

Newsletter



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Is gradual occupancy a vacancy under the policy?

In Nkana c. La Garantie, compagnie d'assurances de l'Amérique du Nord (2018) QCCS 4265), the Superior Court had to decide whether the insureds were entitled to compensation from their insurer for water damage that had occurred before they moved into their newly acquired residence.

The insureds obtained an insurance policy which excluded coverage for damage occurring while the dwelling is vacant. The term "vacant" was described as:

Vacant, the condition of a dwelling whose occupant(s) has/have moved out with no intent to return; a newly constructed dwelling is vacant after it is completed and before the occupant(s) move(s) in. Furthermore, the dwelling is also vacant when the occupant(s) move(s) out and before any new occupant(s) move(s) in. [Our translation]

The insureds purchased their residence on January 5, 2015, but did not move in immediately. Their intention was to move in a few weeks later. However, they visited a number of times to bring furniture and other items, and to meet various contractors (snow removal, painting, etc.).

On February 17, one of the insureds noted that there had been water damage on the first floor, when pipes had frozen. Although the insurer had hired a contractor to perform emergency repairs, on March 12, it decided to deny coverage, alleging that the residence was vacant when the damage occurred. It also instructed the contractor to cease the work and leave the premises. The insureds were only informed of the situation on April 2, after a second occurrence of water damage, although the insureds were under the impression that the contractor was still in the residence to do the repairs.

The insureds filed a claim with their insurer for the damage caused by both water leakage incidents. They were also seeking compensation for the prejudice caused by the insurer's fault in failing to notify them that the contractors had left, and for the increase of their insur-



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ance premiums following the cancellation by the insurer.

The issue for the Superior Court was whether the residence was “vacant” under the policy. The Court indicated that it could not refer to the notion of abandonment. It had to determine whether the insureds had moved in.

After having examined the common definitions of “moving in” (*emménagement*), the Court concluded that the term had to be construed as an “action consisting of filling or occupying the premises with objects and, eventually, people” [Our translation]. Moving-in did not have to be definitive. Since the insureds were in the process of moving in when the damage

occurred, the exclusion from coverage could not apply. The insurer was held to pay compensation for the damage caused by the water leaks.

The claim for compensation for the inconveniences caused by the second occurrence was, however, dismissed for lack of evidence, except for the expense of relocation during the repairs, which were allowed.

Finally, the Court considered that the insurer’s decision to cancel the policy after these events was not abusive, as it had followed the procedure provided for by art 2477 of the *Civil Code of Québec*. Since the insurer was not acting in bad faith, no compensation was granted.

