

**Michael Newmark et al., Respondents, v. Samuel B. Weingrad et al., Appellants.  
Samuel B. Weingrad, Third-Party Plaintiff-Appellant; Chicago Title Insurance Co.,  
Third-Party Defendant-Respondent**

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

*35 N.Y.2d 832; 321 N.E.2d 784; 362 N.Y.S.2d 863; 1974 N.Y. LEXIS 1185*

**October 17, 1974, Argued  
November 21, 1974, Decided**

**PRIOR HISTORY:** [\*\*1] *Newmark v. Weingrad*, 43 A D 2d 983, affirmed.

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 25, 1974, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (Anthony M. Livoti, J.), entered in Queens County, denying a motion by defendants for summary judgment. The modification consisted of granting summary judgment to plaintiffs and granting summary judgment in favor of third-party defendant dismissing a third-party complaint asserted by defendant Weingrad. Plaintiffs sought to recover a down payment made by them and expenses incurred by them in connection with a contract, dated January 13, 1973, for their purchase of premises owned by individual defendant and located at 10 Romola Drive in Great Neck, Long Island. The premises included two adjoining lots, one of which, lot No. 5, consisted of about one and one-half acres, improved with a residence, and the other, lot No. 7, consisted of three and one-half acres washed by the tidal waters of Little Neck Bay. The contract provided that "The seller shall give and the purchaser shall accept a title such [\*\*2] as any Title Insurance Company of purchasers' choice will approve and insure"; that "In the event that the seller is unable to convey title in accordance with the terms of this contract, the sole liability of the seller will be to refund to the purchaser the amount paid on account of the purchase price and to pay the net cost of examining the title \* \* \* and the net cost of any survey made", and that "It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement". After third-party defendant, the title insurance company chosen by plaintiffs, refused to insure title to lot No. 7, plaintiffs demanded the return of their down payment, which was being held in escrow by defendant Weingrad and Weingrad, P. C., and the costs of a title search and survey, and brought the present action when defendants refused to comply with the demand. Defendants alleged, *inter alia*, that, at the time of execution of the contract, the parties had agreed that title to lot No. 7 would not be insured by any title company, in accordance with the accepted custom and usage [\*\*3] existing with relation to land washed by tidal waters, and that a conspiracy existed between plaintiffs and third-party defendant to slander defendant Weingrad's title to the lot for the sole purpose of enabling plaintiffs to abrogate their contract. Special Term found that issues of fact were presented which precluded a summary disposition of the case. The Appellate Division held that defendant vendor had presented nothing to warrant a departure from the firmly entrenched principle that, where a contract required the seller to give and the purchaser to accept a title such as a designated title company would approve and insure, the seller assumed the burden of delivering a title which the title company would approve and insure unconditionally and without exceptions; and that, additionally, defendant vendor had failed to demonstrate by evidentiary facts any substance to his third-party complaint against the title company.

**HEADNOTES**

**Vendor and purchaser -- title insurance -- contract for purchase of two adjoining lots, one of which was washed by tidal waters, provided for vendor to give such title as any title company of purchasers' choice would approve and insure, and that, if he could [\*\*4] not convey title in accordance with contract, he was to refund down payment and pay costs of title search and survey -- after title company chosen by purchasers refused to insure lot washed by tidal waters, and vendor refused demand by purchasers for down payment and costs, latter brought action to recover same, and vendor asserted third-party complaint against title company -- Special Term denied summary judgment, but Appellate Division granted summary judgment in favor of purchasers and in favor of title company -- order of Appellate Division affirmed on memorandum thereat.**

**COUNSEL:** *Samuel B. Weingrad*, appellant *pro se*, and for Weingrad and Weingrad, P. C., appellant.

*Stacy L. Wallach* and *Edward L. Sadowsky* for respondents.

*Charles Feit* and *Samuel Kirschenbaum* for third-party respondent.

**JUDGES:** Concur: Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Rabin and Stevens.

**OPINION**

[\*833] Order affirmed, without costs, on the memorandum at the Appellate Division.