

**New York State Commr. of Taxation & Fin. v
Wachovia Bank**

2009 NY Slip Op 31773(U)

August 5, 2009

Supreme Court, New York County

Docket Number: 402719/08

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGUEROA,
Justice

PART 46

Index Number : 402719/2008

TAXATION AND FINANCE

vs

WACHOVIA BANK

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

1

Answering Affidavits -- Exhibits _____

1

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied by the accompanying decision and judgment.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

NA

Dated: 8/5/09

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
THE NEW YORK STATE COMMISSIONER OF
TAXATION AND FINANCE,

Judgment Creditor/Petitioner,

- against -

WACHOVIA BANK,

Garnishee/Respondent,

**Index No. 402719/08
DECISION AND
JUDGMENT**

and

GARY K. THOMAS,

Judgment Debtor/Respondent,

and

UNFILED JUDGMENT

INA THOMAS,

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Joint Tenant.

-----X

Nicholas Figueroa, J.S.C.:

The State Commissioner of Taxation and Finance petitions for an order directing respondent bank to turn over funds in an account maintained in the names of respondent taxpayer and a joint tenant. The taxpayer has moved to dismiss.

On July 2, 2007, the Commissioner mailed to the taxpayer a Notice of Additional Tax Due in respect of his individual income tax return for the 2004 tax year. The Commissioner had issued such Notice in response to a report from the IRS (pursuant to section 6103[d] of the Internal Revenue Code) that the taxpayer's 2004 federal tax liability had been adjusted upward on audit to reflect a capital gain on the sale of real estate that he had not reported in his tax

return.

Under section 681(e)(1) of the State Tax Law, the Commissioner is authorized to assess a deficiency based on federal audit adjustments if, as here, the taxpayer has not timely reported such adjustments (pursuant to section 659 of the Tax Law). Such assessment is deemed to have been made 30 days after the Commissioner's Notice of Additional Tax is filed unless the taxpayer sooner files an amended return or reports the federal adjustments to the Commissioner, with a statement showing that the federal changes were erroneous. The taxpayer in this case did not file an amended return and has never made such a report.

On October 16, 2007, the Commissioner issued a warrant against the taxpayer (pursuant to section 692 of the Tax Law) and filed it in the County in which the taxpayer resides. As a result, under section 692(e), the Commissioner and the taxpayer respectively became the equivalent of judgment creditor and judgment debtor to the extent of the amount of the assessed deficiency.

On January 22, 2008, after the bank account at issue here was disclosed by respondent bank in compliance with an information subpoena, the Commissioner served on the bank a restraining notice. The Commissioner then commenced the instant proceeding under section 5225(b) of the CPLR, under which a judgment creditor may compel payment by a person in possession of a judgment debtor's property.

The taxpayer's motion to dismiss apparently rests on the proposition that the deficiency assessment was erroneous, based as it was on federal adjustments that he maintains are not supportable. Taxpayer cannot, however, use this proceeding as an end run around the prescribed procedures for contesting a deficiency assessment under Part VI of the Tax Law.

Nevertheless, it remains to be determined whether the relief requested in the petition is supported by the record. In this connection, it is noted that the current balance of the bank account is less than the amount of the deficiency for which the Commissioner is deemed to have a judgment. In other words, the relief that the Commissioner seeks is payment of the entire sum held in the bank account for the taxpayer and his joint tenant. It is further noted that the joint tenant, served by certified mail under the provisions of section 5225, has not appeared.

As a threshold matter, the Commissioner as judgment creditor is entitled to some measure of turnover only if the record establishes that the judgment debtor has an interest in the property at issue. Where the record shows that such property is a bank account in the names of the judgment debtor and a third person, several principles of law apply to the question of turnover. First, such account is presumed to be held as a joint account (Banking Law 675). Second, although, as between themselves and the bank, each of the joint tenants may assert a possessory interest in the entire account, each is nevertheless presumed to have inter se an entitlement to only half of the account (*see Viggiano v Viggiano*, 136 AD2d 630). The foregoing presumptions are, however, rebuttable by proof that a present gift was not intended. Typically, such proof involves the proposition that the depositor opened the account with the other party as a convenience (*see Fragetti v Fragetti*, 262 AD2d 527; *Viggiano v Viggiano, supra*; *Wacikowski v Wacikowski*, 93 AD2d 885;).

The foregoing rules require the Commissioner to rebut the presumption that the taxpayer has an interest in only one half of the bank account balance rather than all of it. The Commissioner has offered no evidence by which it might carry that burden. To be sure, there is authority for the proposition that, where the non-party joint tenant has defaulted, his or her

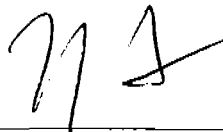
make the judgment creditor's case for rebuttal (*see, e.g., L.R. Credit 10 LLC v Welsh*, 17 Misc 3d 1129; *Rappaport, Steele & Co., P.C. v JPMorgan Chase Bank, N.A.*, 13 Misc 3d 1203; *Ford Motor Credit Co. v Astoria Federal*, 189 Misc 2d 475; *but see, e.g., Velocity Investments, LLC v Kawski*, 21 Misc 3d 276; *Amalgamated Bank of NY v Germain*, 2 Misc 3d 1010(A); *Mendel v Chervanyou*, 147 Misc 2d 1056). Even assuming arguendo that such authority may be valid under some circumstances, such concession does not avail the Commissioner for purposes of the instant proceeding. That is, to the extent relevant in this connection, the instant petition merely alleges that the account is held by the bank on behalf of the taxpayer and his joint tenant and that the Commissioner is entitled to payment under section 5225(b). The non-party joint tenant's silence in the face of such a pleading hardly refutes the presumption that the taxpayer's interest – and therefore his judgment creditor's reach – is limited to half of the account balance. Nor has the taxpayer for his part offered evidence to rebut the presumption that he is entitled to that half, rather than to none of it.

For the foregoing reasons, the motion to dismiss is denied, and the petition is granted in part and denied in part. The bank is directed to turn over to the Commissioner one-half the balance in the subject account. The restraint imposed upon the account by force of the Commissioner's restraining notice shall thereupon be lifted.

This constitutes the decision and judgment of the court.

Dated: August 5, 2009

ENTER:



UNFILED JUDGMENT

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