

Matter of Hiciano v Allstate Settlement Corp.

2010 NY Slip Op 33207(U)

October 20, 2010

Sup Ct, NY County

Docket Number: 109641-10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 109641/2010

HICIANO, FERNANDO

vs.

ALLSTATE SETTLEMENT CORP.

SEQUENCE NUMBER : 001

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

and petition
**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

order to judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: Oct 20, 2010

JJG
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
In the Matter of the Petition of
FERNANDO HICIANO a/k/a
FERNANDO HISIANO
for judicial approval of absolute assignment
agreement with
SETTLEMENT FUNDING OF NEW YORK, LLC,
pursuant to Article 5, Title 17 of the
New York General Obligations Law,

DECISION/ ORDER
Index No.: 109641-10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Petitioner,

-against-

ALLSTATE SETTLEMENT CORPORATION and
ALLSTATE LIFE INSURANCE COMPANY OF NY,

Respondents.

-----X
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Notice of Petition, Petition w/FH affid, exhs	1

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Fernando Hiciano a/k/a Fernando Hisiano ("Hiciano") is a resident of the State of Pennsylvania and the beneficiary of a structured settlement agreement reached in the State of New York in 1997 (Index No. 21899/87). This petition by Settlement Funding of New York, LLC ("SFNY") is for an order approving the transfer of Hiciano's structured settlement payment rights to SFNY. If approved by this court, SFNY then has to also obtain the approval of the Pennsylvania courts.

SFNY has filed proof of service on Hiciano and Allstate. Hiciano has provided his sworn affidavit in support of the petition. However, Allstate takes no position on the relief sought and, therefore, the petition is before the court without opposition. The court's decision and order is as follows:

Hiciano seeks to transfer to SFNY his right to receive 144 monthly payments each in the amount of \$1,533.00 commencing September 12, 2002 through August 12, 2034 ("assigned payments") pursuant to an agreement he entered into with SFNY dated June 5, 2010 ("transfer agreement"). The assigned payments are in the aggregate amount of \$220,752. The present discounted value is \$119,637.49, based upon a discount rate of 3.40%. According to SFNY, the cost of buying a comparable annuity for the aggregate amount of payments to be transferred is \$183,966.52 and \$170,291.17, based upon quotes SFNY obtained from two other annuity issuers.

The gross advance by SFNY, in return for the assigned payments, is \$20,711.02. After deducting commissions, legal fees (\$2,000), a processing fee (\$200) and other charges, Hiciano will receive in hand the sum of \$18,511.02.

According to his affidavit, Hiciano needs this money to buy a shipping truck and invest in inventory and supplies for his import/export business in the Dominican Republic. He earns \$1,500 a month from that business. Hiciano states, without elaborating, that assignment of his anticipated payments and getting a lump sum payment from SFNY is preferable to taking out a loan, because he will not have to pay the money back with interest, as he would with more traditional financing.

In his affidavit, Hiciano states he is married and has three small children, all of whom live with him. Elsewhere, however, he states he only has one dependent, his 15

year old sister.

Discussion

Title 17 of the General Obligation Law ("GOL"), known as the "Structured Settlement Protection Act" ("SSPA") requires judicial approval of any sale of future structured settlement payments to a third party (Matter of Settlement Capital Corporation v. Drew, 2007 Slip Op 30703 (U) [Sup Ct Queens, 2007] *n.o.r.*). This is to protect vulnerable payees from aggressive marketing tactics.

Although the applicant/payee does not have to show economic hardship in order to have the transfer approved, the SSPA does require that the payee be provided with adequate disclosure about the proposed transfer, including a comparison of the proposed transfer to the cost of purchasing a comparable annuity (GOL § 5-1703). Examining the documents provided, petitioner has apparently complied with this first step.

The second step requires that the court to employ a "totality of the circumstances test," very similar to that used in family law matters (see In re 321 Henderson Receivables, L.P., 13 Misc3d 526 [Sup Ct Erie 2006] *and cases cited therein*). The court has to see whether the transfer is in the best interest of the payee, taking into account the welfare and support of his or her dependents (In re 321 Henderson Receivables, L.P., *supra*). This is not only for the protection of the payee, who may be dependent on the structured payments for their long-term financial security, but also for the protection of his or her dependents who are dependent on the payee for their support.

The court must also take into account whether the payee has obtained or waived independent professional advice (GOL § 5-1701).

Hiciano has not shown why it makes sense for him to assign almost \$220,000 in structured payments to SFNY in exchange for the lump sum of \$18,511.02 – less than 10% of what he is otherwise entitled to receive. Stated another way, if this petition is granted he will collect a lump sum that is equal to one year's worth of monthly payments, but surrender 11 years' worth of income for that benefit.

There is no information about the financial health of his business in the Dominican Republic or what attempts he made to secure traditional financing. His explanation, that the money he receives from SFNY will be interest free, makes no sense given the "price," in a different sense, he will have to pay for receiving that lump sum payment. There is no showing that investing this money into his business will yield better income than what he is giving up.

Hiciano apparently has five (5) dependents, yet inexplicably, he has signed his name to another document stating he only has one, his teenaged sister. His income from the business is only \$1,500 and his monthly payments from the settlement will be \$3,000. Hiciano provides no budget to show that he can still meet his support obligations when his monthly payments are reduced in 2022. His youngest child is only five (5) years old. This is Hiciano's second application for a transfer of payments. The prior application, in 1997, for \$217,000, was so he could buy a house.

Although he is being charged for legal fees, Hiciano did not have a lawyer, although he did meet with a certified public accountant.

Hiciano has not presented a compelling case for why he needs this immediate

[* 6]
cash at such a steep discount (In re 321 Henderson Receivables, L.P., supra; In re 321 Henderson, LLC, 19 Misc3d 504 [Sup Ct Queens Co. 2008]). Therefore, the petition is denied.

Conclusion

In accordance with the foregoing,

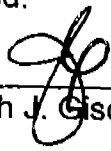
It is hereby,

ORDERED DECLARED AND ADJUDGED that the petition is denied and this proceeding is dismissed.

This constitutes the decision, order and Judgment of the Court.

Dated: New York, New York
 October 20, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).