

<b>Shemia v E. Works LLC</b>
2019 NY Slip Op 33823(U)
December 24, 2019
Supreme Court, Kings County
Docket Number: 513080/2018
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of December, 2019.

PRESENT:

**HON. LAWRENCE S. KNIPEL,**  
Justice.

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**SOLOMON SHEMIA A/K/A STEVE SHEMIA,**  
Plaintiff,

Index No. 513080/2018

- against -

**Mot. Seq. 2 - 5, 7**

**E. WORKS LLC, ANC SALES, INC.,  
AND SAM CHERA,**

Defendants.

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The following e-filed papers read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	23-73; 106-120
Opposing Affidavits (Affirmations) _____	66; 74-90
Reply Affidavits (Affirmations) _____	121

Upon the foregoing papers, in this action by Plaintiff Solomon Shemia (Shemia) against Defendants, ANC Sales Inc. (ANC), E. Works, LLC (E. Works), and Sam Chera (Chera and together with ANC and E. Works, Defendants), for breach of contract, Shemia moves, under motion sequence number two, for an order striking Defendants' answer for their failure to provide complete responses to Shemia's First Notice for Discovery and Inspection dated August 30, 2018 and First Set of Interrogatories served upon each defendant, all dated November 19, 2018. Defendants cross-move, under motion sequence three, for an order compelling Shemia to

provide full and responsive answers to Defendants' First Set of Interrogatories dated January 7, 2019. Defendants move, under motion sequence four, for an order granting them summary judgment dismissing Shemia's complaint on the basis of res judicata, the entire controversy doctrine, and because his claims are otherwise moot. Shemia moves, under motion sequence five, for a preliminary injunction and temporary restraining order enjoining Defendants from selling their products until the warranty information for said products is updated both online and on the product packaging and to remove all references to Element Works USA LLC and any contact information for Shemia, to require Defendants to provide updated packaging and warranty materials to all resellers, and to require Defendants to notify all customers and resellers who have purchased products from May 1, 2018 to the present that E. Works LLC is the warrantor of all products. Shemia also seeks, under motion sequence five, to amend his complaint to add a cause of action for permanent injunction. Shemia moves, under motion sequence seven, for an order granting him leave to amend the complaint to add a claim for attorney's fees.

### *Factual and Procedural Background*

Shemia and Chera were once business partners in two companies, ANC and E. Works, which are in the business of selling electronics to consumers through various online retailers such as amazon.com,groupon.com,newegg.com, among many others. The electronics are sold under the name Element Works USA. According to Shemia's complaint, Element Works USA LLC ("Element Works"), a nonparty herein, is a shell company created solely for the purpose of establishing a trademark for the goods sold by ANC and E. Works. Shemia further represents that, for purposes of accounting, two separate companies were established to sell similar goods. Specifically, that because Amazon calculates taxes differently from other online marketplaces, ANC was created solely for the sale of goods via Amazon and E. Works was created for the sale of goods everywhere else.

Shemia and Chera entered into two separate but nearly identical agreements entitled Separation Agreement and General Release (hereinafter “Separation Agreement”) for ANC and E. Works whereby Shemia agreed to resign from said companies “effective February 12, 2018 (“Separation Date”)” and, “to the extent applicable, with its direct and indirect subsidiaries, affiliates, companies, divisions, units, schools, and affiliated schools (the “Company Affiliates”)...” (Separation Agreement, Paragraph 1). Paragraph 6 of the Separation Agreement provides that “[t]he Company acknowledges that as a material inducement for Member to enter into this Agreement, the Company shall hold Member harmless and not liable for any debts, liability, judgments, tax consequences...of which the Company owes a third party any monetary obligation of any sort, whether such obligation existed prior to the Separation or at any time thereafter.” Paragraph 9 of the Separation Agreement provides that “[i]n the event of a lawsuit or claim by a third party in which the Member is sued either jointly or separately for acts arising out of the scope of the Member’s employment with the Company, the Company agrees to defend the Member and hold the Member harmless in accordance with the Member’s rights to indemnification under the Company’s certificate of incorporation or bylaws of the Company or any existing Indemnification Agreement.....” Paragraph 9 also provides that, in exchange for Member’s cooperation with the “investigation, preparation, prosecution, or defense of the Company’s or the Company Affiliate’s case...[r]easonable out-of-pocket expenses related to such assistance will be reimbursed by the Company, if the Company’s written approval is obtained in advance.” In addition, “the Member will be compensated by the Company for her[sic] time, at the rate of \$100/hour, when requested by the Company to prepare to provide testimony or spend time assisting the Company in any of the foregoing activities or with such matters” (Separation Agreement, Paragraph 9).

In May 2018, Warehouse 18, Inc. (“Warehouse”) commenced a breach of contract action against Element Works and Shemia in the Superior Court of New Jersey, Passaic County, alleging that it was owed \$12,448.17 plus attorney’s fees and costs for storing and shipping Element Works merchandise (hereinafter referred to as the “Warehouse Action”). According to

Shemia, Shemia informed Warehouse that he had separated from the business and that E. Works and Chera were the responsible parties. Warehouse thereafter amended its complaint to include Chera as a defendant.

Shemia contends that, by email on or about May 25, 2018, Shemia requested that Chera honor the Separation Agreement by defending and indemnifying him against the Warehouse Action but that Chera failed to respond. Shemia further contends that his counsel, Nicholas Fortuna, Esq., called Chera on May 30, 2018 to request that he defend and indemnify Shemia but that Chera refused, taking the position that he had no relationship with Element Works and therefore no duty to defend and indemnify Shemia. According to Shemia, he is still the owner of Element Works despite his previous requests to assign Element Works to Chera.

On June 25, 2018, Shemia filed an answer in the Warehouse Action with cross-claims against Chera seeking indemnification, contribution and reimbursement for his time defending against Warehouse's claims. In addition, Shemia sought to "pierce the corporate veil" and hold Chera personally liable for allegedly commingling corporate funds with relation to ANC and E. Works. On the same day, Shemia filed the instant action against Chera, ANC and E. Works asserting claims for indemnification, contribution, reimbursement, and piercing the corporate veil. In addition, Shemia sought damages "in an amount not less than \$1,000,000.00" (Amended Verified Complaint, Paragraph 32) for Chera's failure to defend and indemnify him in the Warehouse Action, alleging that "[a]s a result of the lack of consideration provided to Shemia in return for his contractual conveyance of the business to E. Works and ANC, all assets held by the Companies should be recaptured by Shemia..." (*Id.*).

The trial for the Warehouse Action was scheduled for October 18, 2018. On October 17, 2018, the day before trial, Chera settled with Warehouse and Warehouse withdrew all of its claims. On October 18, 2018, counsel for Chera appeared in Passaic County Superior Court for a trial of Shemia's cross-claims against him. However, Shemia failed to appear. As a result of

Shemia's default at trial, Judge Vicki A. Citrino entered an order dismissing Shemia's cross-claims against Chera with prejudice.

In the instant action, on April 17, 2019, Shemia filed a motion to strike Defendants' answer for their failure to provide discovery responses or, in the alternative, to compel responses pursuant to CPLR 3124. On May 15, 2019, Defendants filed a cross-motion against Shemia to compel discovery responses to their interrogatories.

On May 30, 2019, Defendants filed a motion for summary judgment dismissing Shemia's complaint on the basis that Shemia's claims are barred pursuant to New Jersey's entire controversy doctrine and res judicata. Defendants also argue that Shemia's claims for indemnification and contribution have been rendered moot because Chera settled with and paid Warehouse. With regards to Shemia's claim to invalidate the Separation Agreement for lack of consideration, Defendants argue that there was consideration insofar as Shemia has been indemnified and, moreover, consideration was given upon execution of the subject agreements because Chera took on all of the debts and liabilities of ANC and E. Works, among other mutual promises and obligations. Chera further argues that this claim is, in any case, barred by res judicata and New Jersey's entire controversy doctrine because this should have been raised in the Warehouse Action. In the event that Defendants prevail on their summary judgment motion, Defendants seek attorney's fees pursuant to paragraph 22 of the parties' Separation Agreement which entitles the prevailing party to recover reasonable attorney's fees and costs.

On June 7, 2019, Shemia filed an emergency order to show cause (OTSC) seeking a preliminary injunction with a temporary restraining order (TRO) enjoining Defendants from selling any products under the Element Works name and compelling Defendants to update the product warranty information both online and on the product packaging, and further compelling Defendants to notify all customers and resellers who have purchased products from May 1, 2018 to the present that E. Works is the warrantor of the products and not Element Works. By way of

his affidavit in support of his OTSC, Shemia states that, since separating from ANC and E. Works, he has moved away from the consumer electronics manufacturing and sales industry and into the healthcare industry. Shemia further states that he has developed strategic relationships in his current field and that the sale, by Chera, of products bearing the Element Works name and the display of his personal contact information on the warranties makes him liable for the products, placing his business goodwill and opportunities in jeopardy.

In addition, Shemia contends that the misrepresentation by Defendants that Element Works is the warrantor of ANC and E. Works' products exposes Shemia to (1) liability for violations of Magnuson-Moss Warranty Act because Defendants do not provide sufficient warranty information on their products or online; and (2) Federal Trade Commission enforcement proceedings for intellectual property infringement because Defendants are manufacturing and selling products that are very similar to those sold by GoPro, Nike and FitBit. Shemia states that, in light of the foregoing, he also seeks an order granting him leave to amend his complaint to add a cause of action for permanent injunction. The TRO was granted by the Hon. Lara J. Genovesi by order dated June 7, 2019.

In opposition to Shemia's OTSC,<sup>1</sup> Defendants contend that they have made every effort to remove Shemia's personal information from Defendants' products to the extent that they know such incorrect information exists. Defendants contend that Shemia's counsel was supposed to provide Defendants with a list of websites reflecting Shemia's personal information, having represented that he would do so during argument before Judge Genovesi on the TRO application, but that such list was never provided. In addition, Defendants state that, in an effort to comply with the TRO, they have notified all customers and resellers that the entity warranting their

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<sup>1</sup> Defendants filed two separate opposition papers to Shemia's preliminary injunction application, one on June 11, 2019 and another on October 7, 2019. The Court did not consider Defendants' October 7, 2019 opposition papers as Defendants never sought leave to supplement their initial submission.

products is Element Works USA LLC, a new limited liability company created in New Jersey with Chera as the registered agent. Defendants also state that they have modified the written warranty on file to specify that Defendants' warranted products will be covered by Mobile Tech Works Inc. d/b/a Tech Elements. According to Defendants, based on Shemia's counsel's representation before Judge Genovesi that a transfer of Shemia's interest in Element Works to Chera would resolve Shemia's concerns of potential liability, Defendants' counsel thereafter drafted an agreement assigning Element Works to Chera and sent the agreement to Shemia's counsel on June 11, 2019 but that no response from Shemia was ever received. Based on the foregoing, Defendants contend that Shemia is no longer in danger of any potential third-party liability under the warranties for Defendants' products, and that Shemia's injunction application and request to amend his complaint to add a cause of action for permanent injunction is therefore moot and devoid of any merit.

On October 15, 2019, Shemia filed a motion seeking leave to amend his complaint to add a cause of action for attorney's fees. Shemia contends that he is entitled to attorney's fees for defending against the Warehouse Action as well as attorney's fees in the instant action to the extent that he prevails. In opposition to Defendants' summary judgment motion, Shemia argues that his claims for indemnification are not moot because he is entitled to reimbursement at \$100 per hour plus attorney's fees pursuant to the parties' Separation Agreement. Shemia also argues that his claims herein are not barred because they were not raised and could not have been raised in the Warehouse Action because ANC and E. Works were not named defendants therein and because the Warehouse Action was filed in the Special Civil Part, a court of limited jurisdiction which caps damages to \$15,000, does not allow discovery, and expedites the timeline for trial to three months. Based on the foregoing, Shemia contends that invocation of the entire controversy doctrine would be inequitable.

By way of reply, Defendants argue that Shemia's claims of limited jurisdiction is without merit because the Special Civil Part is merely a branch within the Superior Court of New Jersey

which has jurisdiction to hear all of Shemia's claims and that, had Shemia chosen to assert claims exceeding the monetary threshold, those claims would have been transferred to the Law Division. Defendants further contend that, contrary to Shemia's assertions, the Special Civil Part provides any party the opportunity to serve demands for interrogatories, admissions and production on an adverse party. Lastly, Defendants argue that Shemia should have joined ANC and E. Works in the New Jersey action as they are the entities responsible for Shemia's damages and Shemia's failure to join them in the New Jersey action does not bar application of the entire controversy doctrine.

### *Discussion*

The Court first turns to whether the instant action is barred on the grounds of res judicata and/or New Jersey's entire controversy doctrine. "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties or those in privity with them of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" (*Greenstone/Fontana Corp. v Feldstein*, 72 AD3d 890, 893 [2d Dept 2010][*citations omitted*]). "As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Id.*). Res judicata applies to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised in the prior proceeding (*Matter of Eagle Ins. Co. v Facey*, 272 AD2d 399, 400 [2d Dept 2000]).

Like the doctrine of res judicata, New Jersey's entire controversy doctrine is a theory of claim preclusion that embodies the principle that adjudication of a legal controversy should occur in one litigation in one court (*see Busch v Biggs*, 264 NJ Super 385, 395 [App Div 1993]). The entire controversy doctrine has three purposes: "(1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the

reduction of delay” (*Trolio v Antiles*, 142 NJ 253, 267 [1995]). The doctrine requires the joinder of “virtually all causes, claims, and defenses relating to a controversy between the parties engaged in litigation” (*Oltremare v ESR Custom Rugs, Inc.*, 330 NJ Super 310, 314-15 [App Div 2000]). The central consideration in determining whether a successive claim is barred by the entire controversy doctrine is whether the claims arise from a core set of related factual circumstances (*DiTrolio v Antiles, supra*). In the absence of such a factual nexus, a party is not required to join all of his claims in a single action (*Joel v Morrocco*, 147 NJ 546, 548-50 [1997]).

Here, Shemia’s claims for indemnification, contribution, reimbursement and attorney’s fees under the parties’ Separation Agreement, to the extent that they arise from the Warehouse litigation, are all barred on res judicata grounds. Shemia asserted these claims in the Warehouse Action, or should have asserted them, and the claims were subsequently adjudicated in favor of Chera due to Shemia’s default at trial. Since ANC and E. Works are in privity with Chera, such claims are also barred as against them. Shemia’s claim to pierce the corporate veil should also be precluded because this claim was asserted in the Warehouse Action. Although the Court need not apply the entire controversy doctrine, the Court finds that its application would also bar the foregoing claims as Shemia fails to establish that New Jersey’s Special Civil Part would have been an inadequate forum to address his claims. Moreover, Shemia fails to dispute that his claims would have been transferred to the Law Division of New Jersey’s Superior Court in the event that they exceeded the \$15,000 monetary threshold.

However, with regards to Shemia’s claim to invalidate the Separation Agreement for lack of consideration (fifth cause of action), the Court finds that res judicata and the entire controversy doctrine do not apply. This claim does not arise from the same “core set of related factual circumstances” as the Warehouse Action. While the Warehouse Action concerned Warehouse’s claim for monies owed for the storage of Element Works’ merchandise, who should be liable therefor, and ensuing indemnification or contractual obligations between defendants, the instant action concerns Shemia’s claim that he has been deprived of the benefit of the bargain

due to Chera's refusal to honor the terms of the parties' Separation Agreement. Shemia's allegations regarding Chera's conduct concern, not only Chera's supposed refusal to defend and indemnify him in the past, but also Chera's continued use of the Element Works trade name without accepting assignment of ownership of the LLC bearing Element Works' name or updating the warranty information on the products, all of which are still tied to Shemia. In other words, Shemia contends that he is being exposed to all potential liability for Element Works' products while Chera, alone, enjoys all of the benefits of sole ownership of ANC and E. Works. Although Chera may dispute some of the foregoing factual allegations, there is no basis for the Court to resolve that issue now. In addition, to the extent that Defendants argue that this claim must fail because consideration was in fact provided, Defendants fail to establish same as a matter of law. Thus, summary judgment must be denied as to this cause of action.

With regards to Shemia's motions to amend, permission to amend pleadings should be freely given absent significant prejudice to the other side (*see Edenwald Contracting Co. v New York*, 60 NY2d 957, 959 [1983]). Here, Defendants do not contend that they would be prejudiced by the proposed amendments. Thus, Shemia's application to amend his complaint to add a cause of action for permanent injunction is granted. In addition, Shemia's motion to amend the complaint to add a cause of action for attorney's fees is granted, however any claim for attorney's fees stemming from the Warehouse litigation is barred on res judicata grounds.

Turning to Shemia's motion for a preliminary injunction, the Court finds that Shemia fails to establish that the requested preliminary injunction is warranted. A party moving for a preliminary injunction must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position (*EdCia Corp. v McCormack*, 44 AD3d 991, 993 [2d Dept 2007]). The movant must show that the irreparable harm is "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]). Economic loss, which is compensable by money damages, does not constitute

irreparable harm (*Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739 [2d Dept 2010]).

Here, Shemia alleges that being associated with Element Works' products places his business goodwill and reputation in jeopardy, however, he fails to explain how this is so. Shemia's fear that he may be exposed to liability for defective Element Works products and/or violations of federal and intellectual property laws is purely speculative as Shemia fails to proffer any evidence that the products are defective or that they in fact violate any laws. Moreover, to the extent that Shemia may still be sued in relation to Element Works' products, that possibility is clearly anticipated and accounted for in the parties' Separation Agreement by way of the indemnification provision. Thus, the existence of that possibility cannot constitute irreparable harm. Finally, since the filing of Shemia's OTSC, Chera has updated the warranty information for the products to reflect the correct information on the product packaging and several websites. Thus, the potential for Shemia to be sued in relation to Defendants' products is significantly abated.

Finally, to the extent that any discovery issues remain outstanding in light of this decision, the parties' discovery motions shall be resolved at a compliance conference before Comm-12 on January 14, 2020. That part of Shemia's motion seeking to strike Defendants' answer, however, is denied at this time.

### *Conclusion*

Accordingly, it is hereby

ORDERED that Plaintiff's and Defendants' motions to compel discovery pursuant to CPLR 3124 (motion sequence 2 and 3) shall be resolved at the January 14, 2020 compliance conference before Comm-12 in Room 741; it is further

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's complaint (motion sequence 4) is granted to the extent granted herein but otherwise denied; it is further

ORDERED that Plaintiff's motion for a preliminary injunction and other relief (motion sequence 5) is granted insofar as leave to amend is granted but that the motion is otherwise denied; and it is further

ORDERED that Plaintiff's motion to amend his complaint to add a claim for attorneys' fees (motion sequence 7) is granted to the extent granted herein.

This constitutes the decision and order of the Court.

E N T E R,



HON. LAWRENCE S. KNIPEL  
HON. LAWRENCE KNIPEL  
Administrative Judge

KINGS COUNTY CLERK  
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