

**Midland Funding LLC v Rome Savings Bank**

2008 NY Slip Op 33464(U)

December 31, 2008

Rome City Ct

Docket Number: 30371

Judge: Daniel C. Wilson

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STATE OF NEW YORK  
ROME CITY COURT

COUNTY OF ONEIDA

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MIDLAND FUNDING LLC,  
Petitioner,

MEMORANDUM DECISION

V.

ROME SAVINGS BANK AND  
ANNA HAYNES,  
Respondents,

and,

EDWARD F. HAYNES  
Judgment Debtor.

INDEX NO. 30371

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Cohen & Slamowitz, LLP, Attorneys for the petitioner,  
Leandre M. John, Esq., of counsel

No appearance by Rome Savings Bank,

Edward F. Haynes, pro se, for judgment debtor,

No appearance by Anna Haynes,

PRESENT: Daniel C. Wilson, City Court Judge:

The petitioner has moved this court by a petition which was filed with the court on May 28, 2008 and which was duly submitted to the court on November 18, 2008 for an order directing Rome Savings Bank, the respondent to deliver funds in an allegedly restrained bank account pursuant to §5225(b) of the Civil Practice Laws and Rules. The judgment debtor has opposed said motion in writing, but neither the respondent-garnishee nor the co-owner of the bank account, Anna Haynes, have appeared or answered upon the petition. After the matter was submitted to the court on the aforementioned date and after due deliberation, the court determines the plaintiff's motion as follows:

§ 5225(b) of the Civil Practice Laws and Rules provides as follows:

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

The affirmation of the petitioner's attorney alleges that the respondents were served with a notification restraining the account herein and the judgment-debtor has raised defenses, but the

other respondents, including the co-owner of the account have not appeared or raised any defense.

There is a judicial disagreement over whether the default in appearance of the non-judgment debtor respondent to a turnover proceeding aimed at a joint bank account is alone sufficient to entitle the court to award to the judgment creditor petitioner the turnover of more than half the account.

1. *Ford Motor Credit Company v. Astoria Federal*, 189 Misc.2d 475, 477, 733 N.Y.S.2d 583 (Dist. Ct., Nassau Co.2001)(Fairgrieve, J.), holds that it is. *Mendel v. Chervanyou*, 147 Misc.2d 1056, 1059, 559 N.Y.S.2d 616 (Civ.Ct., N.Y.Co.1990)(Friedman, J.) holds that it is not. And *Direct Merchants Credit Card Bank v. Greenpoint Bank*, 2003 WL 2004163 (N.Y.Dist.Ct.,2003), .

A judgment was entered in favor of the instant petitioner-creditor, Midland Funding LLC, against the respondent-judgment debtor, Edward F. Haynes. The petitioner asserts that no payments have been made. In this special proceeding brought pursuant to CPLR §§ 5225 and 5227, the petitioner seeks the turnover of certain funds belonging to the judgment debtor, but in the possession of respondent Rome Savings Bank. Rome Savings Bank is in possession of a joint account in the name of “ Edward F. Haynes and Anna Haynes.”

Banking Law § 675(b) provides that the opening of a joint bank account such as this “shall ... be prima facie evidence, in any action or proceeding ... of the intention of both depositors ... to create a joint tenancy...” Thus, “[t]he burden of proof in refuting such prima facie evidence is

upon the party or parties challenging” this prima facie showing.

It is only the prima facie nature of the joint tenancy itself which is statutory in nature, not any of the possessory incidents of joint tenancy which flow from that presumption. But it is ancient law (applicable to joint tenancies generally, not merely those having to do with bank accounts), that, as held by the Court of Appeals in

1. *In Re McKelway's Estate*, 221 N.Y. 15, 19, 116 N.E. 348 (1917), “[j]oint tenants ... are said to be seised *per my et per tout*, or by the half and the whole....” This incident of joint tenancy is therefore necessarily implied by and inseparable from the statutory presumption. *See, Direct Merchants Credit Card Bank v. Greenpoint Bank, supra*; *Brown v. Bowery Savings Bank*, 51 N.Y.2d 411, 414, 434 N.Y.S.2d 916, 415 N.E.2d 906 (1980); *Viggiano v. Viggiano*, 136 A.D.2d 630, 523 N.Y.S.2d 874 (2nd Dep't 1988); *Denton v. Grumbach*, 2 A.D.2d 420, 422, 157 N.Y.S.2d 91 (3rd Dep't 1956).

It has been held that the opening of the joint account consequently creates two rebuttable presumptions: (1) a rebuttable presumption that each of the parties is possessed of the whole account, and (2) a rebuttable presumption that each of the parties is entitled to half the account. *See, Direct Merchants Credit Card Bank v. Greenpoint Bank, supra*; *Mendel, supra*, 147 Misc.2d at 1059, 559 N.Y.S.2d 616. As stated in *Joint Tenancy and Turnover Proceedings, supra*, “[e]ach conclusion logically flows from the Banking Law and each appears to be diametrically opposed.”

As explained by the Appellate Division in *Viggiano v. Viggiano, supra*, 136 A.D.2d at 630-631, 523 N.Y.S.2d 874, the rebuttable presumption that each named tenant is possessed of the whole of the account “make[s] the account vulnerable to the levy of a money judgment by

the judgment creditor of one of the joint tenants [citation omitted],” but “[e]ven where a joint account is vulnerable to the levy of a money judgment as against one joint tenant, such a levy is effective only as to the actual interest of that judgment debtor in the account [citation omitted].”

Since the judgment-debtor has raised factual issues as to his possessory interest, or lack thereof, in the entire account, a hearing will be ordered to resolve this factual issue.

Accordingly, a hearing will be scheduled to determine that factual issue on January 26, 2009 at 9:00 A.M.

The petition is granted as above stated, but in all other respects would be denied

This will constitute the decision and the order of the court.

ENTER:

DANIEL C. WILSON

ROME CITY COURT JUDGE

DATED: December 31, 2008