SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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PAULINE MORRIS and
INTEL DIPLO ENTERPRISES, INC.,

Plaintiffs,

Index No.: 651724/2016
DECISION/ORDER

-against-

THE ESTATE OF WINSTON MACINTOSH, and
NIAMBI MACINTOSH, ADMINISTRATOR,

Defendants.

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HON. MELISSA A. CRANE, J.S.C.:

In this action, the co-defendants Estate of Winston Macintosh (the estate), and Niambi Macintosh, Administrator (Niambi; together, defendants) move for summary judgment to dismiss the complaint (motion sequence number 001). The motion is granted.

PARTIES

The late Winston Hubert MacIntosh, professionally known as Peter Tosh (Tosh), was a Jamaican citizen and an internationally known reggae musician who died on September 11, 1987. *See* notice of motion, MacIntosh aff, ¶ 3-4. Niambi is one of his ten children, and is currently the ancillary executor of his estate, de bonis non, in New York. *Id.*, ¶¶ 1, 21; exhibit 16. Plaintiff Pauline Morris (Morris) was Tosh's cousin, and claims to be the owner of corporate co-plaintiff Intel Diplo Enterprises, Inc. (Intel Diplo; together, plaintiffs), which she asserts is the "sole owner of" Tosh's recorded works. *Id.*, ¶¶ 3, 13-17. Morris was also the original ancillary executor of Tosh's estate in New York (until she was removed). *Id.* The basis of this action is a dispute over the right to collect royalty payments for certain of Tosh's recorded works.

FACTUAL FINDINGS

These works were the master recordings that Tosh made pursuant to contracts that he had executed with: 1) CBS records, later Sony Music, in 1976 (the CBS contract); 2) Promotone BV, later EMI Records Ltd, in 1978 (the Promotone contract); and 3) EMI Records Ltd itself in 1983 (the EMI contract). *See* notice of motion, MacIntosh aff, ¶¶ 5-9; exhibits 1, 2, 3. Defendants correctly note that all three contracts contain "no assignment" clauses that legally precluded Tosh from assigning his ownership rights in the master recordings to third parties. *Id.* Defendants also aver that neither Morris nor Intel Diplo was a party to any of the contracts. *Id.*, MacIntosh aff, ¶ 5. This is not entirely accurate. Tosh himself executed all three contracts in his personal capacity (and is denominated therein as "the Artist"). *Id.*, exhibits 1, 2, 3. However, when he signed the EMI contract, Tosh also executed a secondary agreement between EMI and Intel Diplo (referred to therein as "Originator"), on whose behalf he signed as "president." *Id.*, exhibit 3. This secondary agreement recites that "by reason of a Contract for Services, the Originator is exclusively entitled to the recording services of the Artist for . . . at least the term of this Agreement." *Id.* Unfortunately, neither party has presented a copy any such "contract for services," so its exact terms cannot be verified. However, the documentary evidence shows that Tosh signed various amendments to all three contracts, somewhat indiscriminately, either in his personal capacity and/or as the president of Intel Diplo. *Id.* One amendment, dated August 1, 1976 and signed by Tosh in his personal capacity, modified the CBS contract to the extent of directing CBS to remit Tosh's royalty payments to Intel Diplo instead of himself, "solely as an accommodation to me, and [this act] shall not constitute [Intel Diplo as] a party to the Agreement . . . or confer upon [Intel Diplo] any interest therein, as a third-party beneficiary or otherwise."

Id., exhibit 1. Thus, it appears that the "contract of services" simply involved Tosh's company (Intel Diplo) collecting his royalty payments from CBS.

Plaintiffs dispute this. The complaint alleges: 1) that Intel Diplo "was and is the sole owner of the music of" Peter Tosh; 2) that Morris "was and is the sole shareholder of Intel Diplo;" 3) that Morris acquired her interest in Intel Diplo in 1984 from an entity called "Mabrak Music"; and 4) that Morris has been "the sole owner of Intel Diplo" since that time. *See* notice of motion, exhibit 20 (complaint), ¶¶ 3-7. Defendants counter that "Intel Diplo" was actually the name of *two* (now defunct) corporations, neither of which ever had *any* ownership interest in Tosh's master recordings. *Id.*, MacIntosh aff, ¶¶ 9-20. They allege that the first entity called "Intel Diplo Enterprises, Inc." was a New York State licensed "loan out company" that Tosh used for tax reasons (Intel Diplo - NY), and that the purpose of the secondary EMI agreement was to permit Tosh's royalties to be taxed as corporate rather than personal income. *Id.*, ¶ 9. Defendants assert that the second "Intel Diplo Enterprises, Inc." was a Delaware corporation that Morris created in 1993 after Tosh had died (Intel Diplo - Del). *Id.*, ¶¶ 17-20.

Defendants aver that Tosh's arrangement with Intel Diplo - NY was terminable at his discretion, and have presented a copy of an undated letter that he allegedly sent to "Her Majesty's Inspector of Foreign Dividends" (an official of the United Kingdom's taxation authority) that acknowledges that the arrangement "will remain in effect until further notification." *Id.*, ¶ 11, exhibit 4. The provenance and effect of that letter is unimportant, however, because defendant's explanation that Tosh used Intel Diplo - NY as the payee for his royalties for tax purposes is the only reasonable one. The pertinent clauses in the CBS, Promotone and EMI contracts prevented Tosh from assigning the rights to his master recordings to any third party. In a recent copyright decision in *Music Royalty Consulting v Reservoir Media*

Mgt. (_ F Supp 3d _, 2019 WL 1950137 [SDNY 2019]), the United States District Court for the Southern District of New York observed that "[u]nder New York law, contracts are freely assignable absent explicit language to the contrary," although "[w]here an anti-assignment clause exists, such provisions are to be construed narrowly." 2019 WL 1950137, *10 (internal citations omitted). Here, the CBS, Promotone and EMI contracts all unequivocally stated that Tosh could *not* assign his ownership rights in his master recordings, so Intel Diplo - NY could *not* have legally acquired those rights.

The ancillary issue of whether Intel Diplo - NY was once the proper recipient of Tosh's royalties is now moot. First, Tosh's death in 1987, while intestate, made his estate the only entity legally entitled to receive his posthumous royalty payments. EPTL § 11-2.1; *see e.g.*, *Matter of Pryor*, 51 Misc 2d 993 (Surrogate's Court, NY County 1966) (royalty payments from musical compositions are the "property" of a decedent's estate, and their disposition is governed by the EPTL, which defines them as a "wasting asset," consisting of both "principal" and "income"). Second, defendants present a copy of a February 11, 2009 certification from the New York State Department of State that recites that Intel Diplo - NY was originally incorporated on March 11, 1976, but later dissolved on December 24, 1991 for non payment of taxes. *See* notice of motion, exhibit 7. Defendants also present copies of records from the New York State Department of Taxation and Finance that show that the State of New York had imposed a tax lien on Intel Diplo - NY for unpaid taxes from 1983 through 1998, and that the lien remained unpaid as of 2010. *Id.*, exhibits 8, 9. Defendants finally note that plaintiffs offer *no* documentary evidence that Morris was ever an officer or shareholder of Intel Diplo - NY. *Id.*, MacIntosh aff, ¶ 12. The court finds that all of this evidence speaks for itself. It clearly shows: 1) that Tosh incorporated Intel Diplo - NY in 1976 as a vehicle to allow his royalty income to be

taxed at a favorable corporate rate; 2) that rather than being its employee, Tosh owned and/or controlled Intel Diplo - NY, whose sole corporate purpose was to perform a personal, financial service for him (i.e., to receive his royalty income); 3) that after Tosh died in 1987, Intel Diplo - NY was dissolved in 1991; and 4) that Intel Diplo - NY has not done business since that time, that it was never properly wound up, and that it remains the subject of a New York State tax lien. The court now turns to Intel Diplo - Del.

Defendants present a copy of a certificate of incorporation which Morris filed in Kent County, Delaware on July 19, 1993 (after Tosh's death and Intel Diplo - NY's dissolution), to create Intel Diplo - Del.[1] *See* notice of motion, MacIntosh aff, ¶ 17; exhibit 11. Defendants also present a copy of a document dated August 15, 1993 in which Morris purported to assign "one hundred percent (100%) of all rights, title and interest in Master Recordings covering the performances of Peter Tosh" from herself to Intel Diplo - Del. *Id.*, exhibit 11. As will be discussed, defendants aver that this assignment was a nullity, because Morris never had any ownership interest in Tosh's master recordings. *Id.*, MacIntosh aff, ¶ 18. Defendants next present a copy of a second document, dated November 4, 2010 and marked "effective as of July 19, 1993," by which Morris purported to assign all of the assets of Intel Diplo - NY to Intel Diplo - Del. *Id.*, exhibit 12. Defendants aver that this second assignment is nullity too, because Morris had no ownership interest in Intel Diplo - NY to assign, either. *Id.*, ¶ 18, fn 1. Finally, defendants present a copy of a March 1, 2000 order of the Delaware Secretary of State that declared Intel Diplo - Del to be "inoperative and void" (i.e., dissolved) for non payment of taxes as of that date. *Id.*, ¶ 12; exhibit 15. Defendants conclude that Intel Diplo - Del lacks standing to

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[1] Notably, the certificate of incorporation of Intel Diplo states that "Mabrak Music" is a "trade name" or d/b/a alias of that company, and *not* a separate corporate entity. *See* notice of motion, MacIntosh aff, exhibit 11.

proceed as a plaintiff in this action, as it is now defunct and has never owned a legal interest in Tosh's master recordings. *See* defendants' mem of law, at 5-12. The court again finds that the evidence speaks for itself. It clearly discloses:1) that Intel Diplo - Del has been defunct since 2000 (eight years before this action was commenced); and 2) that its alleged assets (i.e., the right to collect Tosh's royalty payments) was an unenforceable right because it derived from an invalid assignment. Regarding that latter point, the court next turns to Morris.

Defendants aver that the administrators of Tosh's estate in Jamaica originally appointed Morris to be the estate's ancillary executor in New York, but that the Jamaican administrators subsequently terminated her appointment and named Niambi to that position in her stead. *See* notice of motion, MacIntosh aff, ¶¶ 13-24. Defendants have presented copies of: 1) the April 18, 1991 order of the Supreme Court of Judicature of Jamaica that appointed the administrators of Tosh's Jamaican estate; 2) the April 8, 1992 document executed by those administrators that appointed Morris as the ancillary executor of Tosh's estate in the United States of America (subject to the approval of the New York County Surrogate's Court); 3) the December 7, 2010 deed by which the Jamaican Administrators terminated Morris as ancillary executor and appointed Niambi to that position; and 4) the June 1, 2009 order of the New York County Surrogate's Court granting letters of administration de bonis non to Niambi. *See* notice of motion, exhibits 6, 10, 16, 17. Morris nonetheless alleges that the administrators of Tosh's estate in Jamaica had "asked her" to apply to the New York County Surrogate's Court to be named as the estate's ancillary executor here, but avers that the Surrogate's Court denied her application, so that she "was never the ancillary administrator." *See* Morris aff in opposition, ¶¶ 18-26. Morris presents no proof to support this allegation. The document that she claims to be a Surrogate's Court's decision denying her application to be the estate's New York ancillary

executor is actually an order granting Niambi's May 21, 2009 application to that court for letters of administration de bonis non. *Id.*, exhibit B. Morris is not mentioned anywhere in that document. Once more, the evidence speaks for itself and makes it clear: 1) that Morris was the estate's ancillary executor in New York from April 8, 1992 until December 7, 2010; 2) that Niambi was the estate's ancillary executor after December 7, 2010; and 3) that Niambi was also the estate's executor, de bonis non, in New York from June 1, 2009 to date.

Regarding Morris's two alleged assignments of rights to Intel Diplo - Del, the evidence is equally clear. The CBS, Promotone and EMI contracts all provided that Tosh could *not* assign his ownership interest in any of his master recordings to third parties. *See* notice of motion, exhibits 1, 2, 3. The amendments to those agreements that Tosh executed demonstrate that the "contract for services" between himself and Intel Diplo - NY was in the nature of a "personal services contract" by which his corporation collected his personal income for tax purposes. *Id.* The Court of Appeals holds that "personal services contracts generally may *not* be assigned absent the principal's consent." *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 482 (2006) (emphasis added); *citing* 9 Corbin, Contracts § 865 (interim ed); 3 Farnsworth, Contracts §§ 11.4, 11.10 (3d ed.). Here, Morris claims that Tosh made her the "owner" of Intel Diplo - NY in 1984. *See* Morris aff in opposition, ¶ 7. However, she presents no evidence to support her assertion. There are no written statements of Tosh's intent, and no documentation that Morris was ever an owner or officer of Intel Diplo - NY.[2] Therefore, the court discounts Morris's

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[2] Interestingly, it was *defendants* who produced the only evidence that bears on these points: a May 15 1984 attorney's letter that states that "the ownership of the shares of stock in [Intel Diplo - NY] will be in the name of Pauline Morris. Peter has agreed and approved this." *See* notice of motion, exhibit 5. However, defendants also point out that there is no evidence that the actions described in the letter were ever carried out. *Id.*, MacIntish aff, ¶ 12. Certainly, Morris has not produced a contract of sale or copies of Intel Diplo - NY's shares of stock. Further, "[a]n attorney's affidavit is of no probative value on a summary judgment motion *unless*

claims. The court also finds that the assignments that Morris executed in 1993 and 2010 ("effective as of 1993") were invalid, because both she and Intel Diplo - NY were contractually precluded from assuming ownership rights to any of Tosh's master recordings, and therefore neither she nor Intel Diplo - NY ever possessed any valid rights to assign to Intel Diplo - Del. The only "rights" that Morris ever enjoyed were those that pertained to her tenure as the ancillary executor of Tosh's estate in New York. She occupied this position from April 8, 1992 through June 1, 2009, when the New York County Surrogate's Court granted letters of administration, de bonis non, to Niambi instead. During that time, Morris owed a fiduciary duty to the estate's distributees that allowed her to, *inter alia*, collect ongoing royalty payments for Tosh's previously released master recordings, and negotiate contracts to exploit Tosh's other unreleased master recordings. Evidently, she did both of these things.

In this action, however, Morris appears to confuse the "rights" she enjoyed as the estate's former ancillary executor with personal rights of ownership in the estate's property which she never enjoyed. The complaint asserts that "any payments that were made to either myself or Intel Diplo were done pursuant to valid contracts between Intel Diplo, myself and the Public Administrator of New York County," and that defendants acted improperly in causing the cessation of those payments. *See* Morris aff in opposition, ¶ 27. The complaint identifies three such "valid contracts":

> "29) An agreement between Intel Diplo and the Public Administrator on behalf of [the estate] . . . on August 22, 1994 calling for each party to receive fifty percent (50%) of all royalties owed by EMI . . .;

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accompanied by documentary evidence which constitutes admissible proof." *Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 (1st Dept 1997). Therefore, the court discounts this letter.

> "30) A similar agreement . . . between the estate, Intel Diplo and BMI on or about September 29, 1994 with each party receiving fifty percent (50%) of all royalties owed by BMI . . .; [and]
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> * * *
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> "32) . . . an agreement with the Public Administrator [dated July 24, 1997] to split the proceeds of [a] boxed set [of Tosh's recordings] and any other recordings that arose from a deal with Sony - 52% to Intel Diplo, 46% to [the estate] and 2% to help fund a Peter Tosh memorial park in Jamaica (the boxed set deal)."

See notice of motion, exhibit 20, ¶¶ 29, 30, 32. Plaintiffs' first, second and third causes of action allege that defendants breached each of these respective contracts "by stopping all payments to Intel Diplo." *Id.*, ¶¶ 51-59. As will be discussed, defendants contend that these were *not* actually contracts, but were instead simply "letters of direction" to the three recording companies that (improperly) requested them to pay Tosh's royalties to Intel Diplo - Del[3] (respectively, the EMI letter, the BMI letter and the Sony letter). *Id.*, MacIntosh aff, ¶¶; exhibits 22, 23, 24.

PROCEDURAL HISTORY

In any case, plaintiffs commenced this action on February 7, 2016 by filing a summons that sets forth claims for: 1) breach of contract (the BMI letter); 2) breach of contract (the EMI letter); 3) breach of contract (the Sony letter); 4) a declaratory judgment; and 5) an accounting. *See* notice of motion, exhibit 20. Defendants filed an answer with affirmative defenses on August 5, 2016. *Id.*, exhibit 21. Discovery was taken, and defendants filed this motion on May 2, 2018 (motion sequence number 001).

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[3] It is noteworthy that the complaint fails to distinguish between Intel Diplo - NY and Intel Diplo - Del, despite the fact that they are clearly different entities

DISCUSSION

Defendants' counsel has styled their motion as seeking "summary judgment to dismiss pursuant to CPLR 3211," despite the facts that they submitted an answer to the complaint in 2016, that substantial discovery has been taken, and that the time for pre-answer dismissal motions has long since expired. To compound the confusion, defendants counsel primarily raises arguments that were drawn from provisions of CPLR 3211; specifically dismissal based on documentary evidence (CPLR 3211 [a] [1]), dismissal based on failure to state a cause of action (CPLR 3211 [a] [7]), dismissal based on lack of capacity (CPLR 3211 [a] [3]), and dismissal based on the statue of limitations (CPLR 3211 [a] [5]). *See* defendants' mem of law, at 5-22. Plaintiffs' opposition arguments are addressed to the same statutory provisions. *See* plaintiffs' mem of law, at 4-8 (pages not numbered). This is procedurally inappropriate. Fortunately, however, CPLR 3211 (c) allows a court to treat a dismissal motion as a motion for summary judgment "[w]hether or not issue has been joined, . . . [and] after adequate notice to the parties." CPLR 3211 (c); *see e.g.*, *City of Rochester v Chiarella*, 65 NY2d 92, 101-102 (1985). Here, issue *was* joined on August 5, 2016 and the parties engaged in substantial disclosure afterwards. Also, the parties' respective papers acknowledge that this motion seeks "summary judgment," even if they present their arguments in the incorrect form. Therefore, because both parties treated the motion as one for summary judgment, they are both on notice that this motion contemplates a summary judgment decision. Moreover, their arguments refer to documentary evidence already adduced during discovery. Thus, the court determines this motion under the standard for summary judgment.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g.*

Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Upon making this showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that require a trial. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Again, the complaint raises three types of claims: breach of contract (causes of action #1-3), a declaratory judgment (cause of action #4), and an accounting (cause of action #5). The court will review each of them in turn.

The elements of a breach of contract claim include "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Further, it is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." *Maysek & Moran v S.G. Warburg & Co.*, 284 AD2d 203, 204 (1st Dept 2001), *quoting Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, defendants assert that the first, second and third causes of action should be dismissed because the documents that plaintiffs base those causes of action on are *not* valid contracts. *See* defendants' mem of law, at 5-10. Instead, defendants assert that each is merely a "letter of direction" that refers to a separate contract, but such contracts either don't exist or weren't breached. *See* notice of motion, MacIntosh aff, ¶¶ 25-29; exhibits 22, 23, 24. Plaintiffs respond that the "three contracts . . . were honored for long periods

of time by all parties . . .." *See* plaintiffs' mem of law, at 7. However, after reviewing the evidence, the court finds for defendants.

The EMI letter, on which plaintiffs base the first breach of contract claim, states in part that "this will confirm that the representatives for the Jamaican and New York Public Administrators have reached an agreement with respect to the distribution of royalties due and payable by EMI records, UK to the Estate of Peter Tosh." *See* notice of motion, exhibit 22. The BMI letter, on which plaintiffs' base the second breach of contract claim, states in part that "in the interest of more efficiently administering the Estate of Peter Tosh, the Public Administrator of the City of New York and the Public Administrator of Jamaica have reached an agreement to authorize and direct you to release the funds which have been held by BMI since 1997 . . .." *Id.*, exhibit 23. Although both of these letters allege that "an agreement was reached" between the New York and Jamaican Public Administrators' offices, neither letter includes a copy of this agreement. Nor have plaintiffs produced one or offered any proof that this agreement ever existed. The EMI and BMI letters themselves do not describe anything other than payment arrangements. This is only a contractual term, not an entire contract. As a result, plaintiffs have failed to establish the "existence or terms of a valid, binding contract" regarding either letter. *Harris v Seward Park Hous. Corp.*, 79 AD3d at 426. Therefore, plaintiffs' first and second causes of action fail, as a matter of law, and defendants are entitled to summary judgment dismissing those claims. This does not dispose of the inquiry, however.

The court observes that the EMI and BMI letters both misrepresent that the New York County Public Administrator had an active role in overseeing Tosh's estate, although that was plainly not the case. The documentary evidence discussed earlier showed that Morris administered the estate as its ancillary executor until 2009, when the New York County

Surrogate's Court ordered that Niambi assume that role, de bonis non. The court also observes plaintiffs' former counsel, one Kendall Minter, Esq. (Minter), wrote both letters. The complaint alleges that Morris discharged Minter in July *1992* for misappropriating estate funds. *See* notice of motion, exhibit 20 (complaint), ¶¶ 11-16. Despite that allegation, Minter wrote the letters in *1994*, listed himself as the estate's attorney, c/o the Public Administrator of the City of New York, and claimed entitlement to 50% of Tosh's royalty payments in that role. *Id.*; exhibits 22, 23. The other 50% was to be paid to "Intel Diplo" c/o a second attorney, one Robert Urband, Esq., whose connections to that company, to Morris or to Minter are not apparant. *Id.* Nevertheless, the New York State Secretary of State had dissolved Intel Diplo - NY for non payment of taxes in 1991, although Morris remained as the estate's ancillary executor until 2009. *Id.*, exhibits 7, 10. Thus, in 1994, Intel Diplo - Del was the only "Intel Diplo" entity in existence, and Morris was its owner and sole shareholder. *Id.*, exhibit 11. The evidence therefore compels the conclusion that the alleged 1994 "agreements" between Intel Diplo and the estate that were mentioned in the BMI and EMI letters were "agreements" between entities Morris solely controlled.[4] Morris herself certainly signed both letters, although they do not indicate in what capacity. *Id.* They do *not* admit that Morris was an officer of "Intel Diplo" (although she owned Intel Diplo - Del.), but merely state that she "accepted and agreed to" the payment terms that Minter proposed. *See* notice of motion, exhibits 22, 23. This evidence does not support claims for breach of contract.

Plaintiffs' third cause of action for breach of contract relies on the Sony letter, that refers to the 1997 boxed set deal that Morris negotiated with Sony while she was still the estate's

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[4] The evidence also indicates that the use of separate attorney's offices to collect all of Tosh's royalty payments may have been a subterfuge, given that those attorneys appear to have worked for the entities that Morris controlled.

ancillary executor. *See* notice of motion, exhibit 20 (complaint), ¶¶ 57-59; exhibit 24. Morris signed the Sony letter in her capacities as an officer of "Intel Diplo" and of the "Peter Tosh Memorial Park Foundation." *Id.*, exhibit 24. The letter asserts that Sony should pay those two entities 50% of the royalties the boxed set deal generated (48% to "Intel Diplo" and 2% to the Memorial Foundation), and the other 50% to Minter, as the attorney for the estate c/o the New York County Public Administrator. *Id.* Minter himself did not sign the Sony letter. *Id.* Unlike the BMI and EMI letters, the Sony letter did *not* reference the existence of a separate, undisclosed and probably fictitious contract. Instead, the Sony letter referred to "the agreements made between CBS records, your predecessor in interest, . . . and Intel Diplo . . . regarding the master recordings of Winston MacIntosh;" i.e., to the 1976 CBS contract. *Id.*; exhibit 1.

Because Sony is CBS's successor in interest, and because the 1997 boxed set contained material taken from Tosh's master recordings, it is clear that the CBS contract obligates Sony to pay any royalties on the boxed set to Tosh's estate. However, the documentary evidence demonstrates that Sony's refusal to pay such royalties to plaintiffs (allegedly at defendants' instigation) does *not* constitute a breach of the CBS contract.

First, the CBS letter asserts that "Intel Diplo" (rather than Morris personally) is entitled to collect royalties from the boxed set deal. However, when Morris negotiated the boxed set deal in 1997, the only "Intel Diplo" entity in existence was Intel Diplo - Del, because Intel Diplo - NY had been dissolved in 1991. *See* notice of motion, exhibits 7, 11. While Intel Diplo - NY was a party to the 1976 CBS contract, Intel Diplo - Del was *not*, as it was not incorporated until 1993. *Id.*, exhibits 1, 11. But, as previously discussed in the beginning of this decision, Morris's two purported assignments of interests to Intel Diplo - Del were both legal nullities. *Id.*, exhibits 11, 12. Thus, while the Sony letter may have referenced a valid contract (i.e., the CBS contract)

it is irrelevant to plaintiffs' claim. This is because Intel Diplo - Del never had any right to royalty payments pursuant to the CBS contract. Consequently, it has also no right to receive royalties from the boxed set deal that the CBS contract governed. In conclusion, the evidence shows that there was no "breach" of the CBS contract. Thus plaintiffs third cause of action for breach of contract is legally deficient. *Harris v Seward Park Hous. Corp.*, 79 AD3d at 426.

After Tosh died in 1987, his master recordings became the property of his estate, that was thereafter entitled to receive all royalty payments from the exploitation of his recordings. As the estate's ancillary executor, Morris bore a fiduciary responsibility to collect royalty payments for the estate. *Id.*, exhibits 10, 17. However, that responsibility ended in 2009, when the New York County Surrogate's Court installed Niambi as the estate's executor, de bonis non.[6] *Id.*, exhibit 16. Morris never had a personal ownership interest in Tosh's master recordings, and she is not a beneficiary of his estate. Therefore, Morris was not and is not entitled to receive any royalty payments herself, although the estate certainly was and is. The Sony letter properly directed Sony to remit royalty payments to the estate, although it incorrectly indicated that the estate should receive 50%, when it was plainly entitled to receive 100%. The Sony letter also asserts that the estate's royalty payments should be remitted to Minter. However, as noted earlier, there is no proof of Minter's actual connection to either the estate or the Public Administrator's office (if any), and the evidence strongly suggests that he may have been working with Morris to acquire the estate's funds through subterfuge.

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[6] As a side note, plaintiffs commenced this action in 2016, while the Sony letter was written 19 years earlier in 1997. Even if Morris did have a viable breach of contract claim based on the Sony letter, it would be barred by the six-year statute of limitations that governs such claims. CPLR § 213.

Plaintiffs' fourth cause of action "seeks a declaratory judgment that [Intel Diplo] is the rightful party to negotiate on behalf of Peter Tosh and the Peter Tosh Estate." *See* notice of motion, exhibit 20 (complaint), ¶ 63. Declaratory judgment is a discretionary remedy that may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). Here, the documentary evidence regarding "the rights and other legal relations of the parties" makes it manifestly clear that plaintiffs are *not* entitled to the declaration they seek. Because Niambi became the estate's ancillary executor in 2009, it has been within her sole discretion to "negotiate on behalf of the estate" herself, or to engage another party to discharge that function. *See* notice of motion, exhibit 16. There is simply no legal basis for Intel Diplo to assert a right to that role. Therefore, plaintiffs' fourth cause of action plainly lacks merit, and the court holds that defendants are entitled to summary judgment dismissing that claim.

Plaintiffs' fifth cause of action "demands an accounting of all books, records and payments made by [Niambi] on behalf of the estate since she was appointed as administrator of the estate." *See* notice of motion, exhibit 20 (complaint), ¶ 67. Defendants assert that plaintiffs have no right to raise this cause of action, because defendants do not stand in a fiduciary relationship with plaintiffs. *See* plaintiffs' mem of law, at 21. This is an accurate statement of the law. *See e.g., Royal Warwick S.A. v Hotel Representative, Inc.*, 106 AD3d 451, 452 (1st Dept 2013) ("[a] claim for an accounting cannot be maintained in the absence of a fiduciary relationship between plaintiff and defendants."). Plaintiffs' opposition papers do not assert the existence of any fiduciary relationship. Nor could they. *See e.g., Silvester v Time Warner*, 1 Misc 3d 250, 257 (Sup Ct, NY County 2003), affd 14 AD3d 430 (1st Dept 2005) ("under New

York law, an artist's assignment of rights to a record company in exchange for royalties is contractual and does not create a fiduciary relationship or duty."). Nor do plaintiffs assert that either Morris or Intel Diplo is a beneficiary of Tosh's estate, or among any of the other classes of claimants authorized to demand an accounting under SCPA § 2205. Therefore, the court finds that plaintiffs have no such right, and concludes that defendants are entitled to summary judgment dismissing plaintiffs' fifth cause of action. Accordingly, the court grants defendants motion in its entirety.

DECISION

ACCORDINGLY, it is hereby

ORDERED that the Court grants the motion, pursuant to CPLR 3211 and 3212, of defendants the Estate of Winston Macintosh, and Niambi Macintosh, Administrator (motion sequence number 001) and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ADJUDGED decreed and declared that Intel Diplo is NOT the proper party to negotiate on behalf of the interests of Peter Tosh.

ORDERED that the Clerk is directed to enter judgment dismissing this entire action accordingly.

Dated: New York, New York
June 28, 2019

ENTER:

Hon. Melissa A. Crane, J.S.C.

HON. MELISSA CRANE