

Matter of Hanks v Transamerica Annuity Serv. Corp.
2011 NY Slip Op 32512(U)
September 14, 2011
Supreme Court, Nassau County
Docket Number: 10575/11
Judge: Thomas Feinman
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK COUNTY OF NASSAU

Present:

Hon. Thomas Feinman
Justice

In the Matter of the Petition of

PHILIP HANKS, JR. a/k/a PHILIP HANKS, for
Judicial approval of an Absolute Assignment
Agreement with SETTLEMENT FUNDING OF
NEW YORK, LLC, pursuant to Article 5,
Title 17 of the New York General Obligations Law,

Petitioner,

- against -

TRANSAMERICA ANNUITY SERVICE CORPORATION
and TRANSAMERICA FINANCIAL LIFE INSURANCE
COMPANY,

Respondents.

TRIAL/IAS, PART 13
NASSAU COUNTY

INDEX NO. 10575/11

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MOTION SUBMISSION
DATE: 8/19/11

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Order to Show Cause and Affidavits.....	<u>X</u>
Affirmation in Opposition.....	<u>N/A</u>
Reply Affirmation.....	<u>N/A</u>

Relief Requested

The petitioner initiates this special proceeding, by way of Order to Show Cause, for an order approving the transfer of structured settlement payment rights from Philip Hanks, Jr., a/k/a Philip Hanks, (hereinafter referred to as "Hanks"), to petitioner, Settlement Funding of New York, LLC, (hereinafter referred to as "Settlement Funding").

Settlement Funding seeks approval of the transfer of certain structured settlement payment rights under the New York Structured Settlement Protection Act, (hereinafter referred to as "SSPA"). Hanks, a resident of the State of New York, County of Nassau, currently resides at 729 Newton Avenue, Uniondale, New York. Apparently, Hanks is the beneficiary of a structured settlement agreement as a result of a personal injury action. The movant fails to annex a copy of such agreement.

In any event, Hanks, under the terms of the proposed Absolute Assignment Agreement with Settlement Funding, intends to transfer and sell his right to one payment of twenty thousand and 00/100 dollars, (\$20,000.00), due on or about January 3, 2014.

In consideration for selling this payment, Settlement Funding agrees to pay Hanks the sum of eleven thousand two hundred thirty-three and 94/100 dollars, (\$11,233.94).

Applicable Law

The SSPA was enacted as a result of concern that the structured settlement payees are especially prone to being victimized and quickly dissipating their awards. (*In re Petition of Settlement Funding of New York, LLC*, 761 NYS2d 816). “The SSPA protects payees from being taken advantage of by businesses seeking to acquire the payee’s structured settlement payment rights” and discourages such transfers by requiring special proceedings seeking judicial approval of the transfer. (*Id.*, General Obligations Law §§5-1705 and 5-1706). A proposed transfer of a portion of payee’s structured settlement for less than half its present discounted value was found not to be in the payee’s “best interest”, as required by the Structured Settlement Protection Act (SSPA). (*Id.*, McKinney’s General Obligations Law §5-1706(b)). The payee’s willingness to transfer the settlement “has no bearing on the court’s determination of whether the interest rate paid by the transferee is ‘fair and reasonable’ within the meaning of Structured Settlement Protection Act, (SSPA).” (*Id.*)

General Obligations Law §5-1703, effective July 1, 2002, provides the following required disclosure:

- (a) the amounts and due dates of the structured settlement payments to be transferred;
- (b) the aggregate amount of such payments;
- (c) the discounted present value of the payments to be transferred, which shall be identified as the “calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities”, and the amount of the applicable federal rate used in calculating such discounted present value;
- (d) the price quote from the original annuity issuer, or, if such price quote is not readily available from the original annuity issuer, then a price quote from two other annuity issuers that reflects the current cost of purchasing a comparable annuity for the aggregate amount of payments to be transferred;
- (e) the gross advance amount and the annual discount rate, compounded monthly, used to determine such figure;
- (f) an itemized listing of all commissions, fees, costs, expenses and charges payable by the payee or deductible from the gross amount otherwise payable to the payee and the total amount of such fees;

(g) the net advance amount including the statement: “The net cash payment you receive in this transaction from the buyer was determined by applying the specified discount rate to the amount of future payments received by the buyer, less the total amount of commissions, fees, costs, expenses and charges payable by you”;

(h) the amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and

(i) a statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, no later than the third business day after the date the agreement is signed by the payee.

General Obligations Law §5-1706 provides that the transfer must be in the best interest of the payee, the transaction is fair and reasonable, and 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. “[D]iscounted present value’ means the present value of future payments, as determined by discounting such payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.” (General Obligations Law §5-1701(c)).

“The primary purpose of the SSPA is to protect recipients of long-term structured settlements from being victimized by companies aggressively seeking the acquisition of their rights to guaranteed structured settlement payments.” (*321 Henderson Receivables Origination, LLC v. Lugo*, 889 NYS2d 508). The Court must independently determine, in its discretion, whether “the transfer is in the best interest of the payee, taking into account the welfare and support of the payee’s dependents, and whether the transaction, including the discount rate used to determine the gross advance amount and fees and expenses used to determine the net advance amount, are **fair and reasonable**”. (emphasis added.) (*In re Petition of Settlement Funding of New York, LLC, supra*, citing General Obligations Law §5-1706[b]). “This is a two pronged test to be applied in evaluating the parties’ agreement.” (*321 Henderson Receivables Origination, LLC, supra*).

The best interests determination, at the Court’s discretion, involves consideration of several facts and circumstances concerning the payee, including the payee’s age, mental capacity, maturity level, “ability to show sufficient income that is independent of the payments sought for transfer”, and ability to provide for payee’s dependents. (*321 Henderson Receivables Origination, LLC, supra*). “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 dependents; 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.” (*Whitney v. LM Property*, 3375/2011 NYLJ June 24, 2011; citing *Matter of Settlement Capital Corporation, [Ballos]*, 1 Misc3d 446). The “best interest” consideration is separate and independent of the consideration of whether the transfer is “fair and reasonable”. (*In re Petition of Settlement Funding of New York, LLC, supra*). A Payee who desperately needed cash to obtain “life sustaining medical treatment for a love one” in the face of having no other alternative means of raising money would serve a payee’s best interest in the face of a “life and death emergency”. (*Id.*) The Court found the transfer was not in a 21 year old payee’s best interest when the payee had a dependent, without any information concerning the putative father, and the request for funds to purchase a vehicle were not explained. (*321 Henderson Receivables Origination, LLC, supra*).

“The ‘best interest’ standard under SSPA requires a case by case 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 financial security afforded to the payee and his or her dependents by the periodic payments.” (*In re Settlement Capital Corp.*, 769 NYS2d 817). An explanation as to why the payee has an immediate need for the transfer of funds, or lump sum, is taken into consideration. (*Whitney, supra, citing In re Settlement Capital Corp.*, 194 Misc2d 711).

A payee who had not “enjoyed the benefits of wise and unbiased counsel in the management of her financial affairs” and waived her right to consult with an independent professional, confirmed the court’s impression that the payee did not fully appreciate the consequences of her transfer. (*Whitney v. LM Property, supra*).

The proposed transfer of the portion of the payee’s structured settlement which would result in the transferee paying “less than half of settlement’s present discounted value” was not fair and reasonable as required by SSPA. (*In re Petition of Settlement Funding of New York, LLC, supra*). The interest rate paid for the transfer of a structured settlement of “no more than 8% would be fair and reasonable” under SSPA whereby the transferee does not charge counsel fees and costs to the payee as a transfer expense. (*Id.*, citing General Obligations Law §5-1701(5)).

Discussion

In the case at bar, the proposed transfer involves the transfer of the aggregate amount of twenty thousand and 00/100 dollars, (\$20,000.00), at a discounted present value of eighteen thousand six hundred ten and 07/100, (\$18,610.07), with a net payment to the payee, of eleven thousand two hundred thirty-three and 94/100 dollars, (\$11,233.94), after payment of an estimated attorney fee of one thousand and 00/100 dollars, (\$1,000.00), a processing fee of two hundred and 00/100 dollars, (\$200.00), and administrative fee of seven hundred fifty and 00/100 dollars, (\$750.00).

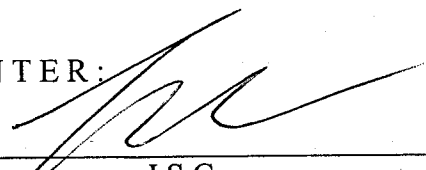
Here, this Court finds the payment of eleven thousand two hundred thirty-three and 94/100 dollars, (\$11,233.94), is not “fair and reasonable”. Additionally, this Court finds the annual discount rate of 19.99% excessive.

The second prong of this test requires this Court to determine whether the transfer is in the payee’s “best interest”. Hanks avers that he is 22 years old. Hanks submits that he intends to use the lump payment of eleven thousand two hundred thirty-three and 94/100 dollars, (\$11,233.94), to improve on a house “to be given” to him by his mother at some future date. Hanks submits that he would like to use approximately eleven thousand two hundred and 00/100 dollars, (\$11,200.00), to purchase new appliances and re-do the flooring, and paint the house. However, Hanks, does not provide any documentation to substantiate his submissions. Additionally, Hanks does not indicate what, if any, hardship, he is enduring. Moreover, this Court is concerned with Hanks’ decision to waive independent professional advice regarding this transaction under these circumstances. This Court is not satisfied that Hanks fully appreciates the consequences of the proposed transaction.

Conclusion

In light of the foregoing, as the proposed transfer of a portion of the payee's rights and interests in his structured settlement does not meet the "best interest" requirement, or the "fair and reasonable requirement" under SSPA, the motion is denied, and therefore, the petition is dismissed.

ENTER:



J.S.C.

Dated: September 14, 2011

cc: Law Offices of Matthew B. Kogan, P.C.
Philip Hanks, Jr. a/k/a Philip Hanks
Transamerica Annuity Service Corporation
Transamerica Financial Life Insurance Company

ENTERED
SEP 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE