

Matter of Settlement Funding of N.Y., LLC v Structured Settlement Trust
2009 NY Slip Op 32553(U)
October 15, 2009
Supreme Court, Nassau County
Docket Number: 09/013246
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X
In the Matter of the Petition of

**SETTLEMENT FUNDING OF NEW YORK, LLC, for
Judicial approval of an absolute Assignment
Agreement with DAVID CIRAULO and FERN
CIRAULO, as natural guardians of the MICHAEL
CIRAULO pursuant to Article 5, Title 17 of the New
York Obligations Law**

Index No. 09/013246

**Motion Submitted: 9/4/09
Motion Sequence: 001**

Petitioner(s),

-against-

**STRUCTURED SETTLEMENT TRUST AND
ALLSTATE LIFE INSURANCE COMPANY**

Respondent(s).

_____ X

The following papers read on this motion:

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

Petitioner Settlement Funding of New York, LLC brings this proceeding to seek approval of the Transfer of Structured Settlement Payment Rights. David Ciralo and Fern Ciralo as parents and natural guardians of Michael Ciralo seek to transfer one lump sum payment, in the amount of \$49,140.00 due on June 29, 2010. A hearing was held on September 4, 2009 and Michael and his father, David, testified in support of the application. Respondent opposed 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. Herein, however, the payee is still a minor and thus the Court’s responsibility to determine his best interests is paramount. 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.*).

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).

Herein, the Payee’s parents were advised in writing by the Transferee to seek independent professional advice regarding the transfer but declined to do so. GOL §5-170(c). The Payee has not spoken with an independent professional, but is relying on his parents in this matter. His parents have a clear interest in the proposed sale, which is contrary to the best interest of the minor payee in that the father testified the funds will be used to meet routine family expenses, not for the specific benefit of the payee. Under the circumstances, I do not find that the purpose behind the notice requirement, i.e.; to prevent an imprudent transfer has been met. (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]).

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 Court is cognizant of the ongoing economic downturn and sympathetic to the plight of the Ciraolo family. Michael testified that he is a seventeen year old student who desperately wants he and his brother to be able to graduate from their community schools. He is working 40 hours per week at a local Foodtown, in addition to attending school. Michael will walk or get a ride from his parents to get to work and hopes to continue to work his way through college. He plans to go to Nassau Community College and study biology and chemistry. Michael testified that he favors this transfer so that he can help his family through a difficult financial period and sees no other way out.

His father, David is in commercial real estate, an industry particularly hard hit in this economy. He testified that he is involved in putting deals together, but none are coming to fruition. David owns commercial real estate with his father and claims that his father is meeting the expenses on those properties. He has not sought or obtained any other means to support the family. Their dwelling has been lost to foreclosure and they are behind on various utility bills. Mrs. Ciraolo has had four back operations and outstanding medical bills have resulted in a \$12,000.00 judgment. She has started her own business selling fitness wear from home, but has yet to generate any meaningful income.

The affidavit in support of this petition submitted by the parents stated that the parents planned to use the proceeds to invest in property, specifically to use the \$38,000.00 as a down payment on an apartment. Michael was to gain a 50% interest in the property,

reportedly valued at \$250,000.00 and this interest would “improve his overall standard of living”. At the hearing, David testified that the money would instead be used for the family’s living expenses for the next few months, with a promise to repay Michael at some unknown point in the future. In June of 2009, when that affidavit was executed, Michael was 16 and unemployed. This young man was forced to grow up in a hurry and secured a full time job to assist his family. His appears to be the only source of income for this household. So often, summer jobs provide young people with spending money for clothes, activities, video games and their first car. Such is not the case here.

Michael is putting his personal interests aside and assuming the role of provider for his family. The Court is impressed with the selflessness of this young man. He is willing to make a significant sacrifice in order to support his family. It is not however his responsibility to support his parents and his brother nor is he even responsible for his own support. That responsibility lies with the parents. While Michael is commended for his efforts, the Court is tasked with determining his best interests and ensuring that any action taken is truly in the best interest of this brave young man.

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 not consult an attorney, nor did he or his parents consult a tax specialist or financial analyst to determine the tax implications of this proposed transfer. He is not required to do so by statute. The Court is not convinced that the proposed transfer is the best alternative available to Payee or that he has a full appreciation of the future impact on his finances if the transfer is approved. (See, *Matter of 321 Henderson*

Receivables, L.P., [Martinez], supra).

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. Petitioner alleges the applicable discount rate is 2.80%. Petitioner claims the discounted present value of the \$49,140.00 in structured payments to be transferred is \$47,680.71. There is no proof in admissible form, by an independent source, to establish that the discount rates are fair and reasonable. The net amount to be advanced is \$38,073.54.

The Disclosure Statement states that the current cost of purchasing a comparable annuity, is either \$44,913.96 or \$46,989.87. The actual quotes were not provided. (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 Mr. And Mrs. Ciraolo. (*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]).

The annual discount rate of 19.99% is 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]).

The Court finds no evidence to support the reasonableness of the proposed legal fees in the amount of \$2,000.00, the processing fee of \$200.00, nor the administrative fee of \$750.00 and thus they are disallowed. (*Matter of Settlement Capital Corp. {Yates}, supra; Settlement Funding of N.Y., LLC v. Transamerica Annuity Service Corp.*, 11 Misc.3d 1061(a), 816 N.Y.S.2d 701 [Sup.Ct., Bronx Co., 2/6/2006].)

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

For the foregoing reasons the Court finds 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.

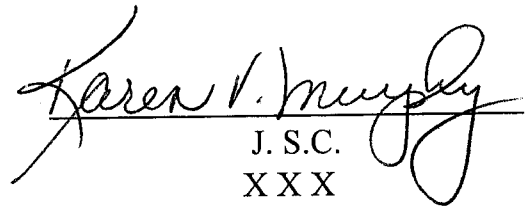
A copy of this Decision and Order shall be annexed to any future application by Mr. Ciraolo transfer his structured settlement funds.

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: October 15, 2009
Mineola, N.Y.


J. S.C.
XXX

ENTERED
OCT 22 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE