

New S. Ins. Co. v Parcel Inc.

2023 NY Slip Op 30520(U)

February 21, 2023

Supreme Court, New York County

Docket Number: Index No. 159700/2019

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

-----X

NEW SOUTH INSURANCE COMPANY,

Plaintiff,

- v -

PARCEL INC., ESSENCE ULMER, and YELENA
SHATALINA,

Defendants.

-----X

INDEX NO. 159700/2019MOTION DATE 01/25/2022MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 50, 51, 52

were read on this motion to/for

JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for a default judgment on its first and second causes of action seeking a declaration that it is not obliged to provide defense or to provide coverage for the defendant Essence Ulmer in the action of Yelena Shatalina vs. EAN Holdings, LLC, Parcel, Inc. and Essence Ulmer, Index No. 515609/2018, Kings County, where defendant Shatalina seeks damages for personal injury against defendant Ulmer, is granted on default; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to provide defense or to provide coverage for the defendant Essence Ulmer in such action pending in Kings County; and it is further

ORDERED that the motion of plaintiff for a summary judgment on its first, third and fourth causes of action seeking a declaration that it is not obliged to provide defense or to provide coverage for the defendant Parcel, Inc. in the action of Yelena Shatalina vs. EAN Holdings, LLC, Parcel, Inc. and Essence Ulmer, Index No. 515609/2018, Kings County, where defendant Shatalina seeks damages for personal injury against defendant Parcel, Inc., is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to provide defense or to provide coverage for the defendant Parcel Inc. in such action pending in Kings County; and it is further

ORDERED that the counterclaims interposed by defendant Parcel Inc. against plaintiff are dismissed.

DECISION

The subject Policy (Definitions, page 1) defines "Your Insured Auto" as:

- a. Any auto described in the Declarations and any auto you replace it with.
- b. Any additional auto which you acquire during the Policy period provided we already insure all autos that you own.

There is no dispute that the vehicle, i.e., 2015 Nissan NV200, involved in the subject accident, was not described in the Declaration Pages of the subject Policy. This court agrees with

plaintiff that the defendant Parcel Inc., the only defendant appearing herein, has come forward with no evidence of a witness with knowledge that the 2015 Nissan NV200 replaced any of the four autos listed in the Declarations or that such four vehicles were all the autos that defendant Parcel Inc. owned.

Likewise, on such basis, defendant Essence Ulmer does not fit the definition of an Insured, since though she states, under oath, that she was an employee of Parcel, Inc., there is no admissible evidence that the motor vehicle she was operating, i.e., the 2015 Nissan NV200, was covered under the Policy.

The accident that is the subject of Yelena Shatalina vs. EAN Holdings, LLC, Parcel, Inc. and Essence Ulmer, Index No. 515609/2018, Kings County (the underlying action) took place on July 16, 2016. Defendant Parcel, Inc. does not disagree that the first notice of loss of such accident that it provided to plaintiff took place on April 1, 2019, while such defendant itself was served with the summons and complaint in the underlying action on August 3, 2018, almost eight months before. Prior to providing such notice of loss to plaintiff, defendant Parcel, Inc. answered, and on March 25, 2019, the judge presiding granted the motion for summary judgment of defendant Shatalina, as plaintiff in the underlying action, finding liability on the part of defendant Parcel, Inc., leaving only the question of comparative fault for trial. Therefore, this court determines that defendant Parcel,

Inc. breached the Policy condition that required it, as insured, to report the accident "as soon as possible" to plaintiff. Plaintiff was not only presumptively prejudiced by such late notice, having been received same more than two years after the loss (Insurance Law § 3420(c)(2)(A)). Plaintiff was also actually prejudiced when the liability of defendant Parcel, Inc., its insured, was adjudicated prior to such notice. As argued by plaintiff, such prejudice is not rebuttable (Insurance Law § 3420[c][2][B]). See American Transit Ins. Co. v Rechev of Brooklyn, Inc., 57 AD3d 257 (1st Dept 2008).

Debra A. James

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2/21/2023
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: