

Matter of Loiseau

2008 NY Slip Op 33331(U)

December 8, 2008

Supreme Court, Queens County

Docket Number: 15736/08

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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In Re: the Matter of the Sale and Transfer of Structured Settlement Payment Rights of ASHLEY LOISEAU, pursuant to and in Accordance with Gen. Oblig. Law §5-1701, et seq.,

Index No: 15736/08
Hearing Date: 10/31/08
Final Submission Date: 11/20/08¹

**DECISION AFTER
STRUCTURED SETTLEMENT
HEARING**

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The following papers numbered 1 to 6 read on this petition for an order approving the transfer of structured settlement payment rights from Ashley Loiseau to petitioner Structured Asset Funding, LLC.

	PAPERS NUMBERED
Notice of Petition-Petition-Affidavits-Exhibits.....	1 - 5
Transcript.....	6

Upon the foregoing papers, it is ordered that the petition for an order approving the transfer of structured settlement payment rights is determined as follows:

Relevant Facts

Petitioner Structured Asset Funding, LLC, (“Asset Funding”) makes the instant application, pursuant to General Obligations Law, Title 17, known as the Structured Settlement Protection Act (“SSPA”), for an order approving the transfer of payment rights vested in Ashley Loiseau (“Loiseau”) under a structured settlement obligated and funded by New York Life Insurance and

¹ At the close of the October 31, 2008 hearing, petitioner Structured Asset Funding, LLC was directed to order the transcript and all additional papers to be considered by this Court on this application by November 14, 2008. Upon petitioner’s failure to do so, the Clerk of this part contacted petitioner on November 20, 2008, and was informed that there were no further submissions forthcoming and it intended to stand on the record already before this Court. Thus, this Court deems the final submission date to be November 20, 2008, and will make its determination accordingly based upon the record before it, including the transcript of the underlying hearing.

Annuity Corporation and New York Life Insurance Company. By hearing dated October 31, 2008, for this Court's determination of the propriety of the application for the transfer of those rights to Asset Funding, Loiseau testified that he is an employed person who lives by himself with no children or dependents, and is employed as a warehouse manager for a packaging company. Loiseau stated, in support of the application for judicial approval of the proposed transfer, and his affidavit in support reiterated, that he is seeking to sell past and future periodic payments through November 5, 2021, and he needs the money to purchase and invest in an established Laundromat.

Discussion

Pursuant to Structured Settlement Payment Right Purchase and Assignment Agreement executed on June 14, 2008, Loiseau transferred to Asset Funding his annuity rights to the following:

8 monthly payments in the amount of \$537.32, commencing on April 5 through November 5, 2008; 156 monthly payments compounded annually at three percent December 5 of each year, commencing on December 5, 2008 in the amount of \$553.44 through November 5, 2021 in the amount of \$789.07; the aggregate amount of the payments totaling \$108,020.56.

In consideration, he agreed to receive a gross advance amount of \$49,500.00, with no other expenses, based upon an annual discount rate of 12.96%. General Obligations Law § 5-1706, entitled, "Approval of transfers of structured settlement payment rights," states the following:

No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been authorized in advance in a final order of a court of competent jurisdiction based upon express findings by such court that:

- (a) the transfer complies with the requirements of this title;
- (b) 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. Provided the court makes the findings as outlined in this subdivision, there is no requirement for the court to find that an applicant is suffering from a hardship to approve the transfer of structured settlement payments under this subdivision;

(c) the payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived such advice in writing;

(d) the transfer does not contravene any applicable statute or the order of any court or other government authority; and

(e) is written in plain language and in compliance with section 5-702 of this article.²

² The Legislative Memorandum in Support [2002 Sess. Law News of N.Y. Legis. Memo Ch. 537 (McKinney's)] relating to the enactment of the Structured Settlement Protection Act, set forth the following as justification for the act:

Structured settlements are a well-recognized means of compensating personal injury victims and workers' compensation claimants. They are negotiated between the injured person's counsel and the other parties to a personal injury action or workers' compensation claim. The structuring of a settlement enables the settlement recipient to receive secure tax-free income over a course of years or a lifetime to provide for future medical care, housing, education, etc. In this way, the proceeds from an award are not dissipated or lost by individuals unaccustomed to managing large sums. Recently a growing number of factoring companies have used aggressive 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. Although transfers of structured settlement payments are generally prohibited by contract (and often prohibited under applicable state law) factoring companies have built a rapidly expanding business around circumventing these prohibitions. This market in the buying and selling of injured individuals' payment streams can pose a hazard to existing recipients of structured settlements and to the public assistance programs on which recipients must often rely, once they have traded away secure income from structured settlements. The market also threatens the viability of structured settlements for injury victims who may need them in the future. This legislation seeks to curtail this practice by limiting transfers of structured settlement payments to true hardship cases. The Act does this by requiring full disclosure of the costs of any factoring transaction, advance notice to interested parties, and

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The SSPA was adopted by the State Legislature to give greater protection to individuals either entering into a structured settlement agreement or negotiating to sell or transfer a periodic payment thereunder to a third party. At issue is whether approval of the proposed transfer would be consistent with the letter and spirit of the SSPA.

The plain language of General Obligations Law § 5-1706 sets forth several procedural mandates that must be adhered to as a condition precedent to judicial approval of an application for transfer of a structured settlement to a third party. Equally significant, the statute mandates that the Court, in determining such an application, apply a two prong inquiry based upon considerations of prudence, equity and reason, and vests in the Court the authority to make an independent discretionary determination as to whether the “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.” The instant record establishes that the petition and supporting papers are in compliance with the procedural mandates enumerated under the SSPA. Having satisfied the procedural requirements, this Court must scrutinize the proposed transfer, applying the two-pronged “best interest” and “fair and reasonable” test.

This Court has previously noted in In re Settlement Capital Corp., 1 Misc.3d 446 (N.Y.Sup. 2003), that absent statutory mandate or a determination by a higher court, which clearly defines the “best interest” standard as one that is analogous to the notion of “hardship” articulated in the Legislative Memorandum in Support of the SSPA, the temptation to adopt, as a general proposition, a “best interest” standard that bespeaks of “desperate or dire straits” or a “life or death emergency” is overly restrictive. In acknowledging the ambiguities between the “Best Interest” standard promulgated by the SSPA and the legislative intent set forth in the Legislative Memorandum in Support, on September 21, 2004, the Legislature amended Subdivision (b) of section 5-1706, to add the following language: “Provided the court makes the findings as outlined in this subdivision, there is no requirement for the court to find that an applicant is suffering from a hardship to approve the transfer of structured settlement payments under this subdivision.”³ Consequently, as the statute

²(...continued)

court approval of any transfer. Transfers of structured judgments or settlements for workers' compensation claims would continue to be prohibited.

³ The justification for the amendment on the New York Bill Jacket [2004 Assembly Bill 11677, Ch. 480 (McKinney's)], provides, in pertinent part, the following:

The law went into effect in February of 2003, since then, courts reviewing proposed structured settlement transfers have applied varying (and sometimes inconsistent) standards reflecting some

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does not require courts to limit the best interest standard to indicia of hardship, this Court adopts a more global consideration, finding that the best interest standard requires an individualized analysis to determine whether the proposed transfer of structured settlement payments, which were designed to preserve the injured person's long-term financial security, will provide needed financial rescue

³(...continued)

possible confusion regarding the legislature's intent in enacting the law in 2002. It is believed that some of the confusion and inconsistency in application of the 2002 may stem from certain inaccuracies in the Bill Memo that accompanied the 2002 Act. The Structured Settlement Protection Act, as enacted, was the product of a three-year legislative discussion. As originally introduced, the legislation did not require that the then present value of a promise of future payments be disclosed to tort claimants as a precondition to establishing any structured settlement. Moreover, as originally introduced, the legislation barred transfers of structured settlement payment rights absent a court finding that the transfer was necessary to avoid "imminent financial hardship." After discussion and deliberation, the "hardship" requirement was eliminated as a precondition to transfers and the requirement that disclosures be made "at the front end" was added. As sometimes happens at the end of session, the bill memo drafted to accompany the original legislative proposal was renumbered and attached to the final legislation without revision to reflect the significant and substantive differences between the original proposal and the final bill as enacted. Thus, while the law as enacted into statute did not require a finding of "hardship," the bill memo accompanying the Act contained the vestigial (and erroneous) assertion that the bill was intended to require a showing of hardship.

Since enactment, several courts have cited the bill memorandum (and its erroneous and vestigial suggestion that transfer approvals be restricted to exceptional instances of "hardship") in denying transfers of payment rights sought by consumers. In fact, the Legislature neither intended nor required any such thing. [] An adult who has not been adjudicated incompetent or incapable of handling his or her own affairs is generally capable of determining what is in their own best interests with regard to their property and affairs, including their structured settlement payment rights, without having to demonstrate or prove "hardship," provided the consumer has been afforded the admonitions to consult with counsel, the rights of cancellation, and the disclosures required by the 2002 Act. This Act is intended to confirm those principles and eliminate the confusion stemming from language in the 2002 Bill Memo.

without jeopardizing or irreparably impairing the financial security afforded to the payee and his or her dependents by the periodic payments. After an independent analysis, this Court determines that the best interest prong should be assessed on a case by case basis, giving specific consideration to 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; capacity to provide for the welfare and support of the payee's dependants; the need for medical treatment; the stated purpose for the transfer; and the demonstrated ability of the payee to appreciate the financial terms and consequences of the proposed transfer based upon independent legal and financial advice.

Here, this Court expresses reticence in finding that the transfer of Loiseau's periodic payments in the sum of \$108,020.56 is economically sound, particularly in view of the fact that Loiseau seeks to sell that amount for a present value of \$49,500.00. Although the Court is marginally satisfied that Loiseau understands the terms of the proposed transfer, and demonstrates a maturity, sophistication and intelligence to make financial decisions that appear to be in his best interest, that satisfaction is belied by the apparent lack of appreciation for the financial consequences of the proposed transfer. This lack of appreciation of the financial consequences of such transfer and his sophomoric business and fiscal acumen is underscored by Loiseau's testimony that he intends to use half of the money as a down payment to purchase an existing Laundromat, and the balance to refurbish the equipment, despite testifying that the costs associated with the purchase of a Laundromat range from \$60,000.00 to \$300,000.00. When asked by this Court if he had a business plan for its review and the location of the business he intended to purchase, he indicated that he did not have the plan in his possession and had not identified a Laundromat to purchase as he did not have the capital to begin negotiations. Nevertheless, Loiseau indicated that he previously identified listings of Laundromats in which he was interested. Additionally, the Court asked Loiseau of his background in the industry and if he had contacted the Small Business Administration, to which he stated that other than making inquiry with owners of Laundromats that he frequents, he has no background or expertise, and further indicated that he was unfamiliar with the Small Business Administration.

Moreover, although Loiseau is a 28 year old single person who has no dependents, rents his living space and is gainfully employed, grossing \$34,000.00, he has failed to demonstrate his ability to show sufficient income that is independent of the payments sought for transfer, in light of his failure to itemize or remotely detail his monthly expenses. In addition, Loiseau testified that he spoke with a friend who is a bank manager who advised him that it would be difficult for him to obtain financing as he has no assets to leverage. Thus, although Loiseau intends to improve his current living condition by opening a business, he does not appear to be in an economically sound position to handle the enormous responsibility of entrepreneurship, or at the very least, make prudent financial decisions to make adjustments in his income stream to meet that responsibility. Indeed, according to Loiseau's testimony of which he stated that the price to purchase a Laundromat starts at \$60,000.00, the \$49,500.00 which he intends to use for the business is insufficient to purchase, no less provide funding to refurbish equipment and maintain the business, particularly in this economically depressed environment. Further, the record is devoid of any evidence that Loiseau has savings which could supplant the shortfall between the proposed transfer amount and the speculative

purchase price of a Laundromat, and provide additional income in the event that the business is not operating at a profit. In fact, the record is also insufficient with regard to whether Loiseau will run the Laundromat himself full time, which would then completely eliminate his current income stream from his existing job, or hire a staff, which would increase the operating costs of the Laundromat. Lastly, although Loiseau stated that he has no problems paying his monthly maintenance payments at his residence, the confluence of either an elimination of his current income stream, or a reduction in his monthly income from removal of the periodic payments, the introduction of a huge financial undertaking of opening a business with the additional caveat of no experience, and the current dismal economy, make for a very volatile combination for which this Court is not convinced that Loiseau is prepared.

Indeed, the line of thinking expressed above further reiterates Loiseau's need for independent professional financial advice, which he declined to seek to his detriment, and this Court's charge to carefully cull out an individualized analysis to balance the preservation of his long-term financial security with the expressed need for financial rescue, the hardship of which is seemingly lacking in the instant matter. Although this Court can appreciate, and certainly encourages, a vision which is indicative of Loiseau's desire to seek to procure a successful future, this Court is unwavering in its belief that approval of this settlement would serve to place Loiseau in an unfavorable financial position prospectively. Consequently, application of these and other factors to the instant case compels the conclusion that the proposed transfer at issue is not in the best interest of Loiseau.

Conclusion

As previously set forth, the protections afforded by the SSPA vest this Court with the authority to determine whether the transfer is in the best interest of the payee, *and* whether the transaction, including the discount rate and the fees and expenses, are fair and reasonable. Therefore, as the best interest standard is an independent query from the fair and reasonable standard, and the two-prong standard must be met prior to approval of such transfer, a further inquiry by this Court would be academic as Loiseau has failed to demonstrate that the transfer would be in his best interest. Accordingly, the petition is denied upon the ground that the instant Structured Settlement Payment Right Purchase and Assignment Agreement executed on June 14, 2008, is not in the best interest of Loiseau.

Dated: December 8, 2008

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J.S.C.