

**Matter of Washington Sq. Fin. LLC v GE Capital
Assignment Corp.**

2011 NY Slip Op 30262(U)

January 20, 2011

Sup Ct, Nassau County

Docket Number: 20807/10

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 WASHINGTON
SQUARE FINANCIAL LLC, d/b/a IMPERIAL
STRUCTURED SETTLEMENTS and Phillip L.
Perez a/k/a Phillip Perez,**

Index No. 20807/10

**Motion Submitted: 11/29/10
Motion Sequence: 001**

Petitioner(s),

-against-

**GE CAPITAL ASSIGNMENT CORPORATION
("Settlement Obligor") and GENWORTH LIFE
INSURANCE COMPANY ("Annuity Issuer"),**

Defendant(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 Washington Square Financial, LLC ("Washington Square") seeks an Order from the Court granting judicial approval of the transfer/sale of a structured settlement payment from Phillip L. Perez, a/k/a Phillip Perez to Washington Square. Respondents GE

Capital Assignment Corporation (“GE”) and Genworth Life Insurance Company (“Genworth”) have not submitted opposition to the requested relief.¹

This action arises from a structured settlement agreement providing for payment of an aggregate sum of \$176,574 to Mr. Perez as the result of the settlement of a personal injury action.² The first lump sum payment, which is the subject of this petition, is in the amount of \$50,000, due and payable on or about April 1, 2014. Apparently, Mr. Perez wishes to sell/transfer \$33,000 of the first lump sum payment to Washington Square in exchange for the net amount of \$15,772.14 in cash. Mr. Perez states in his affidavit that he intends to use the proceeds to purchase a “reliable” used vehicle and one year of automobile insurance. Mr. Perez states that he is a student pursuing a degree as a dental assistant, and needs “reliable transportation” to attend classes. Mr. Perez also states that he is twenty-one (21) years old, lives with his fiancé, who supports him financially, and expects to graduate and enter the workforce “in the very near future.” Mr. Perez has no dependents.

Petitioner Washington Square has provided as exhibits the sale and security agreement pertaining to the prospective sale/transfer of the \$33,000, as well as various disclosure forms sent to Mr. Perez. The agreement and disclosure forms state that the sale/transfer of the \$33,000 will result in a gross payment to Mr. Perez of \$17,972.14, at a “nominal annual discount rate of 17.25%.” After \$2,000 in “legal fees” and \$200 in “processing fees” are deducted from the gross payment, Mr. Perez will net \$15,772.14. The discounted present value of the payment to be sold and transferred is \$30,794.29. Thus, Mr. Perez’s net advance would be fifty-two percent (52%) 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*,

¹It does not appear that respondents were properly served with the instant application. Washington Square’s affidavit of service indicates that respondents were served with notice of this special proceeding by mailing the supporting papers via Federal Express, rather than properly serving respondents pursuant to CPLR § 311 or 312-a. Although petitioner’s application may be denied on this basis alone, the Court will address the merits of the petition in the body of its decision.

²Neither petitioner nor Mr. Perez has provided any details regarding the personal injury action, nor a copy of the structured settlement providing for the lump sum payments.

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 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, the Court finds that Washington Square has failed to comply with the statutory time requirements regarding the written disclosure to be provided to Mr. Perez. In his "Disclosure Affidavit" submitted in support of the instant petition, Mr. Perez claims to have received the statutorily required disclosures on October 4, 2010, via e-mail. The transfer agreement is dated October 13, 2010, which is only nine days after Mr. Perez received the disclosures, not to mention the fact that service of the disclosure by e-mail is not permitted by the applicable statute. Additionally, the disclosures submitted with the instant application are not dated October 4, 2010, but are dated October 13, 2010, the same date that Mr. Perez signed the transfer agreement.

Washington Square has failed to provide evidence that it complied with the mailing requirements set forth in the GOL. The Court finds it disturbing that Washington Square's counsel set forth in her verified petition that the disclosure documents were sent to Mr. Perez "via three methods of mailing: United States Postal Service Certified Mail, Return Receipt Requested, United States Postal Service First Class Mail, and Federal Express Standard Overnight Delivery."³ Washington Square has not provided proof that the disclosures were sent to Mr. Perez according to those methods, despite counsel's claim that proof of same is attached to the petition as part of Exhibit C. Petitioner Washington Square is silent as to whether or not it sent the disclosures via e-mail.

The Court further finds that the transfer/sale is not in Mr. Perez's best interests, and that Washington Square has not demonstrated that the discount rate applied, and the fees charged, are fair and reasonable.

Mr. Perez is 21 years old, with no dependents. He is unemployed, but is a full-time college student being supported by his fiancé. Mr. Perez states that the purpose of the proposed transfer is to obtain cash to purchase a newer, reliable, used car, and one year of automobile insurance, in order that he can travel to and from his college classes. Mr. Perez states that he wishes to pay for the car "outright" so that he is not "saddled with a monthly loan obligation."

Mr. Perez does not explain where his college is located relative to his residence, and whether or not public transportation is available to get him to and from his classes. He has not supplied specific information regarding the vehicle he is considering purchasing, including its cost, nor has he provided information as to the estimated cost of insurance. Also unexplained is whether or not Mr. Perez's fiancé can assist him with his transportation needs.

³Federal Express delivery is not authorized by GOL § 5-1703.

Of equal concern to the Court is the letter from Robert E. Carter, Esq., dated October 27, 2010. Apparently, Mr. Perez consulted with Mr. Carter about the proposed transfer, and Mr. Carter discussed with Mr. Perez “other methods to obtain the funds desired and . . . encouraged [Mr. Perez] to explore all alternative forms and financial arrangements available.” The Court does not consider Mr. Carter’s letter to be supportive of the proposed transfer. Mr. Perez has not stated what, if any, financing arrangements he has explored relative to purchasing a car. Nor has Mr. Perez explained how he is financing his education, and what portion of his total expenses are being paid for by his fiancé.

Mr. Perez acknowledges by affidavit that he does not have a copy of the annuity contract providing for the lump sum payments under the structured settlement, and that he is not in possession of the Release and Settlement Agreement. Although Mr. Perez claims that respondents have not provided him with those documents despite his requests for them, the fact that Mr. Perez does not already possess the very documents related to his sizeable personal injury award gives the Court pause. Without those documents, the Court is not satisfied that Mr. Perez appreciates the consequences of the transfer that he and Washington Square seek.

The Court now turns to the issue of the discount rate selected for the proposed transfer. 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, Washington Square has not demonstrated why this particular discount rate of 17.52% was selected to apply to the proposed transfer, and/or why it should be deemed fair and reasonable. The affidavit of Anthony Mitchell, whose relationship to Washington Square and Imperial Structured Settlements is unclear, lacks persuasiveness. Mr. Mitchell’s affidavit amounts to nothing more than a general dissertation concerning the state of the structured settlement market, but contains no factual explanation as to how Washington Square arrived at the determination that a 17.52% discount rate should apply to Mr. Perez’s proposed transfer.

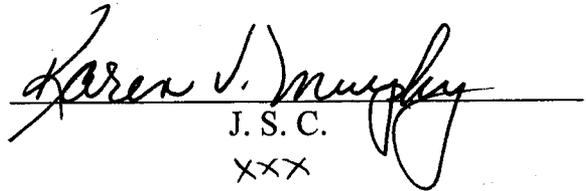
Additionally, Washington Square has utterly failed to provide any justification for the reasonableness of the \$2,000 "legal fee," and the \$200 "processing fee," both of which are to be deducted from the gross advance amount. Thus, such fees are disallowed (*Settlement Funding of New York, LLC v. Transamerica Annuity Service Corp.*, 11 Misc.3d 1061(a), 816 N.Y.S.2d 701 [Sup. Ct. Bronx County 2006]).

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

Plaintiff's counsel is directed to serve a copy of this Order, with Notice of Entry, upon the respondents, and in accordance with the CPLR.

The foregoing constitutes the Order of this Court.

Dated: January 20, 2011
Mineola, N.Y.



J. S. C.
XXX

ENTERED

JAN 28 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE