

<b>Rodolo, LLC v Smith</b>
2015 NY Slip Op 32548(U)
April 22, 2015
Supreme Court, Broome County
Docket Number: 2015-0501
Judge: Ferris D. Lebus
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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, 92 Court Street, City of Binghamton, New York, on the 10<sup>th</sup> day of April, 2015.

PRESENT: HON. FERRIS D. LÉBOUS  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF BROOME

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In the Matter of RODOLO, LLC,

Petitioner,

For Approval of the Sale and Transfer of Structured  
Settlement Payment Rights of KIMBERLY M. SMITH  
In Accordance with Gen. Oblig. Law § 5-1701

**DECISION AND ORDER**

Index No. 2015-0501  
RJI No. 2015-0268

against-

KIMBERLY M. SMITH, ALLSTATE LIFE INSURANCE  
COMPANY, and ALLSTATE SETTLEMENT  
CORPORATION,

Respondents

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APPEARANCES:

COUNSEL FOR PETITIONER:

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KIMBERLY M. SMITH  
68 CEMETERY ROAD  
LISLE, NY 13797-1224

**HON. FERRIS D. LEBOUS, J.S.C.**

This is the third petition involving this structured settlement. This current petition is filed by petitioner, Rodolo, LLC, for judicial approval of the proposed transfer of the remaining future payments due Kimberly M. Smith (formerly Knapp) under a structured settlement agreement in exchange for the present payment of a discounted lump sum (General Obligations Law § 5-1701 *et seq.*).

The current petition was deemed submitted on the papers as of a return date of April 10, 2015.

**BACKGROUND**

Ms. Smith was the recipient of certain guaranteed payments under a 1993 structured settlement agreement entitling her to the following payments:

- \$200 per month for 107 months from 10-1-1993 through 8-1-2002
- \$17,500 per year for four years (8-1-2003 through 8-1-2006)
- \$1,516 per month for 30 years guaranteed and life commencing 8-15-2006
- \$25,000 on 8-15-2009
- \$25,000 on 8-15-2014
- \$50,000 on 8-15-2019

Ms. Smith has made two prior applications seeking to sell payments from this agreement, namely in 2010 and 2011.<sup>1</sup> While petitioner disclosed the existence of her prior applications, she did not reveal any of the relevant information from those applications. The court has obtained

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<sup>1</sup> Presumably the payments due prior to these applications were actually paid to petitioner, namely \$200 per month from October 1, 1993 through August 1, 2002 and the four annual payments of \$17,500 per year for four years (August 1, 2003 through August 1, 2006).

those prior files from the Cortland County Clerk's Office in order to ascertain the pertinent details. Before proceeding to a review of this current petition, the court will review the prior applications made by Ms. Smith.

**Past Applications:**

**Petition #1 (Cortland Index No. 2010-0565: RJI No. 2010-0327).**

By Order dated November 29, 2010, the Hon. Phillip R. Rumsey granted Ms. Smith the right to sell a portion of her monthly payments in the amount of \$200 per month commencing on December 15, 2010 through and including November 15, 2017; one lump sum payment of \$20,000 due on August 15, 2014; and one lump sum payment of \$35,000 due on August 15, 2019 in exchange for a net payment of \$26,200.76.

In her supporting affidavit of Petition #1, Ms. Smith identified herself as a 26 year old, married mother of two children. Ms. Smith represented she was unemployed, while her husband received \$292 a month in disability benefits and workers compensation in amount of \$468 bi-weekly (Smith Affidavit sworn to October 9, 2012<sup>2</sup>, ¶ 8). Ms. Smith further represented that she intended to use the payout to pay a \$15,000 outstanding tax lien; \$5,000 outstanding medical bills; and approximately \$4,200 for home improvements (Smith Affidavit sworn to October 9, 2012, ¶ 10). Justice Rumsey's Order is annexed as Court Exhibit A to this Decision & Order.

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<sup>2</sup>Presumably the "2012" is a typographical error and should read "2010".

**Petition #2 (Cortland County Index No. 2011-220; RJI No. 2011-0103).**

By Decision, Order and Judgment dated May 4, 2011, Justice Rumsey denied Ms. Smith's second petition to transfer further portions of her settlement. Although denied, Ms. Smith was seeking to sell additional portions of the monthly payments (\$216 per month from August 2011 through September 2017 and \$416 from October 2017 through July 2020), in exchange for a net payment of \$10,100. In her supporting affidavit of Petition #2, Ms. Smith stated she needed the money to pay outstanding credit card bills.

Justice Rumsey's Decision, Order and Judgment dated May 4, 2011 notes, among other things, that Petition #2 was submitted a mere five months after Petition #1 was approved. More importantly, Justice Rumsey found that the petition was not sufficiently detailed due to the failure to submit any of the account statements or any other information regarding the allegedly outstanding credit card debts. Justice Rumsey's Decision, Order and Judgment dated May 4, 2011 is annexed hereto as Court Exhibit B.

**Current Petition**

By way of this third and current petition, Ms. Smith seeks to transfer monthly payments of \$316 per month for 23 months (from January 15, 2016 through November 15, 2017) and then \$516 per month for 180 months (from December 15, 2017 through November 15, 2032), as well as the remaining \$15,000 from the August 15, 2019 payment for a total aggregate value of \$115,148 at an annual discount rate of 16.27% in exchange for a net payment of \$37,102.11.

By this court's calculations, if this third and current petition were to be granted, Ms. Smith's original 1993 structured settlement agreement would essentially be decimated. There would be no more lump sum payments due in the future, with only \$1,000 monthly payments remaining.

### DISCUSSION

General Obligations Law § 5-1701 *et seq.*, also known as the "Structured Settlement Protection Act" or "SSPA", was enacted in 2002 due to the concern that structured settlement payees, such as Ms. Smith, are particularly prone to being victimized and quickly dissipating their assets and to protect them from the growing number of companies using "[a]ggressive 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" (Mem. in Support, N.Y. State Assembly, 2002 McKinney's Session Laws of N.Y., at 2036)" (*Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355 [1<sup>st</sup> Dept 2006]). This legislation "[d]iscourages such transfers by requiring would-be transferees to commence special proceedings for the purpose of seeking judicial approval of the transfer [*citations omitted*]" (*Matter of Settlement Funding of N.Y.*, 195 Misc 2d 721, 722 [Rensselaer County 2003]). "The SSPA clearly reflects the Legislature's dissatisfaction with the structured settlement transfer market rates, and its conclusion that payees cannot protect their best interest and thus require judicial supervision" (*Settlement Funding*, 195 Misc 2d at 724).

This court's judicial function under the SSPA requires an evaluation of a variety of factors, but particularly: (1) whether the transaction is fair and reasonable; and (2) whether the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents, if any.

Whether the proposed transaction is fair and reasonable is a function of the discount rate and the fees and costs associated with the transaction in relation to the level of financial hardship affecting the individual (*Barr v Hartford Life Ins. Co.*, 4 Misc 3d 1021(A) [Sup Ct Nassau Co 2004]). Stated another way, "[t]he more pressing the need, the more reasonable it may be for a payee to obtain immediate cash at a steep discount rate" (*Matter of 321 Henderson Receivables Ltd. Parthnership*, 2 Misc 3d 463, 465 [Sup Ct Monroe Co 2003]). Here, Ms. Smith seeks to transfer \$115,148 in future payments at an annual discount rate of 16.27% in exchange for a present payment of \$37,102.11. There are no fees or expenses being deducted from the gross payment. As for the discount rate of 16.27%, the court notes that the amount of an acceptable discount rate has been hard to identify with rates ranging from 15.46% to nearly 20% being rejected (*Matter of Settlement Funding*, 195 Misc 2d at 724 [15.46%]; *Matter of Settlement Capital Corp. [Ballos]*, 1 Misc 3d 446 [ Sup Ct Queens Co 2003] [19.82%]). Based on the foregoing, the court finds said transaction is not fair and reasonable.<sup>3</sup>

The next consideration is whether the proposed transfer is in Ms. Smith's "best interest."

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<sup>3</sup>In any event, even if the court had found the discount rate to be reasonable in and of itself, the court's decision hereinbelow that this transfer is not in Ms. Smith's best interest would dictate a denial of the petition.

The "best interests" analysis cannot be reviewed in a vacuum but rather must be determined on a case-by-case basis with due regard being made to the purpose to which the funds are intended to be used, the level of financial problems faced by the individual, all of which should be viewed in relation to their long-term financial security. Crucial to this analysis is the level of detail with which the court is provided. Here, as is typical with such applications, the court is provided with a minimal amount of information.

Based upon the original papers submitted, Ms. Smith simply stated that she sought to use the \$37,102.11 "to purchase a home" (Smith Declaration in Support, ¶ 4). That was the extent of the information provided. Then, on the day before the return date, another scrap of information was submitted by way of an affirmation from counsel stating that Ms. Smith intends to use the proceeds "to place a down payment towards the purchase of a home" and annexing a "To Whom it May Concern" letter from a broker stating that Ms. Smith is looking at homes in the "\$40,000 to \$65,000 asking price" in the Town of Lisle (Affirmation in Further Support of Mathew W. Beckwith, Esq., ¶ 3).

Not one other piece of information is provided. The list of information that has not been provided to the court in support of this petition is too long to list, but easily includes Ms. Smith's current employment, if any; sources of current income (and that of her spouse); monthly income and expenses; and current living situation.

With respect to the home to be purchased, although Ms. Smith now indicates the funds

would be used as a down payment, there is still no information to help this court ascertain whether Ms. Smith has any other source of income or assets that would enable her to financially handle the enormous responsibility of being a homeowner (*Matter of Washington Square Financial LLC v Mejia*, 38 Misc3d 1204(A) [Sup Ct Queens Co 2012]). While the court lauds her desire to purchase a home, it is not clear that such a purchase is in Ms. Smith's best interests given the lack of financial information.

Additionally, a review of Ms. Smith's prior and current representations as to how she planned/plans to use funds released, if approved, is also warranted and reveals further missing information. Ms. Smith stated in connection with Petition #1 that she would use the money to pay a \$15,000 outstanding tax lien; \$5,000 outstanding medical bills; and approximately \$4,200 for home improvements. Were any of those debts paid? What home were those improvements on, were those improvements made, does she rent or own her current home (if so, is there a mortgage on that home), and why does she want to move or sell now?

In Petition #2, albeit denied, Ms. Smith averred she needed to pay off outstanding credit card bills. Are those debts still outstanding or were they paid?

Most notable, however, is Ms. Smith's total lack of an explanation about how she has spent any of the cash she has been receiving under the underlying structured settlement. The history of this case leads this court to conclude that previous cash payments have not been used in a manner to benefit Ms. Smith's long term financial situation, but rather for daily living

expenses. The court finds Ms. Smith's use of funds demonstrated to date to be short sighted and not in her financial best interest. Based upon this record, the court finds that giving up the right to \$115,148 in future payments in exchange for a payment today of \$37,102.11 is not in Ms. Smith's best interest (*Whitney v LM Prop. & Cas. Ins. Co.*, 32 Misc 3d 1212(A) [Sup Ct Westchester Co 2011]).

Quite simply, the court finds this petition as a whole to be overwhelming insufficient.

### CONCLUSION

Based on the foregoing, the court finds that petitioner has failed to demonstrate to the court's satisfaction that the transaction is fair and reasonable and that the transfer is in Ms. Smith's best interest (GOL § 5-1706 [b]). Consequently, the Petition is denied. The court further directs that on any future petitions to this or any other court of competent jurisdiction, a copy of this Decision & Order including Court Exhibits A & B, should be annexed to any future petitions.

Dated: April 22, 2015  
Binghamton, New York

s/ Ferris D. Lebous  
Hon. Ferris D. Lebous  
Justice, Supreme Court