

**Matter of Benes v American Gen. Annuity Serv.  
Corp.**

2011 NY Slip Op 33397(U)

December 12, 2011

Sup Ct, Nassau County

Docket Number: 14957/11

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

BRIAN BENES for Judicial approval of a Structured Settlement Annuity Sale and Assignment Agreement with LAVENDER FUNDING, LLC, pursuant to Article 5 Title 17 of the New York General Obligations Law,

Petitioners,

- against -

AMERICAN GENERAL ANNUITY SERVICE CORPORATION and AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK N/K/A UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,

Respondents.

TRIAL/IAS, PART 13  
NASSAU COUNTY

INDEX NO. 14957/11

MOTION SUBMISSION  
DATE: 11/23/11

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 Brian Benes, (hereinafter referred to as "Benes"), to petitioner, Lavender Funding, LLC, (hereinafter referred to as "Lavender").

Lavender seeks approval of the transfer of certain structured settlement payment rights under the New York Structured Settlement Protection Act, (hereinafter referred to as "SSPA"). Benes, a resident of the State of New York, County of Nassau, currently resides at 10 Thrush Lane, Levittown, New York. Benes is the beneficiary of a structured settlement agreement dated May 12, 2010 that provides that Benes is entitled to monthly payment amounts of one thousand seven hundred ninety and 00/100 dollars, (\$1,790.00), starting June 12, 2010, ending May 12, 2040.

Benes, under the terms of the proposed Structured Settlement Annuity Sale and Assignment Agreement with Lavender intends to transfer and sell his rights to sixty (60) monthly payments of one thousand seven hundred ninety and 00/100 dollars, (\$1,790.00), commencing October 12, 2011 through and including September 12, 2016.

The aggregate amount of payments to be transferred to Lavender total one hundred seven thousand four hundred and 00/100 dollars, (\$107,400.00). The net amount Lavender agrees to pay Benes is eighty thousand and 00/100 dollars, (\$80,000.00).

#### 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)).

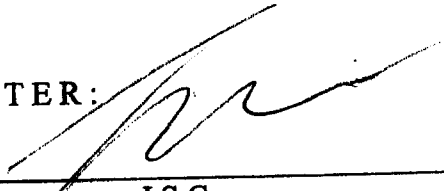
Discussion

In the case at bar, the proposed transfer involves the transfer of the aggregate amount of one hundred seven thousand four hundred and 00/100 dollars, (\$107,400.00), at a discounted present value of one hundred thousand seven hundred seventeen and 20/100 dollars, (\$100,717.20), with a net payment to the payee, of eighty thousand and 00/100 dollars, (\$80,000.00).

While this Court finds that the payment is “fair and reasonable”, the second prong of this test requires this Court to determine whether the transfer is in the payee’s “best interest”. Benes avers that he intends to use the proceeds for repairs to an old home that he recently purchased, including a new roof, floor, bathroom and appliances. However, Benes, does not provide any documentation to substantiate his submissions.

Conclusion

In light of the foregoing, the instant motion is denied with leave to renew to allow Benes an opportunity to provide documentation supporting his submission that he intends to use the proposed net amount payment of eighty thousand and 00/100 dollars, (\$80,000.00), towards repairs to his newly purchased home.

ENTER:   
\_\_\_\_\_  
J.S.C.

Dated: December 12, 2011

cc: Paris & Chaikan, PLLC  
Brian Benes

**ENTERED**  
DEC 15 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE