA, it "did not intend for the courts to be mere rubber stamps" for Factoring Companies to acquire structured settlement payments. *Id.* quoting *In re Settlement Capital Corp.*, 1 Misc 3d 446, 461 (Sup. Ct., N.Y. County, 2003). The

legislative history clearly states that to avoid the corruption prevalent in these types of transactions, the court must carefully examine and determine whether the proposed sale is truly in the payee's best interest. *Id.* As a result, most courts have denied these petitions on the ground that the proposed sales did not serve the best interest of the payee. *Id.*, citing *Capital Corp.*, *supra*; *Allstate*, *supra*; *Matter of Settlement Funding of New York LLC v. Solivan*, 8 Misc 3d 1006[A], 2005 NY Slip op 50946[U] (Sup. Ct., Kings County, 2005); *Matter of 321 Henderson Receivables L.P. v. D'Amora*, 9 Misc 3d 1110[A], 2005 NY Slip Op 51479[U] (Sup. Ct., Kings County, 2005); *Matter of Barr v. Hartford Life Ins. Co.*, 4 Misc 3d 1021[A], 2004 NY Slip Op 50980[U] (Sup. Ct., Nassau County, 2004); *Matter of Rapid Settlements Ltd.*, 6 Misc 3d 1030[A], 2004 NY Slip Op 51844[U] (Sup. Ct., Cortland County, 2004); *Matter of Taliercio v. Aetna Cas. & Sur. Co.*, NYLJ, Feb. 20, 2004, at 21 col 3 (Sup. Ct., Richmond County); *Matter of 321 Receivables LP v. Williams*, NYLJ, Oct. 20, 2003, at 20 col 3 (Sup. Ct., Queens County); *Matter of 321 Henderson Receivables Ltd. P'Ship v. DeMallie*, 2 Misc 3d 463, 769 NYS2d 859 (Sup. Ct., Monroe County, 2003); *In re Settlement Funding of N.Y., LLC*, 1 Misc 3d 910[A], 2003 NY Slip Op 51638[U] (Sup. Ct., Ontario County, 2003). These denials arise for two reasons. First, the discount rate offered by the factoring company is so large that the payee, contrary to his best interest, ends up selling his structured settlement for a fraction of its value. *321 Henderson*, 11 Misc 3d at 895. Second, the payee usually lacks a viable plan for use of the funds, or a more practicable alternative exists which better serves his interests. *Id.* at 896.

Applying this criteria here, the proposed transaction is neither in Olivarez's best interest nor fair and reasonable. Regarding the best interest prong, Olivarez is a 34 year old married father of a two-year-old child. He is currently collecting unemployment. His wife makes

\$50,000 a year. Olivarez states he intends to use the proposed transaction to pay off: a prior judgment owed to his former landlord; back taxes; credit card debt; overdue car payments; and for a down-payment on a mortgage. How Olivarez, who is collecting unemployment, and his wife, who earns \$50,000 a year, intend to show a sufficient income level to obtain a mortgage in light of the current housing and credit crisis has not been adequately explained. His credit history certainly cannot help. In addition, judging by the family's current struggle in keeping up with bills and expenses, it is clearly not in their best interest to take the remaining \$10,000 and invest it in a house. Olivarez has shown no ability to maintain financial stability and security for his family. In 1999, he sold approximately \$132,000 worth of aggregate monthly annuity payments (\$750 per month from 1999 through August 2014) and \$90,000 worth of aggregate lump sum annuity payments due on May 1 of 2002, 2007, and 2012, to an unidentified Factoring Company for an undisclosed amount of cash. He used this cash to fund his education and training as a Network Engineer. Olivarez has not stated how much his education and training cost. Despite these omissions, the court will assume that neither is valued at anywhere near the \$222,000 worth of aggregate annuity payments he transferred. Had he not sold these annuity payments, he would have received a lump sum payment of \$25,000 on May 1, 2007. This payment would have served to pay off all the debt he is seeking to satisfy here. The SSPA was enacted in 2002 to protect payee's from falling into the quick allure of cash trap that affected Olivarez in 1999.

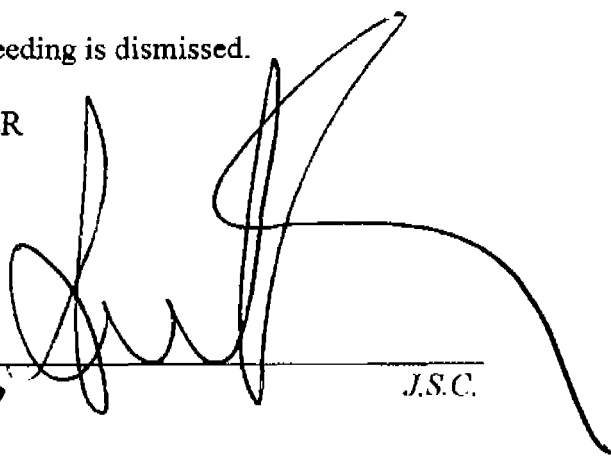
Olivarez also makes no mention as to how he intends to pay for the costs of raising his son. In making a best interest determination, the court must be mindful of the future costs of raising a child. *Allstate*, 2007 NY Slip Op at *3 (cost of raising child is substantial and grows

along with child. In future, greater needs of child may be deprived if payee is permitted to sell substantial benefit for a fraction of its value). Olivarez is set to receive a \$75,000 lump sum payment on May 1, 2017 when his son will be 11 years old. His son's needs would be better served by Olivarez taking this payment in 2017 and investing it directly towards his son's future educational costs and expenses. Therefore, due to the "paternalistic" nature of the statute, the court finds that it is not in Olivarez's or his son's best interest to permit this transaction. *Id.*

Turning to the fair and reasonable prong, Settlement Funding proposes to purchase a portion of Olivarez's structured settlement annuity presently worth \$63,683.60 for \$29,084.72, or 45.67% of its present discounted value. The aggregate amount of structured settlement payments to be transferred is \$99,502.61. Therefore, Olivarez actually will be receiving 29.23% of the aggregate amount of purchased annuity payments. Further, Settlement Funding is charging Olivarez a processing fee of \$200 and \$2,000 in legal fees. As a result, Olivarez will only be netting \$26,884.72 from the sale. It is not fair and reasonable to allow this transaction to proceed where Olivarez is receiving, at present value and in the aggregate, only a fraction of his guaranteed future payments. Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed.

ENTER



J.S.C.

DATE: June 6, 2008
New York, NY

FILED
JUN 10 2008
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NEW YORK