

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

2010 NY Slip Op 32122(U)

August 3, 2010

Sup Ct, NY County

Docket Number: 401181/05

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Justice

Index Number : 401305/2010

**NYS COMMISSIONER OF TAXATION**

vs.

**WACHOVIA BANK, N.A.**

SEQUENCE NUMBER : 001

TURNOVER PROCEEDING

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*and ReLiken*

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**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 4103)

AUG 03 2010

Dated: August 3, 2010

*JJG*  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

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

Judgment Creditor-Petitioner,

-against-

WACHOVIA BANK, N.A.

Garnishee-Respondent,

-and-

NANCY BERMAN,

Judgment Debtor,

-and-

CAROLINE COUCH,

Joint Tenant.

-----X

**DECISION/ORDER**

Index No.: 401181/05  
Seq. No.: 001

**Present:**  
Hon. Judith J. Gische  
J.S.C.

**UNFILED JUDGMENT**  
*This judgment has not been entered by the Court, and notice of entry cannot be served. Counsel must appear in person at the Court to obtain entry. Counsel for respondent must appear in person at the Court to obtain entry. (CPLR 1412).*

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**PAPERS**

**NUMBERED**

Verif Petition w/exhs ..... 1

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Gische, J.

Upon the foregoing papers, the decision and order of the court is as follows:

This is a special proceeding commenced by petitioner - judgment creditor, the New York State Tax Commissioner of Taxation and Finance ("petitioner") against Wachovia Bank N.A. ("bank") where Nancy Behrman ("Behrman" or "judgment-debtor") and Caroline Couch ("Couch" or "non-debtor") have a joint bank account. Petitioner

seeks an order directing the transfer of the money in that bank account to satisfy a tax warrant that petitioner has against Behrman (CPLR §§ 5222 [b]; 5227).

Petitioner served its petition on the bank by personal service. Behrman and Couch were each served with the petition by certified mail. The bank takes no position on this motion. Behrman and Couch have each defaulted in appearing.

### **Underlying facts**

The petitioner docketed a warrant on May 27, 2009 in the amount of \$202,460.34 for unpaid taxes due and payable by Behrman for the tax year ending December 2007. Petitioner has restrained the account jointly owned by Behrman and Couch which contains \$5,753.87 and now seeks an order directing the bank to turn over the money on deposit in that account to satisfy the outstanding tax debt (CPLR §§ 5222 [b]; 5227). There is, however, no tax warrant against Couch.

### **Discussion**

A joint account establishes a rebuttable presumption that a joint tenancy with right of survivorship exists as to the funds on deposit (Banking Law §675; Denton v. Grumbach, 2 AD2d 420 [3<sup>rd</sup> Dept 1956]). Moreover, such tenancy creates the further rebuttable presumption that each tenant is at once seized of the whole of the account and of half of it ("*per my et per tout*") (In Re McKelway's Estate, 221 NY 15, 19 [1917]). This is consistent with the nature of a joint tenancy with right of survivorship, in which the surviving tenant has the legal right to the entire account when the other tenant dies, but until that time (*i.e.* death), each tenant is presumed to have equal right to half the funds in the account (Moskowitz v. Marrow, 251 NY 380 [1929]).

Some courts have, however, ordered the entire bank account turned over to the judgment-creditor notwithstanding these legal principles. This is based upon another well-established principle that a default in answering the complaint or petition is deemed

to be an admission of all factual allegations contained in pleadings and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). Thus, those courts have held that when the joint tenants default in answering the turnover petition, petitioner's burden of rebutting the presumption that each tenant only has a right to half the funds in the account is met (Denton v. Grumbach, 2 A.D.2d 420, 422 [2nd Dept 1988]; Ford Motor Credit Company v. Astoria Federal, 189 Misc2d 475 [Dist Ct Nassau Co. 2001]).

CPLR § 5222 [b] only requires personal service on the garnishee and permits the judgment-debtor to be served by certified mail. This is because by the time a turnover proceeding is brought, there is already a money judgment (here, a warrant) against the judgment creditor and the money in the garnishee's possession belongs to the judgment-creditor who is seeking an order that it be "turned over" to satisfy the judgment it obtained (CPLR §§ 5222 [b]; 5227). The service provisions of CPLR § 5222 [b] do not, however, set forth any requirements as to how a non-debtor has to be served. The restraining notice was not served on Couch (CPLR 5222 [d]) and this turnover petition was not personally served on Couch, only set to her by certified mail (*compare*, Ford Motor Credit Company v. Astoria Federal, *supra*).

This court finds that the petitioner-judgment debtor can only lay claim to half the money in the jointly held bank account because Couch, the co-owner of the account, is not also a judgment creditor (see, Mendel v. Chervanyou, 147 Misc2d 1056 [Civil Ct., Kings Co. 1990]; Direct Merchants Credit Card v. Greenpoint Bank and Wright, 2003 WL 2004163 [Dist Ct., Nassau Co. 2003] n.o.r.; Amalgamated Bank of New York v. Germain, 2 Misc3d 1010A [Dist Ct., Nassau Co. 2004]).

Since petitioner is seeking to have the entire account turned over to satisfy Behrman's tax debt, petitioner has the burden of rebutting the legal presumption that

Behrman only has an undivided 50% ownership in the bank account jointly held with Couch (Direct Merchants Credit Card v. Greenpoint Bank and Wright, supra; Amalgamated Bank of New York v. Germain, 2 Misc.3d 1010 [A] [Civ Ct., N.Y. Co. 2004]). To do so, petitioner has to make a prima facie showing that the Behrman has a disproportionate ownership in the restrained funds (Amalgamated Bank of New York v. Germain, supra.; Direct Merchants Credit Card Bank v. Greenpoint Bank and Wright, supra). Having failed to meet that burden, petitioner is entitled to no more than half the proceeds in the jointly held bank account and the petition is granted to that extent only, otherwise it is denied.

**Conclusion**

In accordance with the foregoing,

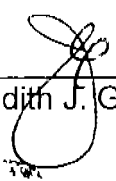
*It is hereby*

**ORDERED DECLARED AND ADJUDGED** that the petition is granted in part and garnishee-respondent Wachovia Bank N.A. shall turn over to petitioner the sum of Two Thousand Eight Hundred Seventy Six and 93/100 Dollars (\$2,876.93) to petitioner, The New York State Department of Taxation and Finance from the joint account held in the names of Nancy Behrman and Caroline Couch within Ten (10) Days after service of this decision, order and judgment with notice of entry; and it is further

**ORDERED DECLARED AND ADJUDGED** that the petition is otherwise denied.

Dated: New York, New York  
August 3, 2010

ENTER

  
\_\_\_\_\_  
Hon. Judith J. Gische

**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).