

**Dewar v Bangkok Bank Pub. Co. Ltd**

2012 NY Slip Op 32904(U)

October 26, 2012

Supreme Court, New York County

Docket Number: 112560/2010

Judge: Shlomo S. Hagler

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

PRESENT: Hon. Shlomo S. Hagler  
*Justice*

PART: 17

**DOUGLAS M. DEWAR,**

**Petitioner,**

**- against -**

**BANGKOK BANK PUBLIC COMPANY LIMITED,  
NEW YORK BRANCH,**

**Respondent.**

INDEX NO.: 112560/2010

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

MOTION SEQ. NO.: 001

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

Petition pursuant to CPLR § 5225(b) for a turnover order.


	Papers Numbered
Notice of Petition and Petition with Affirmation in Support & Exhibits A through D .....	1
Motion in Opposition to Petition with Affirmation by Respondent's Counsel Eric M. Zissu, Esq. and Exhibits A and B .....	2
Respondent's Memorandum of Law in Support of Motion to Deny the Turnover Petition .....	3
Petitioner's Reply Memorandum of Law with Exhibits A and B .....	4
Petitioner's Supplemental Memorandum of Law in Opposition to Respondent's Motion to Dismiss and in Support of the Petition with Exhibits 1 through 5 .....	5
Transcript of April 16, 2012 Oral Argument .....	6

Cross-Motion:  No  Yes      Number of Cross-Motions: \_\_\_\_\_

Upon the foregoing papers, it is hereby ordered that this Petition and Motion are decided as follows:

The Motion by respondent to dismiss is granted and the Petition is dismissed without prejudice to the extent set forth in the attached separate written Decision and Order.

**FILED**  
NOV 19 2012  
NEW YORK  
COUNTY CLERKS OFFICE

  
**Shlomo Hagler**  
J.S.C.

Dated: October 26, 2012  
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one:  **Final Disposition**       **Non-Final Disposition**

Motion is:  **Granted**       **Denied**       **Granted in Part**       **Other**

Check if Appropriate:       **SETTLE ORDER**       **SUBMIT ORDER**

**DO NOT POST**       **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 17

-----X  
DOUGLAS M. DEWAR,

Index No.: 112560/2010

Plaintiff,

- against -

BANGKOK BANK PUBLIC COMPANY LIMITED,  
NEW YORK BRANCH,

DECISION & ORDER

Respondent.

-----X  
HON. SHLOMO S. HAGLER, J.S.C.

**FILED**  
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BACKGROUND

Petitioner Douglas M. Dewar ("Dewar" or "petitioner") is a judgment creditor and a citizen of Washington State. Respondent Bangkok Bank Public Company Limited, New York Branch ("Bangkok Bank NY" or "respondent"), is a New York City branch of Bangkok Bank Public Company Limited ("Bangkok Bank"), located in and incorporated under the laws of the Kingdom of Thailand.

In 2009, petitioner commenced an action in Washington State Superior Court, King County, and later on April 2, 2010, obtained a "Stipulation and Agreed Judgment" against the judgment debtor Bradley E. Beddall ("Beddall" or "judgment debtor") in the total amount of \$4,109,115.48. (See Exhibit "A" to the Petition.) Prior to the entry of judgment, Beddall transferred \$140,000 from a bank in Washington State to a bank account at the parent Bangkok Bank in the Kingdom of Thailand. Petitioner alleges that he has identified two bank accounts at the parent Bangkok Bank which, upon information and belief, contain the funds transferred out of the United States by the judgment debtor. (Petition at ¶ 11.) In September 2010, petitioner duly domesticated the

Washington State judgment in the Supreme Court of the State of New York, New York County.  
(See Exhibit "B" to the Petition.)

### PROCEDURAL HISTORY

Petitioner seeks an order, pursuant to CPLR § 5225(b), to compel Bangkok Bank NY to turn over the judgment debtor's funds held in the parent Bangkok Bank to satisfy petitioner's judgment. Respondent Bangkok Bank NY has moved for an order, pursuant to CPLR §§ 404(a) and 5240,<sup>1</sup> denying the petition in all respects on the grounds that (1) it is not and has never been the holder of the funds belonging to the judgment debtor and thus holds no funds that can be turned over to the petitioner, and (2) petitioner has failed to properly serve the judgment debtor with notice of this turnover proceeding in compliance with CPLR § 5225.<sup>2</sup>

### DISCUSSION

The primary issue in this proceeding is whether this Court can order Bangkok Bank NY to turnover the judgment debtor's funds held by its parent bank in Bangkok, Thailand based on a foreign judgment which has been domesticated in New York State.

The resolution of this issue is dependent upon three factors: (1) did the judgment debtor receive proper notice of this turnover proceeding pursuant to CPLR § 5225(b); (2) does this Court have personal jurisdiction over the parent Bangkok Bank; and (3) did the petitioner bring the proceeding against the proper party as garnishee.

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1. Whether respondent's papers are treated as a motion or merely as opposition to the petition, is not substantively significant as the result of the decision is the same.

2. Significantly, respondent Bangkok Bank NY has not raised a defense of lack of personal jurisdiction under CPLR § 3211.

### Factual Allegations

To begin with, it should be noted that respondent has failed to submit an affidavit or affirmation from an individual with personal knowledge in support of its motion which contains any facts to challenge the allegations in the petition or support claims and arguments made in its memorandum of law. The affirmation of Erik M. Zissu in support of respondent's motion, dated February 22, 2011, merely refers to two attached exhibits – one being a copy of the petitioner's Restraining Notice and Information Subpoena dated September 24, 2010 and the second is a copy of a letter dated September 27, 2010, from Guillermo Rodriguez, VP & Compliance Risk Manager at Bangkok Bank NY to the petitioner's attorney informing him that Bangkok Bank NY neither had a relationship with, nor handled any transactions for the judgment creditor and directed petitioner's counsel to contact the parent Bangkok Bank directly. While respondent also submitted a memorandum of law which included certain factual allegations, this memorandum cannot be used as the basis for admissible facts and can not take the place of an affidavit or affirmation of a person with actual knowledge. *See e.g. JMD Holding Corp. v Congress Financial Corp.*, 4 NY3 373 (2005) (“The conclusory affidavit of JMD's president, which relied entirely on the memorandum of law prepared by JMD's attorney, provides no factual basis to support any conclusion”); *Brown v Smith*, 85 AD3d 1648, 1649 (4th Dept 2011) (“a memorandum of law also has no evidentiary value”); *Eden Rock Finance Fund, L.P. v Gerova Financial Group, Ltd.*, 34 Misc 3d 1205(A) (Sup Ct, NY County 2011) (Bernard J. Fried, J.) (“The numerous factual assertions made by counsel for Gerova in its memoranda of law, upon which its arguments are based, would lack any evidentiary value even on a motion for summary judgment”). As a result, respondent has not presented any evidence in admissible form to rebut any of petitioner's factual allegations, which must be accepted as uncontroverted for purposes of this motion and the petition.

### **Notice to Judgment Debtor**

Respondent argues that the petition should be denied on the grounds that the judgment debtor has not been properly served with notice of this turnover proceeding. However, petitioner has submitted an affidavit of service by Daniela Marando, sworn to on November 16, 2010, evidencing service of the Notice of Petition and Petition for Turnover pursuant to CPLR § 5225(b), with the affirmation in support of the Petition, and a Request for Judicial Intervention, by certified mail with return receipt requested, upon judgment debtor Bradley E. Beddall at his last known address. Respondent argues that this service was insufficient and that petitioner should have made additional attempts at either mail or in person service upon the judgment debtor.

This Court finds that petitioner's service upon the judgment debtor complied with the notice provisions of CPLR § 5225(b), especially in light of the alleged attempts of the judgment debtor to avoid the execution of the judgment.

### **Jurisdiction Over Bangkok Bank NY and Parent Bangkok Bank**

Petitioner argues that it is entitled to an order against Bangkok Bank NY to turnover assets held by its parent Bangkok Bank, located in the Kingdom of Thailand, based on the decision in *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533 (2009). In that landmark case, the Court of Appeals, certifying a question from the Second Circuit held that "a court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce [assets of the judgment debtor] located outside New York, pursuant to CPLR 5225(b)." 12 NY3d at 541. As the Court explained, "the principle that a New York court may issue a judgment ordering the turnover of out-of-state assets is not limited to judgment debtors, but applies equally to garnishees." *Id.*

The *Koehler* court noted the difference between pre-judgment attachments which are governed by Article 62 of the CPLR and require *in rem* jurisdiction over the property, from post-judgment turnover proceedings which are governed by Article 52 of the CPLR and only require *in personam* jurisdiction.

The Court approvingly discussed several First Department cases that permitted New York courts to order turnover of judgment debtor assets held outside of New York State as follows:

The First Department of the Appellate Division has expressly held that judgment debtors can be ordered to turn over out-of-state assets under CPLR article 52 (see *Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.*, 41 A.D.3d 25 [1st Dept.2007], *lv. denied* 10 N.Y.3d 705 [2008]; see also *Miller v. Doniger*, 28 A.D.3d 405 [1st Dept.2006]; *Starbare II Partners v. Sloan*, 216 A.D.2d 238 [1st Dept.1995]). “[T]he explicit rationale was that the court could order the defendant judgment debtor to turn over property because it had personal jurisdiction over the defendant” (*Gryphon*, 41 A.D.3d at 31, citing *Starbare*, 216 A.D.2d at 239). Recently, the First Department endorsed the position that “New York courts have the power to command a garnishee present in the state to bring out-of-state assets under the garnishee’s control into the state” (*Morgenthau v. Avion Resources Ltd.*, 49 A.D.3d 50, 54 [1st Dept 2007], *mod. on other grounds* 11 N.Y.3d 383 [2008]).

As that court noted, the key to the reach of the turnover order is personal jurisdiction over a particular defendant. “[A] turnover order merely directs a defendant, over whom the New York court has jurisdiction, to bring its own property into New York” (*Gryphon*, 41 A.D.3d at 31). A New York court has the authority to issue a turnover order pertaining to extraterritorial property, if it has personal jurisdiction over a judgment debtor in possession of the property. “As long as the debtor is subject to the court’s personal jurisdiction, a delivery order can be effective even when the property sought is outside the state” Siegel, NY Prac. § 510, at 866 (4th ed.).

The Court explained the rationale behind its decision to extend the power of the New York courts to a bank holding extraterritorial funds or assets of the judgment debtor as follows:

Both CPLR 5225(a) and (b) provide that a judgment creditor may obtain an order from a New York court, requiring a defendant

who is in possession or custody of money or other personal property in which a judgment debtor has an interest to turn over the property or pay the money to the judgment creditor. CPLR 5225(a) applies when the property sought is in the possession of the judgment debtor himself. CPLR 5225(b) applies when the property is not in the judgment debtor's possession. The most significant difference between the subdivisions is that CPLR 5225(a) is invoked by a *motion* made by the judgment creditor, whereas CPLR 5225(b) requires a *special proceeding* brought by the judgment creditor against the garnishee. The reason for this procedural distinction is that the garnishee, not being a party to the main action, has to be independently subjected to the court's jurisdiction. But both CPLR 5225(a) and (b) contemplate an order, directed at a defendant who is amenable to the personal jurisdiction of the court, requiring him to pay money or deliver property.

12 NY3d at 540-41.

The *Koehler* majority pointed out that “Article 52 authorizes a judgment creditor to file a motion against a judgment debtor to compel turnover of assets or, when the property sought is not in the possession of the judgment debtor himself, to commence a special proceeding against a **garnishee who holds the assets.**” *Id.* at 537. A garnishee is “a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest.” CPLR § 105(i).

The dissent in *Koehler* was concerned about the broad reach of the majority decision and pointed out that:

The majority’s holding opens up a forum-shopping opportunity for any judgment creditor trying to reach an asset of any judgment debtor held by a bank (or any other garnishee) anywhere in the world. **If the bank has a New York branch – either one that is not separately incorporated, or a subsidiary with which the parent’s relationship is close enough to subject the parent to New York jurisdiction – the judgment creditor, having registered the judgment in New York, can obtain an order requiring the asset to be delivered here.** It is, apparently, irrelevant whether New York has any relationship with the judgment creditor, the judgment debtor or the dispute between them – indeed, in this case, so far as the record shows, no such relationship exists.

12 NY3d 542 (*emphasis added*).



Significantly, neither the majority nor the dissent in *Koehler* discussed the impact of its decision upon what is known as the “separate entity rule” Indeed, neither opinion even mentioned the “separate entity rule.”

### **Separate Entity Rule**

Respondent has argued in its memorandum of law that New York has a “separate entity rule” which requires that each branch of a bank be treated as a separate entity for attachment or garnishment purposes. See *McCloskey v Chase Manhattan Bank*, 11 NY2d 936 (1962). The “separate entity rule” dates back to the early 1900’s and provides that “each branch of a bank is treated as a separate entity, in no way concerned with accounts maintained by depositors in other branches or at a home office” (Lanier Saperstein and Geoffrey Sant, Outside Counsel, *The Separate Entity Rule: The Deep Divide*, NYLJ, April 13, 2012, quoting *Cronan v Schilling*, 100 NYS2d 474, 476 (Sup Ct NY County 1950). The rationale behind this judicially created doctrine is that it was impractical to require bank branches [and even the home bank] to constantly monitor accounts in all the other branches and that requiring branches to freeze or turn over assets held in foreign countries could implicate or violate that country’s banking laws, raising comity concerns. *Id.*

Since the *Koehler* decision, there has been a dispute over whether the “separate entity” doctrine is still good law or whether it has been implicitly overturned by *Koehler*. See *Global Technology, Inc. v Royal Bank of Canada*. 34 Misc 3d 1209(A) (Sup Ct, NY County 2012) (Michael D. Stallman, J.) (discussing and analyzing post-*Koehler* decisions). See also Saperstein and Sant, Outside Counsel, *The Separate Entity Rule: The Deep Divide*.

Respondent cites to *Global Technology, Inc. v Royal Bank of Canada*. 34 Misc 3d 1209(A) (Sup Ct, NY County 2012) (Michael D. Stallman, J.), *Samsun Logix Corp. v Bank of China, et al*, 31 Misc 3d 1226(A) (Jane S. Solomon, J.), and *Parbulk II AS v Heritage Maritime, SA, et al*, 35

Misc 3d 235 (Sup Ct NY County 2011) (O. Peter Sherwood, J.), three New York State trial level courts which have held that the “separate entity rule” applies post-*Koehler* to prevent a New York court from ordering the turnover of a judgment debtors assets that are held in foreign bank branches when faced with challenges from the respondent banks. There have been no appellate decisions in the New York State courts to resolve the question of whether the “separate entity rule” still survives in the aftermath of the *Koehler* decision.

However, whether or not the “separate entity rule” still applies in post-judgment turnover proceedings after *Koehler* is not an issue this Court needs to decide in this case at this time. As Justice Stallman noted in *Global Technologies*, “*Koehler* did not involve the separate entity rule, because the entity served with the writ of execution was not a bank branch, but rather a wholly-owned New York subsidiary of the Bank of Bermuda Ltd., served through an officer of the New York subsidiary.” 34 Misc 3d at \*10.

### **Personal Jurisdiction**

As noted in *Koehler*, a key issue to be decided is whether the New York court has personal jurisdiction over the garnishee bank. In *Koehler*, the Court of Appeals found that a New York court had personal jurisdiction over Bank of Bermuda, Ltd. since it “was ‘doing business’ in New York through its wholly owned subsidiary” located in New York.<sup>2</sup>

In the instant case, respondent Bangkok Bank NY was properly served, has appeared as the respondent in this action and has not raised any objection to the Court’s personal jurisdiction over

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2. Similarly, in *JW Oilfield Equip., LLC v Commerzbank AG*, 764 F Supp 2d 587 (SDNY 2011), the Southern District of New York court, relying on the *Koehler* decision, found that it had personal jurisdiction over the German branch of Commerzbank because it was doing business systematically and continuously through its New York branch, which was neither incorporated nor a separate entity from its parent bank.

it in this matter. Additionally, respondent has not denied that its parent Bangkok Bank maintains an office and does business in New York through Bangkok Bank NY, the New York domestic branch of the parent bank located in Thailand. Significantly, however, neither the affirmation of Mr. Zissu, nor the attached exhibits, presents any evidence that Bangkok Bank NY is a separate entity from the parent Bangkok Bank.

However, respondent argues that since the parent Bangkok Bank has not been named as the garnishee or been served directly, this Court does not have personal jurisdiction over the parent Bangkok Bank. Respondent distinguishes *Koehler* from the case at bar, arguing that in *Koehler* the petitioner named the parent Bank of Bermuda Limited as the garnishee, where the judgment debtors assets were actually located, and that once the parent bank agreed to the personal jurisdiction of the New York court through the service upon its wholly owned subsidiary, there was no longer an issue of *in personam* jurisdiction. In stark contrast to *Koehler*, petitioner in this proceeding only named the New York branch of the bank, not the parent bank in Thailand, which has not consented to personal jurisdiction.

Respondent is correct in pointing out that *Koehler* and CPLR § 5225(b) requires that the turnover petition must be directed at the garnishee who holds or has control of the judgment debtors' assets. In the instant case, the garnishee who admittedly has possession of the judgment debtor's assets, and which should have been named in the turnover petition, is the parent Bangkok Bank.

### CONCLUSION

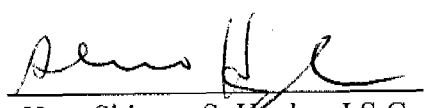
Accordingly, this Court grants the motion of respondent Bangkok Bank Public Company Limited, New York Branch to dismiss the turnover petition against it; and

IT IS HEREBY ORDERED that the turnover petition is dismissed without prejudice for the petitioner to name the proper garnishee.

The foregoing constitutes the Decision, Order and Judgment of this Court. Courtesy copies of this decision have been sent to counsel for the parties.

ENTER:

Dated: October 26, 2012  
New York, New York

  
Hon. Shlomo S. Hagler, J.S.C.

**FILED**  
NOV 19 2012  
NEW YORK  
COUNTY CLERK'S OFFICE