

**J. Herbert Grimsey et al., Respondents, v. Lawyers Title Insurance Corporation, Defendant-Appellant and Third-Party Plaintiff. Thomas P. Lynch, Third-Party Defendant. (And Another Title.)**

[NO NUMBER IN ORIGINAL]

**Court of Appeals of New York**

*31 N.Y.2d 953; 293 N.E.2d 249; 341 N.Y.S.2d 100; 1972 N.Y. LEXIS 906*

**November 29, 1972, Argued  
December 29, 1972, Decided**

**PRIOR HISTORY:** *Grimsey v. Lawyers Tit. Ins. Corp.*, 38 A D 2d 572.

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court entered December 13, 1971, which, insofar as appealed from, modified on the law and, as modified, affirmed a judgment of the Supreme Court (John F. Skahen, J.), entered in Rockland County in favor of plaintiffs-respondents against appellant Lawyers Title Insurance Corporation. Plaintiffs had ordered title insurance with respect to unimproved land in Rockland County from Lawyers Title Insurance Corporation through third-party defendant Thomas P. Lynch, an "Approved Attorney" and apparent agent of the insurer. The insurer issued an interim title insurance binder through said Lynch to plaintiffs and plaintiffs purchased the land. Although the insurer never issued a policy of title insurance the agent did accept and deposit a check from plaintiffs for title insurance. Subsequently, plaintiffs were informed by the Rockland County Attorney's office that their title derived from deeds issued pursuant to the purchase of two erroneous tax liens, the land being actually owned by the county through appropriation. When the Lawyers Title Insurance Corporation denied coverage, plaintiffs commenced an action in damages against it for \$ 125,000, the face value of the binder. Later, they proceeded against Rockland County pursuant to *article 15 of the Real Property Actions and Proceedings Law*, to which the county responded by a counterclaim seeking a judgment determining that the county was the lawful owner of the property. The insurance company then commenced an action against said Lynch as a third-party defendant for any sum recovered by plaintiffs. These actions were consolidated. The trial court, adjudging that the county held title, found that the plaintiffs had effectively purchased title insurance and awarded \$ 65,000 as damages, which was the total purchase price, \$ 7,800 for interest already paid on a \$ 40,000 purchase-money mortgage, \$ 5,000 as counsel fees for representing plaintiffs both in their action against the county and the action brought against the insurance company, plus \$ 1,320 in costs and \$ 948.75 in disbursements. The Appellate Division held that the insurer was estopped from denying coverage because of third-party defendant Lynch's apparent agency to act on behalf of the insurer and modified the judgment of the Supreme Court by (1) reducing the award by the amount of the \$ 40,000 purchase-money mortgage by plaintiffs to the vendors, holding that the contract breached was in the nature of indemnity, entitling plaintiffs to recovery only for actual loss, and (2) reducing the award of costs to \$ 150 by deducting the statutory allowance of \$ 1,170, stating that such an allowance may not be made pursuant to *CPLR 8302* (subd. [a], par. 3) in an action solely to recover damages for breach of a contract of title insurance.

**DISPOSITION:** Ordered accordingly.

**HEADNOTES**

**Insurance -- title insurance -- attorneys' fees -- title insurance company which issued binder of title insurance but did not issue policy estopped from denying coverage because of apparent agency of "Approved Attorney" to act on behalf of title insurance company -- award for amount of insureds' counsel fees proper insofar as it embraced cost of services rendered in defense of claim of title interposed against insureds but unauthorized to extent that it included fees incurred in prosecuting action brought against title insurance company -- order of Appellate Division modified and matter remanded for further proceedings.**

**COUNSEL:** *Samuel Kirschenbaum* and *Arthur Winoker* for appellant.

*Thomas J. Leyden* for respondents.

No appearance for third-party defendant.

**JUDGES:** Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel, Jasen and Gibson concur.

**OPINION**

[\*955] [\*\*250] [\*\*\*101] Memorandum. The award for the amount of plaintiffs' counsel fees was proper insofar as it embraced the cost of services rendered in defense of the claim of title interposed against the plaintiffs but was unauthorized to the extent that it included attorneys' fees incurred in prosecuting the action brought against the title insurance company and now before us ( *Doyle v. Allstate Ins. Co.*, 1 N Y 2d 439); and remand is necessary for determination of the amount of the attorneys' fees properly incurred in the defense of the title action and for modification of the judgment accordingly. Otherwise, the order of the Appellate Division, to the extent that it is before us pursuant to the Appellate Division's grant of leave, is correct.

The order appealed from should be modified so as to provide that the case be remitted to the Supreme Court, Rockland County, for further proceedings in accordance with this memorandum and, as so modified, affirmed, without costs.