IN THE COURT OF APPEALS OF IOWA

FILED
MAR 16 1989
CLERK SUPREME COURT

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| **MARVIN L. PERKINS,** | ) | |
| Plaintiff-Appellee, | ) | |
| vs. | ) | |
| **FARMERS MUTUAL INSURANCE ASSOCIATION OF IOWA,** | ) | 8-638<br>88-504 |
| Defendant-Appellant. | ) | |

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Appeal from the Iowa District Court for Polk County (No. CL62-36419), Gene L. Needles, Judge.

Insurer appeals the district court order requiring payment of a fire loss. **REVERSED.**

Robert N. Helmick of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for the defendant-appellant.

Mark A. Roeder and Theodore T. Duffield of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

**DONIELSON, J.**

The defendant insurer refused to pay for a fire loss on an insured rental house. The insurer took the position that the policy provided no coverage because the house was vacant. The policy contains a vacancy clause which excludes coverage if a rental house is vacant for more than 120 days.

The owner of the house brought the present suit against the insurer to compel payment for the fire loss. The district court directed the insurer to pay for the fire loss, and the insurer has appealed. The insurer contends the district court erred by concluding the insurer had waived the vacancy clause.

Vacancy clauses are common in fire policies and are valid and enforceable. If a vacancy clause is violated, the coverage is suspended as to the vacant property until such time as the breach ceases. Baldwin v. German Ins. Co. of Freeport, Ill., 105 Iowa 379, 385, 75 N.W. 326, 328 (1898).

In the present case, Perkins admitted to Farmers' fire inspector that the house had been vacant and unoccupied one year prior to the fire. No one ever notified Farmers or Perkins' agent of the vacancy prior to the loss, so under the terms of the policy, Perkins had no coverage on the dwelling in question after it had been vacant for 120 days.

The trial court's finding that Farmers waived the vacancy clause is in error. To prove waiver of a policy term, the party challenging the denial of coverage must establish that the insurer was aware of the existence of the matter to be waived and that it had an intention to waive the term of the policy. Scheetz v. IMT Ins. Co. (Mut.), 324 N.W.2d 302, 304 (Iowa 1982). Perkins has not shown that Farmers acted with an intent to relinquish its right to assert the vacancy clause. Therefore, no waiver occurred.

The decision of the district court is reversed, and Perkins claim under the policy is dismissed.

**REVERSED.**