

Matter of Seneca One, LLC v Stevens

2011 NY Slip Op 31776(U)

June 21, 2011

Supreme Court, Nassau County

Docket Number: 4060/11

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

In the Matter of the Petition of

SENECA ONE, LLC,
Petitioner(s),

Index No. 4060/11

Motion Submitted: 04/29/11
Motion Sequence: 001

**For Approval of the Sale and Transfer of Structured
Settlement Payment Rights of SHARLENE
STEVENS In Accordance with Gen. Oblig. Law §5-
1701, et. Seq.**

-against-

**SHARLENE STEVENS, NEW YORK LIFE
INSURANCE COMPANY, and NEW YORK LIFE
INSURANCE AND ANNUITY CORPORATION,**

Respondent(s).

_____ X

The following papers read on this motion:

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

Petitioner Seneca One, LLC ("Seneca") seeks an Order from the Court granting judicial approval of the transfer/sale of a structured settlement payment from Sharlene

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Stevens to Seneca. New York Life Insurance Company and New York Life Insurance and Annuity Corporation have not submitted opposition to the requested relief.¹

This action arises from a structured settlement agreement pertaining to a medical malpractice action commenced in Bronx County some time ago (Index No. 23186/93). Ms. Stevens states that she has been receiving monthly annuity payments, now in excess of \$7,000, which payments commenced on or about April 1, 2008. In addition to the monthly payments, Ms. Stevens is/was to receive three lump sum payments, due and payable on June 30, 2011, June 30, 2016, and June 30, 2021.

By order of this Court (Feinman, J.) dated May 30, 2008, Ms. Stevens was authorized to sell her first \$100,000 lump sum payment due and payable on June 30, 2011. At that time, Ms. Stevens stated that she intended to use the proceeds to pay off medical bills, credit card debt, and to remodel her home.

By this application, Ms. seeks to assign \$150,000 of the \$250,000 payable on June 30, 2021 to petitioner in exchange for a sum of money.² According to the terms of the Transfer and Assignment Agreement, Ms. Stevens will realize \$40,000 from the transfer of her \$150,000 to petitioner. Ms. Stevens states in her affidavit that she intends to use the proceeds of this transfer to pay \$13,000 in mortgage arrears, pay off her "car note" in the amount of \$10,000, and pay off school loans. Ms. Stevens is 34 years old, with a three-year-old daughter.³ In her affidavit, Ms. Stevens does not state that she currently attends, or attended, school for a degree, or whether she is employed. Unlike her "car note," Ms. Stevens fails to state the sum due and owing on her school loans and/or on her mortgage.

¹There is no affidavit of service accompanying the instant application indicating that the insurance company respondents were served. Although petitioner's application may be denied with leave to renew on this basis alone, the Court will address the merits of the petition in the body of its decision. On April 29, 2011, the Court afforded petitioner and Sharlene Stevens an opportunity to be heard on this matter.

²Neither petitioner, nor Ms. Stevens, makes mention of the lump sum payment due and payable on June 30, 2016.

³Ms. Stevens' affidavit in support of the transfer approved in 2008 is dated March 20, 2008. The order to show cause in that matter was signed by the Court on April 14, 2008. Ms. Stevens' daughter was born on April 24, 2008. In her March 2008 affidavit, Ms. Stevens stated that she had no minor children, but she neglected to state that she was in advanced state of pregnancy.

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The Court notes that the affidavit is not dated in the area designated for the date, above Ms. Stevens' signature line. The affidavit is, however, notarized and dated March 15, 2011.

Aside from Ms. Stevens' affidavit, petitioner has provided, *inter alia*, a petition verified only by its counsel, a certificate of marital status and seller's dependents, an undated settlement agreement and release related to the underlying malpractice action, a transfer and assignment agreement dated March 15, 2011, an undated disclosure statement, and an undated acknowledgment of professional advice. The transfer agreement and disclosure forms state that the sale/transfer of the \$150,000, with an allegedly discounted present value of \$110,178.76, will result in a payment to Ms. Stevens of \$40,000,⁴ which is equivalent to her being charged an interest rate of 13.70 % annually. Based on a price quote from Metropolitan Life Insurance Company and New York Life Insurance Company, the current cost of purchasing a comparable annuity for the aggregate sum of the payments is \$104,406 and \$107,980.50, respectively. Based on the foregoing, Ms. Stevens' gross/net would be approximately 37 % of the discounted present value of the payment sought to be sold and transferred.

New York's Structured Settlement Protection Act, General Obligations Law, Title 17 was enacted to provide greater protection to individuals entering into structured settlement agreements, and/or negotiating to sell or transfer a periodic payment to a third party. Since 2002, such transfers require judicial approval in order to protect the long-term financial security of the structured settlement payees (*Matter of Settlement Funding of New York, LLC (Ciraolo) v. Structured Settlement Trust and Allstate Life Insurance Co.*, 2009 WL 3713136, 2009 Slip Op. 32553U [Sup. Ct. Nassau County, Trial Order 2009]).

Specifically, General Obligations Law § 5-1706 sets forth the express findings that a Court must make in order to authorize a transfer of any structured settlement payment to a third party. Among the findings required to be made for approval of the transfer are that the transfer complies with the requirements of Title 17; that the transfer "is in the best interests of the payee;" that the discount rate applied is "fair and reasonable;" that the payee has been advised in writing to seek independent professional advice regarding the transfer, and has either received such advice or knowingly waived such advice in writing.

The "best interests" analysis must be approached on a case-by-case basis, considering whether the transfer of a structured settlement payment "will provide needed

⁴The \$40,000 is amount of both the gross and net payment. No fees are being deducted from the proposed payment of \$40,000.

[* 4]

financial rescue without jeopardizing or irreparably impairing the financial security afforded to the payee . . . by the periodic payments” (*Matter of the Petition of Settlement Capital Corporation for Approval of Transfer of Structured Settlement Payment Rights of Richard C. Ballos*, 1 Misc.3d 446, 455, 769 N.Y.S.2d 817 [Sup. Ct. Queens County, 2003]). Among the factors to be considered, are the payee’s age, mental and physical capacity, maturity level, ability to show sufficient income independent of the payments sought for transfer, the stated purpose for the transfer, and the payee’s ability to appreciate the financial terms and consequences of the proposed transfer based on independent legal and financial advice (*Id.* at 455; *Matter of the Petition of Ryan R. Barr and 321 Henderson Receivables L.P. v. Hartford Life Insurance Co.*, 4 Misc.3d 1021A, 798 N.Y.S.2d 342 [Sup. Ct. Nassau County 2004]).

In addition to the requirement that the transaction be in the best interests of the payee, the transferee must demonstrate that 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” (*CPLR § 5-1706 (b)*; *Matter of Capital Corporation, supra* at 460-63; *Matter of Petition of Washington Square Financial LLC v. Allstate Assignment Company*, 29 Misc.3d 1204A, 2010 N.Y. Slip Op. 51688U [Sup. Ct., Queens County 2010]).

General Obligations Law (“GOL”) § 5-1703 requires that, prior to a payee signing a transfer agreement, the transferee must provide written disclosure setting forth, *inter alia*, the aggregate amount of the payment, the discounted present value of the payment, the gross advance amount, itemization of fees to be deducted, and the net advance amount that will ultimately be paid to the payee. The statute mandates that the disclosure be provided to the payee “not less than ten days prior to the date on which the payee signs a transfer agreement.” Furthermore, the disclosure must be provided to the payee by “first class and certified mail, return receipt requested or United States postal service priority mail.”

Turning first to the notice requirements of GOL § 5-1703, petitioner claims that it provided the disclosure statement “not less than ten (10) days prior to the date on which Payee executed the transfer agreement by regular mail and certified-mail return-receipt requested and/or postal office priority mail. . .” Petitioner has failed to provide any proof that it mailed the disclosure statement to Ms. Stevens via certified mail, return receipt requested. As previously noted by the Court, the disclosure statement and acknowledgment of professional advice are both undated. The affidavit of Ms. Stevens also fails to state the date upon which she received and signed the disclosure and professional advice statements. Because petitioner has not submitted proof of mailing, the Court is unable to determine whether the statutory time requirements have been

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satisfied.

In any event, the Court further finds that the transfer/sale is not in Ms. Stevens' best interests, and that petitioner has not demonstrated by evidence in admissible form that the discount rate applied is fair and reasonable.

Courts have routinely declined to accept as fair and reasonable high discount rates, when transferees fail to explain why a particular discount rate is selected, and why the rate should be deemed fair and reasonable (*Matter of Settlement Funding of New York, LLC for Approval of a Transfer of a Structured Settlement Payment Right of Christlyne B. Point Du Jour*, 2010 N.Y. Slip Op. 52102U, 2010 N.Y. Misc. LEXIS 6081 (Sup. Ct., Queens County 2010); *Matter of Settlement Funding of New York, LLC for Approval of a Transfer of a Structured Settlement Payment Right of Kareem M. Williams*, 2010 N.Y. Slip Op. 52103U, 2010 N.Y. Misc. LEXIS 6085 (Sup. Ct. Queens County 2010); *Matter of Petition of Washington Square Financial LLC, supra; Settlement Funding of New York, LLC v. Hartford-Comprehensive Employee Ben. Svc. Co.*, 25 Misc.3d 1220A, 901 N.Y.S.2d 910 [Sup. Ct. Queens County 2009]; *Matter of the Petition of Settlement Capital Corporation (Ballos), supra*).

In this case, petitioner has not demonstrated why this particular discount rate of 13.70% was selected to apply to the proposed transfer, and/or why it should be deemed fair and reasonable. Petitioner has failed to submit an affidavit from any of its principals demonstrating the fairness and reasonableness of the discount rate applied. Instead, petitioner relies on the verified petition of its counsel. Even if this Court were to accept counsel's conclusory statement, which it will not, counsel has not established why the rate used in this case is fair and reasonable. Without any explanation whatsoever, counsel's petition simply refers the Court to Exhibit E, which is the undated disclosure statement, for the annual discount rate.

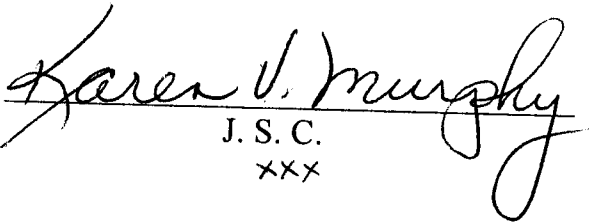
Moreover, the Court finds it highly unlikely that a gross/net payment which is only approximately 37 % of the discounted present value of the payment sought to be sold and transferred is in Ms. Stevens' best interests.

For all of the foregoing reasons, the instant petition is in all respects denied, and the proceeding is dismissed.

[* 6]
Petitioner's counsel is directed to serve a copy of this Order, with Notice of Entry, upon each of the respondents, and in accordance with the CPLR.

The foregoing constitutes the Order of this Court.

Dated: June 21, 2011
Mineola, N.Y.


J. S. C.
XXX

ENTERED
JUN 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE