

Matter of J.G. Wentworth Originations, LLC v Arce

2010 NY Slip Op 32899(U)

September 23, 2010

Supreme Court, Queens County

Docket Number: 8764/10

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 the Matter of the Petition of

J.G. WENTWORTH ORIGINATIONS, LLC f/k/a
321 HENDERSON RECEIVABLES ORIGINATION,
LLC,

Petitioner,

-and-

JENNY ARCE, AMERICAN INTERNATIONAL
LIFE ASSURANCE COMPANY OF NEW YORK
and AMERICAN HOME ASSURANCE COMPANY,

As Interested Person Pursuant to GOL § 5-1701(c).

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Index No: 8764/10
Motion Date: 6/16/10
Motion Cal. No: 12
Motion Seq. No: 1

**DECISION AFTER
STRUCTURED SETTLEMENT
HEARING**

The following papers numbered 1 to 10 read on this petition for an order approving the transfer of structured settlement payment rights from Jenny Arce to petitioner Settlement Funding of New York, LLC.

	PAPERS NUMBERED
Notice of Petition-Petition-Affidavits-Exhibits.....	1 - 9
Transcript.....	10

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:

Petitioner J.G. Wentworth Originations, LLC (“Wentworth”) 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 Jenny Arce (“Arce”) under a structured settlement obligated and funded by American Home Assurance Company and American International Life Assurance Company of New York (“American”), respectively. By hearing on May 19, 2010, for this Court’s determination of the propriety of the application for the transfer of those rights to Wentworth, Arce testified that she is a 42 year old single person with no dependents, who

is employed with a telecommunications company earning approximately \$35,000.00 annually. She further testified that she is seeking to sell a portion of the \$11,300.00 annual payments that she receives. She stated, in support of the application for judicial approval of the proposed transfer, and her affidavit in support reiterated, that she needs the money to pay off medical bills that she incurred from surgery she had on February 23, 2010 at Elmhurst Hospital.

Discussion

Pursuant to Purchase Contract executed on March 23, 2010, Arce transferred to Wentworth her annuity rights to a portion of 10 annual payments in the amount of \$6300.00, totaling \$63,000.00, commencing on July 15, 2011 through July 15, 2020. In consideration thereof, she agreed to receive a gross advance amount of \$24,550.00, yielding a net advance amount from Wentworth of \$24,550.00, based upon an annual discount rate of 20.00%. 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.

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.”¹ Consequently, as the statute

¹ 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:

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

(continued...)

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 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, although this Court expresses some reticence in finding that the transfer of \$6300.00 of the \$11,300.00 annual annuity payment for ten years is economically sound, it is satisfied that Arce fully understands the terms of the proposed transfer and is of a maturity and intelligence to make financial decisions that are in her best interest which appreciates the financial consequences of the proposed transfer. Consequently, application of these factors to the instant case compels the conclusion that the instant proposed transfer is in the best interest of Arce.

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 in necessary.

The Legislative Memorandum in Support of the justification for the SSPA acknowledged that "[r]ecently 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." See, fn.1, supra. The "fair and reasonable"

¹(...continued)

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.

standard thus is directed at an evaluation of the discount rate applied against future settlement proceeds in a given case. Although it is clear that the New York State Legislature has expressed great disdain for this industry of factoring companies that induces settlement annuitants to cash out future payments at substantial discounts, the lawmaking body has stopped short of placing a ceiling upon the allowable interest rates. Nonetheless, the Legislature, in enacting the SSPA and in empowering the courts with the discretion to determine whether the terms of a proposed transfer of future payments is fair and reasonable, did not intend for the courts to be mere rubber stamps. Therefore, it is incumbent upon the courts to make such a determination, presumably based upon the representations made by the very factoring companies whose interests are to employ the highest discount rate based upon their setting of the prevailing market. Notwithstanding, this Court, in In re Settlement Capital Corp., 1 Misc.3d 446, expressed optimism with respect to the downward trend of discount rates based upon the enactment of laws, such as the SSPA, the interpretation of such legislation by the judiciary, and the increasing competition to, and within the industry. Nevertheless, those factors seem to be of no import to this application.

In the instant matter, the Disclosure Statement, included among the documents submitted as mandated by statute, sets forth, inter alia, that the aggregate amount of \$63,000.00 to be transferred in this transaction has a discounted present value of \$51,956.92, based upon the applicable 3.4% federal rate most recently published by the Internal Revenue Service. The statement sets forth that \$54,736.00 would be the cost of purchasing a comparable annuity for the aggregate amount of payments to be transferred based upon a quote by Allstate Life Insurance Company, and that the annual discount rate, compounded monthly, used to determine the gross advance amount is 20.00%. The statement further sets forth that the net advance amount would be \$24,550.00, without fees.

Here, based upon the general downward trend of interest rates, and in particular, in the factoring industry since the enactment of the SSPA, this petition is disquieting to this Court and is reminiscent of the exorbitant interest rates offered in these types of transaction as a general practice just a few short years ago. In recognizing that the rate employed in this transaction is higher than the annual discount rates, ranging from 15.46% to 19.82%, which were previously rejected by New York courts as unreasonable, this Court finds that this particular petition is neither fair nor reasonable. This is particularly so, given that the net advance funds of \$24,550.00 represent approximately 39% of the \$63,000.00 aggregate future payments that are being transferred. This Court would be hard-pressed to find “fair and reasonable” which would result in Arce receiving only 39% of the monies designated to be transferred, a consequence that this Court finds unconscionable, and will not condone.

Conclusion

Based upon the foregoing, this Court finds that the petitioner has meet its burden of establishing that the transaction is in the best interest of Jenny Arce, but has failed to demonstrate that the terms of the transaction are fair and reasonable. Accordingly, the petition is denied.

Dated: September 23, 2010

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J.S.C.