

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

2009 NY Slip Op 31109(U)

May 18, 2009

Supreme Court, New York County

Docket Number: 602345/05

Judge: Richard B. Lowe

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

PRESENT: Loew  
~~HON. RICHARD B. LOEW~~  
Justice

PART 3603

COLES

INDEX NO. 602310/07

MOTION DATE 4/15/09

MOTION SEQ. NO. 606

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

- v -

WU TANG PRODUCTIONS INC

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

Dated: 5/18/09

HON. RICHARD B. LOEW  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

-----X  
DENNIS COLES,

Plaintiff,

Index No. 602345/05

-against-

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

Defendants.

-----X  
**Hon. Richard B. Lowe, III**

Defendant Robert Diggs ('Diggs') makes this motion pursuant to CPLR 2221(e) seeking an order renewing and rehearing this court's decision dated March 19, 2009 (the "Decision"). Plaintiff cross moves pursuant to CPLR 3025(c) to amend the complaint to conform to the evidence.

**Background**

The relevant facts to this matter are discussed in the Decision, reference to which is made herein.

This court did not preside over the trial of this matter. Rather, retired Justice Herman Cahn was the presiding justice. Justice Cahn retired before issuing a decision and the matter was thereafter transferred to this court. The parties subsequently stipulated to this court's issuing a decision upon its review of the proceedings.

In the Decision this Court found that by order dated November 19, 2007, Justice Cahn struck defendants' answer for failure to comply with the court's disclosure orders. Therefore, the Decision found that Diggs was personally liable for plaintiff's damages without addressing defendants' argument that plaintiff failed to present evidence at trial showing he dominated and

controlled Wu-Tang Productions, Inc (“Productions”). The court, therefore found Diggs personally liable for Coles’ damages, which included a 50% producers fee deducted from royalties due Coles, as Productions’ alter ego.

Diggs makes this motion because this court was unaware of and not provided with a copy of Justice Cahn’s subsequent vacatur of the November 19, 2007 order. Diggs now submits a copy of a transcript from January 30, 2008, wherein Justice Cahn granted a motion to vacate the November 19, 2007 order upon defendants paying plaintiff \$1,000 in costs and producing certain previously requested documents (Motta Affirmation Exhibit C). In this instant motion, defendant affirms that he complied with the Court’s order and therefore argues this court should renew and rehear the issue and thereafter find Diggs is not personally liable as there was no evidence presented at trial supporting plaintiff’s alter ego theory.

The plaintiff cross moves in opposition to this application and seeks an order amending the complaint to conform to the evidence to add a claim against Diggs for the unauthorized receipt of the 50% producers fee. Plaintiff does not dispute Digg’s assertion that he complied with the court’s order and the default judgment was vacated.

### **Discussion**

In order to pierce the corporate veil, the movant must establish that the owners, through their domination of the corporation, abused the privilege of doing business in the corporate form to perpetrate a wrong or an injustice against the party such that a court in equity will intervene (*Morris v New York State Department of Taxation and Finance*, 82 NY2d 135, 142 [1993]). Factors to determine domination for purposes of piercing the corporate veil include the absence of formalities which are a part of the corporate existence, inadequate capitalization, personal use of corporate funds, absence of assets, liabilities or income, and perpetration of fraud by means of

the corporate vehicle (*Business Relationship* 14 NYJur2d *Business Relationships* § 37 (2009); *International Credit Brokerage Co., Inc. v Agapov*, 249 AD2d 77 [ 1st Dept 1998]).

Other than the allegation that Diggs and his brother Mitchell Diggs were the owners of Productions, no evidence was presented at trial which would support piercing Productions corporate veil and holding Diggs personally liable. Therefore, the cause of action seeking to hold Diggs liable under a theory of piercing the corporate veil is dismissed.

Plaintiff seeks to amend the complaint to add a cause of action holding Diggs personally liable for his receipt of a 50% producers fee which this court determined in the Decision to be unauthorized.


CPLR 3025 allows the court to amend pleadings “before or after judgment to conform them to the evidence, upon such terms as may be just . . .” “If there is nothing in the nature of the amendment to which [a defendant] can claim prejudice, the proof at trial should be given the upper hand and defects in pleading either overlooked or conformed to the proof adduced” (McKinneys Practice Commentary C 3025:15)

At trial, Diggs’ participation in the creation of Wu-Tang Clan compositions was extensively discussed. In support of his alleged right to a 50% producer’s fee, Diggs testified that he created the musical beats for the songs. Because of this, defendants alleged Diggs was entitled to 50% of revenue separate and apart from the 50% received by the lyric writers. This was the proper distribution argued by defendants rather than a proportional share to be divided among all of the creators as urged by plaintiff. Diggs did not dispute plaintiffs assertions that he received the improper fee, rather he provided testimony in support of his receipt of the fee. Furthermore, he proffered expert testimony to support his receipt of the 50% producer’s fee. Therefore, there is no substantial prejudice to him as he was aware that plaintiff was attempting

to impose liability against him. Accordingly, the complaint is deemed amended and plaintiff is entitled to judgment against Diggs in the an amount representing one-half of what this court has already determined due plaintiff for royalty fees in its March 19, 2009 decision.

Settle Judgment.

Dated: May 18, 2009

ENTER:  
  
\_\_\_\_\_  
J.S.C.  
HON. RICHARD B. LOVELL JR.