

Matter of Stratcap Invs., Inc. v Potocnik

2010 NY Slip Op 30632(U)

March 10, 2010

Supreme Court, Nassau County

Docket Number: 16192/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Petition of STRATCAP INVESTMENTS, INC.,	TRIAL/IAS PART 32 NASSAU COUNTY
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Petitioner,

for Approval of the Sale and Transfer of Structured
Settlement Payment Rights of PETER POTOCHNIK
In Accordance with Gen. Oblig. Law §5-1701, et seq.

Index No.: 16192/09
Motion Seq. No.: 02
Motion Date: 01/14/10

- against -

PETER POTOCHNIK, AXA EQUITABLE LIFE
INSURANCE COMPANY f/k/a The Equitable
Life Assurance Society of the United States and
CONTINENTAL CASUALTY COMPANY,

Respondents.

The following papers have been read on this motion:

<u></u>	<u>Papers Numbered</u>
<u>Notice of Motion for Re-Argument and/or Renewal, Affirmation,</u>	
<u>Supplemental Affidavit and Exhibits</u>	<u>1</u>

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner brings the present motion for an order, pursuant to CPLR Rule 2221, vacating the Decision/Order of the Honorable Daniel Martin, dated October 16, 2009; for an order, pursuant to CPLR Rule 2221 (d), (e), granting re-argument and/or renewal of the Petitioner's application for an Order, pursuant to Gen. Oblig. Law §5-1701, et seq., approving the sale and transfer of certain structured settlement payment rights due to the Respondent/Payee, Peter

Potocnik, under a structured settlement agreement, upon such grounds that the Court misapprehended and/or overlooked controlling principles of law and/or relevant facts and upon such further grounds that there is new and/or additional material facts and evidence not previously available, and upon the Court's grant of re-argument and/or renewal: for a further Order, pursuant to Gen. Oblig. Law §5-1701, et seq., approving the sale and transfer of certain structured settlement payment rights due to the Respondent/Payee, Peter Potocnik, under a structured settlement agreement, and for an award of costs, disbursements and reasonable attorney's fees to abide this motion. No opposition was submitted to the motion.

Based upon petitioner's argument pursuant to CPLR Rule 2221, which the Court finds to be a proper application, the Court hereby grants leave to the defendant to re-argue those portions of the October 16, 2009 Decision/Order of the Honorable Daniel Martin upon which the court based its denial of petitioner's request for an Order, pursuant to Gen. Oblig. Law §5-1701, et seq., approving the sale and transfer of certain structured settlement payment rights due to the Respondent/Payee, Peter Potocnik, under a structured settlement agreement.

Upon such re-argument, the Court has reviewed the basis for Acting Justice Martin's October 16, 2009 Decision/Order. In said Decision/Order, Acting Justice Martin held that

“[t]he petition also alleges that “the discounted present value... under Federal standards for valuing annuities based on the rate of 3.4% is \$121,151.22.” See, Ex. D of the petition. Nonetheless, the petition employs a discount rate of 14% in arriving at a present value of \$62,500.

No explanation is offered as to why a discount rate of 14% was employed, or whether such rate is appropriate in the light of current economic conditions in which interest rates are at historic lows....

No explanation has been given as to why this rate is fair and reasonable or indeed how it is calculated and applied in determining the gross amount payable to the seller. In the absence of such an explanation this court is not willing to find that the transfer is in the seller's best interests.”

In response to this holding by Acting Justice Martin, and as part of his re-argument of

same, Petitioner submits the affidavit of independent expert Kenneth R. Barnett, Esq. *See* Petitioner's Motion for Re-argument and/or Renewal Exhibit D. In said affidavit, Mr. Barnett advises the Court that "[s]ince October of 1997, I have been employed continuously by Singer Asset Finance Company, L.L.C. ("Singer") and have worked almost exclusively in the structured settlement secondary market, originating new transactions and servicing transactions that were previously originated by Singer. At Singer, I have been responsible for the purchase of over two hundred million dollars (\$200 million) of structured settlement payments." Mr. Barnett further goes on to "impart to the Court information that will assist the Court in (a) understanding the structured settlement funding marketplace and (b) determining whether, based on the facts and circumstances relevant to this Application and the standard(s) under the structured settlement transfer statute(s) implicated in this transaction (the "Transfer Act(s)") the discount rate used in the proposed transfer is appropriate." Mr. Barnett's affidavit also sets forth "the reasons why the discount rate used in the pending transfer is appropriate under the facts and circumstances relevant thereto." Mr. Barnett offers his expert opinion that "the purchase price that Petitioner has offered seller is fair, reasonable and consistent with the market rate applicable to these assets particularly in light of the substantial risks and costs that occasion these transactions."

The Court holds that the information provided in Mr. Barnett's affidavit provides an adequate explanation as to why a discount rate of fourteen percent (14%) was employed and how such rate is appropriate in the light of current economic conditions. It also provides an adequate explanation as to why this rate is fair and reasonable and how it is calculated and applied in determining the gross amount payable to the seller. Having provided this thorough explanation, the Court is now willing to find that the transfer is in the seller's best interests.

In his October 16, 2009 Decision/Order, Acting Justice Martin also held that, "Moreover, the court notes that no exigent circumstances have been alleged and there is no explanation as to why the more than \$100,000 expected to be received in one year is inadequate for the purposes alleged in the petition. In view of all the circumstances set forth above, the court is unable to conclude that the proposed

transfer (with the concomitant loss of more 50% of the annuity value in a six year period of time) can be deemed in the best interest of the respondent.”

In response to this holding by Acting Justice Martin, and as part of his re-argument of same, Petitioner submits the supplemental affidavit of Respondent Peter Potocnik (“Potocnik”). Respondent Potocnik advises the Court that “I have only \$24,250.00 due on 11/1/10, not the \$104,250.00 which number was previously furnished to the court by an old (2006) letter from AXA Equitable. From that former amount I sold \$80,000.00 in 2006, which I forgot about, leaving the current amount of \$24,250.00 A recent letter from AXA Equitable was faxed to my attorney, Richard Levine, Esq., a copy of which is annexed hereto as evidence of same.” Respondent Potocnik adds “[d]ue to my estranged wife’s recent disability, I am now paying \$1,600.00 monthly for child support and spousal maintenance, plus my son’s extracurricular activities mentioned in my initial application, compared to the \$1,300.00 per month figure set out in my prior affidavit. My wife’s disability diminished her earnings so that I am currently paying her heating and electric bills of about \$300.00 per month as she and my son reside together.” Finally Respondent Potocnik states “Stratcap Investments, Inc., as Petitioner and purchaser, has increased the amount which they will pay for my annuity installment in 2015, by paying my attorney an additional sum of \$5,000.00. This will cover my legal expenses (I engaged an attorney to represent me) and enable me to repay some borrowed funds, which has the effect of increasing the net amount to me. I am satisfied with these revisions, particularly since I have a strong immediate need for such funds that cannot wait until 2015.”

The Court holds that the information provided in Respondent Potocnik’s supplemental affidavit provides an adequate explanation as to the exigent circumstances that exist with respect to Respondent Potocnik’s need for the money at the present time. Additionally, said supplemental affidavit provides an adequate explanation why the proposed transfer is in the best interest of Respondent Potocnik.

Accordingly it is

ORDERED that the Decision/Order of the Honorable Daniel Martin, dated October 16, 2009, is hereby vacated; and it is further

ORDERED that the unopposed motion by the Petitioner for an order pursuant to General Obligations Law § 5-1701 et. seq. approving the transfer of certain structured

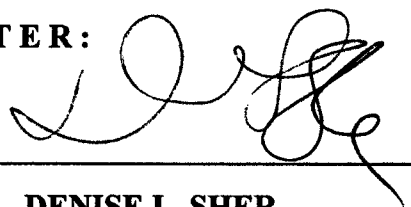
settlement payment rights due to the respondent/payee, Peter Potocnik to Petitioner STRATCAP INVESTMENTS, INC. is **GRANTED**. It appears from a review of the documentation presented that all necessary parties have been served with notice of this application, and further, that the relief requested is appropriate.

Petitioner's request for an award of costs, disbursements and reasonable attorney's fees to abide this motion is denied.

Settle Order on Notice.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
March 10, 2010

ENTERED
MAR 22 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE