

Matter of BLDG Mgt. Co., Inc. v Petersen

2023 NY Slip Op 31045(U)

April 3, 2023

Supreme Court, New York County

Docket Number: Index No. 160381/2022

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of	INDEX NO. <u>160381/2022</u>
BLDG MANAGEMENT CO., INC., doing business as BRISTOL MANAGEMENT CO.,	MOTION DATE <u>01/13/2023</u>
	MOTION SEQ. NO. <u>001</u>

Petitioner,

- v -

TOM PETERSEN, DIEGO HERRERO, and TD BANK, N.A.,

Respondents.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

were read on this motion to/for ENFORCE/EXEC JUDGMENT/TURNOVER.

In this proceeding pursuant to CPLR 5225, the petitioner, BLDG Management Co., Inc., doing business as Bristol Management Co. (BLDG), seeks an order directing the respondent TD Bank, N.A. (the bank), to turn over, from an account that the bank maintains for the respondent Tom Petersen, the sum of \$9,340.50, plus statutory interest at 9% per annum from October 9, 2007, to satisfy a judgment that had been entered in the Civil Court, New York County, in favor of BLDG and against Petersen on October 9, 2007. No opposition is submitted. The petition is granted.

On October 9, 2007, in a Civil Court proceeding entitled *Matter of BLDG Management Co., Inc. v Petersen*, BLDG secured a money judgment against Petersen in the principal sum of \$9,340.50, inclusive of prejudgment contractual interest (*see Matter of BLDG Management Co., Inc. v Petersen*, Civ Ct, N.Y. County, Index No. 61096/2006, Oct. 9, 2007). BLDG established that no portion of that judgment has been satisfied. On or about November 14, 2022, BLDG

served the bank with an information subpoena and restraining notice pursuant to CPLR 5222(b), directing that it restrain any and all of Petersen's accounts that he maintained with the bank. On November 18, 2022, BLDG served Petersen with a restraining notice as well. In a response dated November 25, 2022, the bank reported that Petersen and the respondent Diego Herrero maintained a joint account at the bank, and that it would restrain the account, but would not turn over any of the funds to BLDG in the absence of a turnover order, inasmuch as only Petersen, and not Herrero, was a judgment debtor. BLDG commenced this proceeding on December 6, 2022, naming Petersen, Herrero, and the bank as respondents.

"CPLR 5225(b) provides for an expedited special proceeding by which a judgment creditor can recover 'money or other personal property' belonging to a judgment debtor 'against a person in possession or custody of money or other personal property in which the judgment debtor has an interest' in order to satisfy a judgment" (*Matter of New York Community Bank v Bank of Am., N.A.* 169 AD3d 35, 37-38 [1st Dept 2019], quoting *Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 [2d Dept 2009]). That provision thus is the appropriate provision under which to pursue a turnover proceeding against a bank that holds the judgment debtor's assets on deposit (*see Matter of First Am. Tit. Ins. Co. v Kenderian*, 157 AD3d 891, 891-892 [1st Dept 2018]; *see also Plymouth Venture Partners, II, L.P. v GTR Source, LLC*, 37 NY3d 591, 613-614 [2021] [Wilson, J., dissenting]; Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C5225:1; *see generally Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 540-541 [2009]). Alternatively, CPLR 5527 provides, in relevant part, that:

"[u]pon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness."

In *Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce* (21 NY3d 55, 59 n 3 [2013]), however, the Court of Appeals declined to reach the defendant bank's contention that CPLR 5227, referable to persons indebted to the judgment debtor, is the appropriate statute under which a turnover proceeding should be commenced against a bank that holds the debtor's assets on deposit, rather than CPLR 5225(b), which is referable to persons in possession or custody of money belonging to debtor. Consequently, the court deems the instant proceeding to be one that is being prosecuted pursuant to CPLR 5225(b).

Here, BLDG, after serving the bank and Petersen with restraining notices, properly commenced this proceeding pursuant to CPLR 5225 to secure an order turning over all non-exempt funds in the subject bank account to itself, and properly named and served the bank, the debtor, and the joint tenant of the debtor's account in this proceeding (see *Matter of Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 429 [1st Dept 2014]).

It is well settled that "[e]ven jointly owned assets are vulnerable to levy by a judgment creditor pursuant to CPLR 5225" (*Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d at 918). While the opening of a joint account constitutes prima facie evidence of an intent to create a joint tenancy, with each party entitled to equal shares of the account (see Banking Law § 675[b]), it also "creates a rebuttable presumption that each named tenant is possessed of the whole of the account so as to make the account vulnerable to levy of a money judgment by the judgment creditor of one of the joint tenants" (*Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d at 918, quoting *Tayar v Tayar*, 208 AD2d 609, 610 [2d Dept 1994]; see *Matter of New York Community Bank v Bank of Am., N.A.* 169 AD3d at 37-38). The presumption can be rebutted with "direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only" (*Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d at 918, quoting *Fragetti v Fragetti*, 262 AD2d 527, 527 [2d Dept 1999]), without the intention of conferring a beneficial interest on the other joint tenant (see *Matter of Hayevsky*, 302 AD2d 524, 525 [2d Dept 2003]; *Dowling Textile Mfg. Co. v Land*, 179

AD2d 621 [2d Dept 1992]; *Phillips v Phillips*, 70 AD2d 30 [2d Dept 1979]). To rebut the presumption of a joint tenancy, the burden of proof rests with the party seeking to prove that the account was opened for mere convenience and was not intended to create a joint tenancy (see *Viggiano v Viggiano*, 136 AD2d 630, 631 [2d Dept 1988], citing *Sherman v Georgopoulos*, 84 AD2d 811 [2d Dept 1981]). Only where the presumption is rebutted will the judgment creditor's levy on the jointly owned bank account be limited to the actual proportional interest held in the account by the judgment debtor (see *Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d at 918; *Viggiano v Viggiano*, 136 AD2d at 631).

Since neither Petersen, as the judgment debtor, nor Herrero, as the joint tenant of Petersen's account with the bank, appeared in this proceeding, they have forfeited the opportunity to rebut the presumption that the entire account is subject to levy of a money judgment by Petersen's judgment creditor.

Accordingly, it is

ORDERED that the petition is granted, without opposition; and it is further,

ORDERED that the respondent TD Bank, N.A., is directed, within 45 days of service upon it of a copy of this order, with notice of entry, to deliver, to the attorney for the petitioner, all sums up to \$9,340.50, plus statutory simple interest on that sum at 9% per annum, from October 9, 2007, that it holds for the account of Tom Petersen and Diego Herrero in account number xxxxxxxx2171, by certified, bank, or treasurer's check, payable jointly to the petitioner, BLDG Management Co., Inc., doing business as Bristol Management Co., and The Nathanson Law Firm, LLP, as attorneys; and it is further,

ORDERED that the petitioner shall serve a copy of this order upon Tom Petersen, Diego Herrero, and TD Bank, N.A., both by regular and certified mail, return receipt requested, within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.

4/3/2023
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE