

Matter of Kimberly S.
2015 NY Slip Op 32549(U)
December 8, 2015
Supreme Court, Broome County
Docket Number: 2015-2677
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 13th day of November, 2015.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

In the Matter of the Petition for Approval of the Sale and Transfer of Structured Settlement Payment Rights of Kimberly S., In Accordance with Gen. Oblig. Law § 5-1701,

DECISION AND ORDER

Index No. 2015-2677
RJI No. 2015-1461

APPEARANCES:

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

This is the fourth petition within five years seeking judicial approval of the proposed transfer of a portion of the future payments due Kimberly Smith under a structured settlement agreement in exchange for the present payment of a discounted lump sum (General Obligations Law § 5-1701 *et seq.*).

The petition was deemed submitted as of the return date of November 13, 2015.

BACKGROUND

Ms. Smith is the recipient of certain guaranteed payments under a 1993 structured settlement which is outlined hereinbelow. As noted, there have been four petitions in five years by Ms. Smith. A detailed review of the three prior petitions is contained in this court's prior Decision & Order (Petition #3), but a brief summary of the history is as follows:

Petition #1: *Matter of Settlement Funding of New York, LLC [Kimberly M. Smith a/k/a Kimberly M. Knapp]*, Sup Ct, Cortland County, November 29, 2010, Rumsey, J., index No. 2010-0565. Order granting right to transfer \$200 in monthly payments from December 15, 2010 through November 15, 2017 plus lump sum payments of \$20,000 and \$35,000 in exchange for \$26,200.76.

Petition #2: *Matter of Settlement Funding of New York, LLC [Kimberly Marie Smith a/k/a Kimberly M. Knapp]*, Sup Ct, Cortland County, May 4, 2011, Rumsey, J., index No. 2011-0220) [Decision & Order denying petition].

Petition #3: *Matter of Rodolo, LLC [Kimberly M. Smith]*, Sup Ct, Broome County, April 22, 2015, Lebus, J., index No. 2015-0501) [Decision & Order denying petition].

Petition #4: The current petition.

The following chart sets forth the underlying settlement payment schedule with notations of which payments have been previously paid to Ms. Smith, transferred by Petition #1, and/or are the subject of the current petition (Petition #4). The chart does not attempt to identify those payments that Ms. Smith attempted to transfer in Petitions #2 and #3 but which were denied.

Date paid/due	Amount Due/Paid	Seeking to transfer/ previously transferred or paid
10-1-1993 through 8-1-2002	\$200 payable monthly	Paid
8-1-2003 through 8-1-2006	\$17,500 per year for four years	Paid
8-15-2006	\$1,516 payable monthly for life (guaranteed for 30 years)	<p>←sold partial payments of \$200 per month from 12-15-2010 through 11-15-2017 (Petition #1).</p> <p>←Petition #4 seeks to sell 40 monthly payments of \$316 beginning 1-15-2016 through 4-15-2019.</p> <p>←Petition #4 also seeks to sell 207 monthly payments of \$516 beginning 5-15-2019 through 7-15-2036.</p>
8-15-2009	\$25,000	Paid
8-15-2014	\$25,000	←sold \$20,000 (Petition #1). \$5,000 balance presumably paid.
8-15-2019	\$50,000	<p>←sold \$35,000 (Petition #1)</p> <p>←Petition #4 seeks to sell \$5,000</p>

In connection with the pending petition, Ms. Smith avers that she was advised of the right to seek independent counsel, but waived such right.

DISCUSSION

A. The Current Petition (Petition #4)

Before proceeding to the court's customary analysis of such petitions, the court highlights several concerns regarding the contents of Petition #4.

First, the children listed by Ms. Smith on this Petition #4 differs from Petition #3.¹ On Petition #3, Ms. Smith listed three children, namely Beonkia, Kasiaey and Nathaniel. On Petition #4, Ms. Smith lists only two children (Kasiaey and newborn son Katin Knapp), but does not list Beonkia or Nathaniel. So, it would appear that Ms. Smith has four children even though her current petition only lists two children. There is no explanation of Ms. Smith's legal role with respect to custody, visitation and/or child support regarding Beonkia or Nathaniel.

The second concern relates to conflicting facsimiles received by the court from Ms. Smith dated September 23, 2015 and November 10, 2015. The first facsimile was received on October 30, 2015 (but dated September 23, 2015) and states as follows:

TO WHOM IT MAY CONCERN:

I have decided to cancel my transfer of structured settlement rights with LAE Holdings, LLC. Therefore, I no longer wish to sell my payments to LAE Holdings, LLC and therefore will not be

¹Obviously, Ms. Smith's newborn son was not named in Petition #3 as he was born in 2015.

appearing at any hearing that may be scheduled by LAE Holdings, LLC. To the extent necessary, I formally object to this transfer with LAE Holdings, LLC as the economics of the transfer with LAE Holdings, LLC are no longer in my best interest since I was able to get better value elsewhere.

s/Kim Smith²

(Court Exhibit A).

In view of this correspondence, the court sent a letter dated November 4, 2015 to the parties advising that the court would take no further action on the petition (Court Exhibit B).

On November 10, 2015, the court received a telephone call from an unidentified caller stating that Ms. Smith did not sign anything. The caller was advised to write a letter to the court. Later on that same day, the court received the following facsimile dated November 10, 2015:

This letter is in response to your letter dated November 4, 2015. *I did not sign and notarize that letter dated September 23, 2015.* I do not live in Florida and have never been there. The company that sent you that letter tried to get me to do a Florida deal, but I do not live in Florida. They found out about my deal with LAE Holdings and sent that letter to you. I want to continue moving forward with my deal with LAE Holdings. The contract I signed with LAE Holdings on October 1, 2015 is valid.

Please see the letter attached. It is a letter I sent that Company, to Allstate and to their attorneys.

Thank you,

Ms. Kim Smith³

²Ms. Smith's signature is handwritten and was notarized in Florida.

³Ms. Smith's name is typewritten without any handwritten signature and not notarized.

(Court Exhibit C [emphasis added]).

In view of said facsimile the court returned the matter to the motion calendar by letter dated November 10, 2015 (Court Exhibit D). However, needless to say, these communications from Ms. Smith do not lend credibility to the current petition.

Finally, the Petition #4 (¶ 25) and the accompanying Request for judicial intervention (list of related cases) identified only one prior application made by Ms. Smith (which is what this court is referring to as Petition #3). This is incorrect as noted above. There have been three prior petitions in total. The first two were filed in Cortland County and the third was filed before this court. The two Cortland County petitions were clearly identified and, in fact, annexed to this court's Decision & Order in Petition #3. This error was corrected by the filing of an Amended Petition on November 13, 2015, but the late disclosure means that neither petitioner nor Ms. Smith offered any explanation of the issues raised in those prior applications.

B. Analysis

Turning to the merits of the current petition (Petition #4), it is well-settled that 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 [1st Dept 2006]). 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 (*Matter of 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 \$124,452 in future payments at an annual discount rate of 10.32% in exchange for a present payment of \$50,000. There are no fees or expenses being deducted from the gross payment. The court finds the discount rate, in and of itself, to be reasonable. Overall, while not overly impressive, the court does find the proposed transfer fair and reasonable.

The next consideration is whether the proposed transfer is in Ms. Smith's "best interest." Ms. Smith sets forth the following explanation for her need for the proposed transfer:

I intend to use the proceeds I receive from LAE Holdings LLC to purchase a reliable vehicle, pay off past due child support arrears, move into an apartment and pay the first years rent up front and purchase new baby furniture and any other baby necessities that

will be needed.

(Petition #4, Exhibit F, ¶ 8).

The questions raised by this brief statement are endless and mirror, in part, the same questions raised by this court in its prior Decision & Order rejecting Petition #3, as well as Justice Rumsey's Decision & Order denying Petition #2. Those unanswered questions include but are not limited to whether Mrs. Smith is currently employed; what are her current sources, if any, of income (and that of her spouse); what are the family's monthly expenses; what is the family's current living situation (rent or own); and does she own a vehicle now? Additionally, the three prior petitions listed various financial needs such as outstanding tax liens, medical bills, home improvements, and credit card bills. Have any of those previously identified debts been paid?

Now, added to the previous list of unanswered questions, Ms. Smith avers that she owes child support arrears. However, petitioner and Ms. Smith have failed to provide this court with any proof of her obligations or the amount of the child support arrears.⁴ Further, there is no information as to which children the arrears relate to, whether she has joint custody and/or visitation with those children, and/or whether those children live with her.

Additionally, Ms. Smith has failed to address any of the payments she presumably has

⁴The court also questions whether the New York State Division of Child Support Enforcement should have been on notice of this application due to the involvement of child support arrears.

already received and is receiving under the underlying settlement (the remainder of the monthly payment not previously transferred) or, for that matter, the \$26,200.76 she received from Petition #1 in 2010.

In sum, the court finds the proposed transfer is not in Ms. Smith's best interest.

CONCLUSION

Based on the foregoing, the court finds that petitioner has failed to demonstrate to the court's satisfaction that the transaction is in Ms. Smith's best interest (GOL § 5-1706 [b]). Consequently, the Petition is denied.

A copy of this Decision & Order should be annexed as an exhibit to any future petition, together with a copy of the Order dated November 29, 2010 (Cortland Index No. 2010-0565), the Decision & Order dated May 4, 2011 (Cortland Index No. 2011-0220) and the Decision & Order dated April 22, 2015 (Broome Index 2015-0501).

Dated: December 8, 2015
Binghamton, New York

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

The court considered the following papers which are on file in the Broome County Clerk's Office:

1. Order to Show cause signed October 6, 2015;
2. Verified Petition dated October 2, 2015, with exhibits;
3. Order dated November 29, 2010 (Cortland Index No. 2010-0565);
4. Decision & Order dated May 4, 2011 (Cortland Index No. 2011-220);
5. Decision & Order dated April 22, 2015 (Broome Index 2015-0501);
6. Amended Verified Petition dated November 12, 2015, with exhibits;
7. Kim Smith facsimile dated September 23, 2015 (Court Exhibit A);
8. Court letter dated November 4, 2015 (Court Exhibit B);
9. Kim Smith facsimile dated November 10, 2015 (Court Exhibit C);
10. Court letter dated November 10, 2015 (Court Exhibit D).