

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

109

**CA 20-00757**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

---

COLLING ENTERPRISES, LLC,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

UNITED FRONTIER MUTUAL INSURANCE COMPANY,  
DEFENDANT-APPELLANT-RESPONDENT.

---

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JAMES J. GRABER OF  
COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT-APPELLANT.

---

Appeal and cross appeal from an order of the Supreme Court,  
Niagara County (Frank Caruso, J.), entered May 20, 2020. The order  
denied defendant's motion for summary judgment and denied plaintiff's  
cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by granting the motion and dismissing  
the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff, following a fire at a building that it  
owned, commenced this action to recover damages allegedly owed to it  
under a fire insurance policy issued by defendant. We agree with  
defendant on its appeal that Supreme Court erred in denying its motion  
for summary judgment dismissing the complaint, and we therefore modify  
the order accordingly. Here, "the clear and unambiguous language of  
the policy exclud[ed] coverage if plaintiff's building was vacant for  
60 consecutive days prior to the loss, and the record establishes that  
the building was vacant within the meaning of the policy for the  
requisite period" (*Nicholas J. Masterpol, Inc. v Travelers Ins. Cos.*,  
273 AD2d 817, 817 [4th Dept 2000]). Plaintiff had "conclusive  
presumptive knowledge of the terms of the policy prior to the loss and  
took no action to close the gap in coverage resulting from the  
exclusion for vacancy" (*id.* at 818; see *Gui's Lbr. & Home Ctr., Inc. v  
Pennsylvania Lumbermens Mut. Ins. Co.*, 55 AD3d 1389, 1390 [4th Dept  
2008]). The cases upon which plaintiff relies are inapposite because,  
here, the policy was undisputedly valid when it was delivered (*cf.*  
*Short v Home Ins. Co.*, 90 NY 16, 20 [1882]).

Entered: June 11, 2021

Mark W. Bennett  
Clerk of the Court