

**Coles v Wu-Tang Prods., Inc.**

2011 NY Slip Op 31660(U)

June 20, 2011

Supreme Court, New York County

Docket Number: 602896/2009

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

Justice

COLES, DENNIS

- v -

WU-TANG PRODUCTIONS, INC

INDEX NO. 602596/2009

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

MOTION SEQ. NO. 01

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

**FILED** LABER NUMBERED

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

Answering Affidavits -- Exhibits \_\_\_\_\_

JUN 21 2011

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

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*and cross-motion are decided in accordance with the accompanying memorandum decision.*

Dated: 6/20/11

Saliann Scarpulla  
**SALIANN SCARPULLA** 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: CIVIL TERM: PART 19

-----X  
DENNIS COLES,

Plaintiff,

- against -

WU-TANG PRODUCTIONS, INC., d/b/a  
WU-TANG PUBLISHING, and ROBERT  
DIGGS,

Defendants.

-----X

For Plaintiff:  
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For Defendants:  
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New York, NY 10004

Index No.: 602896/2009

Submission Date: 7/14/10  
**DECISION AND ORDER**

**FILED**

JUN 21 2011

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COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment:

Notice of Motion.....	1
Notice of Cross Motion.....	2
Aff in Reply in Support of Motion for Partial Summary Judgment.....	3
Aff in Reply to Cross Motion for Stay.....	4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages, plaintiff Dennis Coles ("Coles") moves for partial summary judgment and a subsequent trial on damages.

Coles, alleges, *inter alia*, that defendants, Wu-Tang Productions, Inc. d/b/a Wu-Tang Publishing ("WTP") and Robert Diggs ("Diggs"), have failed to make payments to him in accordance with an earlier decision of this Court, and that they have failed to pay him his share of current royalties since that earlier decision. He commenced this action by summons and complaint dated September 21, 2009, seeking to recover compensatory and punitive damages.

This case stems from the distribution of royalty fees from the copyrighted works of the Wu-Tang Clan. Coles and Diggs were both members of the iconic hip-hop group; Coles performed under the name “Ghostface Killah” and Diggs as “RZA.”

In 2005, Coles commenced an action claiming that Diggs and WTP had not paid him the total amount of royalty fees that he was owed. He challenged the twenty-five percent and fifty-percent withholdings of WTP and Diggs, respectively. Diggs and WTP both argued that these withholdings were appropriate. WTP alleged that the fees were for administrative work and Diggs alleged that his fifty-percent withholding was understood to be his fee for producing the “beats” used in the group’s songs.

In a decision dated March 19, 2009, this Court (Justice Richard Lowe) held that WTP was not entitled to the twenty-five percent withholding it had been taking, and that Diggs was also ineligible for the fifty percent production withholding he had claimed. However, in a decision dated February 10, 2011, the Appellate Division, First Department modified the Court’s decision to allow WTP to continue to receive its twenty-five percent deduction.<sup>1</sup> *Coles v. Wu-Tang Productions, Inc.*, 81 A.D.3d 477, 478 (1<sup>st</sup> Dept. 2011).

While Justice Lowe found that WTP had transferred its entire interest in the Wu-Tang Clan’s copyrighted works to BMG, the Appellate Division held that only half of the interest had been transferred; the matter was remanded for new damage calculations. *Id*

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<sup>1</sup> In light of the fact that the Appellate Division has already rendered a decision in this case, the cross motion by defendant WTP requesting a stay is moot.

at 478. Due to the timing of the first suit, it only dealt with royalties accounted for prior to June 30, 2007.

In his new complaint, Coles alleges that he has not been paid any of the damages stemming from the first suit and that he has also not been paid any royalties that were accounted for after June 30, 2007. Coles has brought this suit seeking a declaratory judgment stating that the formula developed in the earlier decision applies to royalties after June 30, 2007, that WTP and Diggs have failed to pay the damages from the earlier action, and that Coles may collect damages and future royalties directly from BMG (BMG currently collects the royalties, deducts twenty-five percent for itself, and then distributes the remainder to WTP for distribution to the artists).

### **Discussion**

It is well established that a motion for summary judgment “may only be made after joinder of issue.” *Afco Credit Corp. v. Mohr*, 156 A.D.2d 287 (1<sup>st</sup> Dept. 1989); CPLR 3212 (a). If a party has not yet appeared in an action, a motion for summary judgment is premature and will not be granted. This rule demands strict adherence. *Kantor v. Bernstein*, 225 A.D.2d 500 (1<sup>st</sup> Dept. 1996); *Shah v. Shah*, 215 A.D.2d 287 (1<sup>st</sup> Dept. 1995); *Leff v. Leff*, 182 A.D.2d 401 (1<sup>st</sup> Dept. 1992).

In this case, Diggs has not yet answered the complaint and therefore issue has not been joined as to him. Accordingly, Coles’ motion for summary judgment is denied as to Diggs.

With respect to Coles’ motion as against WTP, a movant seeking summary judgment must make a “*prima facie* showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). If the movant fails to do so, the motion must be denied. *Id.*

Here, Coles has failed to establish that he is entitled to judgment as a matter of law. Coles bases his claim against WTP on the fact that he has not received any payments toward the previous judgment. However, in light of the ruling of the Appellate Division, First Department, it does not appear that WTP has any liability to Coles. In his decision, Judge Lowe discussed payments to Coles in the amount of \$178,381.00. Because WTP is entitled to the twenty-five percent fee it was collecting (*Coles*, 81 A.D.3d at 478), it appears that WTP may have already disbursed to Coles any money that he is entitled to.

The damage calculation ordered by the Appellate Division has still not been determined on remand. Once the liability from the earlier judgment is determined, it may be found that Coles is entitled to further payment from WTP, but at this time Coles has not provided this Court with sufficient evidence to establish *prima facie* entitlement to judgment as a matter of law.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by plaintiff Dennis Coles is denied; and it is further

ORDERED that the cross-motion for a stay to these proceedings by defendant Wu-Tang Productions, Inc. d/b/a Wu-Tang Publishing is denied as moot.

This constitutes the decision and order of the Court.

**FILED**

Dated: New York, New York  
June 20, 2011

JUN 21 2011

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*Saliann Scarpulla*  
Saliann Scarpulla, J.S.C.