

**CAUSE NO. 22-00105**

CSD VAN ZANDT LLC  
Plaintiff

§ IN THE DISTRICT COURT

v.

§ 294th JUDICIAL DISTRICT

UDO BIRNBAUM  
Defendant

§ VAN ZANDT COUNTY, TX

**MOTION TO MODIFY CORRECT AND REFORM  
THE JUDGMENT**

1. This Court, under color of law, specifically under color of eviction as a tenant, unlawfully “ejectmented” Defendant off his 42 year 150 acre homestead.

An ejectment being the removal of a person from real property who does not have the legal right to occupy the property, i.e. anyone, not only tenants. But Texas Property Code 22.001(b) specifically states: “The action of ejectment is not available in this state”. Defendant UDO BIRNBAUM of course had a right to be on his property if only by reason of 42 year homestead possession.

(Attach 1 - posting onto door of eviction as a tenant)

2. And this unlawful “ejectment” was brought about by the forgery of a document purporting to be a lawful writ, upon signature of a judge, lawful writs are upon the signature and authority of the Clerk, in the name of and under the great seal of the State of Texas. Be it also noted that this document bears no file stamp whatsoever of ever having been duly “signed with the Clerk”.

(Attach 2 - Writ of Possession as unlawfully signed by and coming directly from the judge instead of lawfully upon signature and Office of the Clerk)

3. Furthermore this writ was fraudulently proposed onto this judge as an Order to be signed, and he did so on 8-17-2023. But writs do not get “proposed”, but are issued upon judgment, of which there was clearly none on 8-17-2023, Judgment not being till 9-20-2023.

(Attach 3 – The act of fraudulently “sneaking in” of a Proposed Writ under color of being a proposed Order)

4. As for Texas law, eviction is solely by the Justice Court of the precinct, case law coming out of and upon this very 294th District Court, then under Hon. Teresa Drum, It's the Berrys, LLC v. Edom Corner, LLC, 271 S.W.3d 765 (Tex. App. 2008) (Attach 4)

#### **OPINION**

Appellant It's the Berry's, LLC d/b/a Mary Ellen's (Berry's) complains of a district court judgment granting possession of its leasehold to its landlord, appellee Edom Corner, LLC. Brought as an action for forcible detainer in justice court, the case was transferred to district court and there tried as though that court possessed original subject matter jurisdiction. **Finding the district court lacked original subject matter jurisdiction to try an eviction suit**, we will sever, vacate and dismiss the forcible detainer suit and affirm the remainder of the judgment. (emphasis added)

And again, Texas Property Code 22.001(b), “The action of ejectment is not available in this state”

5. And as for the 9-20-2023 Judgment itself: “1. On August 17,2023 the Court Granted all relief requested in *Plaintiff's Traditional Motion for Summary Judgment.*”

(Attach 5 – Final Judgment)

6. The curious issue, of course, is if the Court already granted Plaintiff everything on 8-17-2023, why do we need another granting of everything again on 9-20-2023?

(Attach 6 – the fraudulent on 8-17-2023 signed Order that is now being flashed as being a judgment, already snuck in way back on 10-20-2022, now 8-17-2023 and 9-20-2023 being fraudulently under color of law being used )

## **PRAYER**

For the reasons stated above, Defendant UDO BIRNBAUM moves this Court to modify, correct, and reform both the unlawful judgment of 9-20-2023 and the unlawful writ of possession of 8-17-2023.

Also attached hereto is the WARNING (Attach 7) posted on his front door by Defendant BIRNBAUM, to whoever officer in charge, detailing exactly how and why their writ being unlawful, and a human impact sample (Attach 8) of this vicious retaliatory process perpetrated upon him, an 86 year old elderly, under color of law.

---

UDO BIRNBAUM  
P.O. Box 4281  
Palestine, TX 75802  
903-802-9669  
BRNBM@AOL.COM

### **Certificate of Service**

Today October \_\_\_\_\_, 2023, CMRR 7022 2410 0002 2355 4227, to Corey Kellam, Flowers Davis, 1021 ESE Loop 323, Suite 200, Tyler, Texas 75701.

Today October \_\_\_\_\_, 2023, CMRR 7022 2410 0002 2355 4258, to District Clerk, Karen L. Wilson, Courthouse, 121 E. Dallas St., Suite 302, Canton TX, 75103

ATTACH 1 - unlawful Eviction as a  
supposed "tenant" in a "unit" - from  
his 150 acre 42 year homestead

# WARNING

A Writ of Possession has been issued by 294<sup>th</sup>  
Judicial District Court of Van Zandt County,  
Case No. 22-00105

All tenants and their personal property should be  
removed from 540 Van Zandt County Road  
2916, Eustace, Texas 75124 by

SEPTEMBER 07, 2023 at  
9:00AM

Tenants and personal property remaining on the  
premises after that date and time will be subject to  
removal. The unit will be turned over to:

CSD Van Zandt, LLC

Van Zandt County Sheriffs Office  
Posted by S.D. Henson

05 Day of September, 2023 at 2:54 pm

ATTACH 2 - unlawful writ directly from a judge instead of duly from the Clerk's Office under her Seal and signature

CAUSE NO. 22-00105

CSD VAN ZANDT LLC  
*Plaintiff*

§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

v.

294<sup>th</sup> JUDICIAL DISTRICT

UDO BIRNBAUM  
*Defendant*

VAN ZANDT COUNTY, TEXAS

WRIT OF POSSESSION OF PREMISES

TO ANY SHERIFF OR CONSTABLE IN THE STATE OF TEXAS:

WHEREAS the Plaintiff has recovered judgment of possession of the premises in the above-entitled and numbered action; and

no such judgment. Was a mere Order on a Motion

WHEREAS the judgment was executed on August 17, 2023; and

WHEREAS the Plaintiff has proven an entitlement to immediate possession of the premises;

Texas Property Code 22.001(b) : "The action of ejectment is not available in this state"

YOU ARE HEREBY COMMANDED to place Plaintiff, CSD VAN ZANDT, LLC, in immediate possession of the premises located at 540 VZ County Road 2916, Eustace, Texas 75124, and legally described as:

All that certain lot, tract or parcel of land located within the P. Young Survey, Abstract No. 978 of Van Zandt County, Texas, being all of a called 74.507 acre tract, described as Tract 1 and all of a called 74.507 acre tract, described as Tract 2 in a deed from T.C. Travis and wife, Carolyn Ann Travis to Udo H. Birnbaum, dated September 17, 1991 and recorded in Volume 964, Page 447 of the Deed Records of Van Zandt County, Texas, and this 148.12 acre tract being more fully described as follows:

BEGINNING at a Point in County Road 2916, the West line of a called 96.60 acre tract, described as Tract 2 in a deed from Jerry D. Robbins and Vicky A. Robbins to The Texas 4 R'S, LP, dated July 19, 2007 and recorded in Volume 2255, Page 113, and the common line of said P. Young Survey and the A. Flowers Survey, Abstract No. 264, and being at the Northeast corner of said 74.507 acre tract, Tract 1 and the Southeast corner of a called 5.00 acre tract as described in a deed from Fannie Mae to Paul G. Coker and Lindsay K. Coker, dated March 21, 2014 and recorded in Document No. 2014-002199, from which a 1/2" Iron Rod Found in the West line of said County Road 2916 and the common line of said 5.00 acre tract and a called 5.72 acre tract, described as Tract 2 in a deed from Bunny E. Anderson to Brady Irwin and Sharon Irwin, dated June 26, 2020 and recorded in Document No. 2020-005698 bears North 04 deg. 44 min. 24 sec. West, a distance of 513.56 feet;

**THENCE with said County Road 2916, the West line of said 96.60 acre tract, a called 52.48 acre tract, described as Tract 1 in Said Volume 2255, Page 113, and the residue of a called 105.73 acre tract as described in a deed from Shirley Solivio Phillips, Executrix of the Estate of Harland William Phillips to Susan Alice Emerson, et al, dated January 25, 2005 and recorded in Volume 2001, Page 529; and the common line of said P. Young Survey, said A. Flowers Survey, and the W. Flowers Survey, Abstract No. 263, the following four (4) courses and distances:**

**South 01 deg. 18 min. 19 sec. East, a distance of 1,350.63 feet to a Point for Corner;**

**South 00 deg. 56 min. 34 sec. East, a distance of 1,127.70 feet to a Point for Corner;**

**South 01 deg. 25 min. 26 sec. East, a distance of 682.62 feet to a Point for Corner;**

**South 01 deg. 08 min. 12 sec. East, a distance of 313.34 feet to a Point for Corner at the Southeast corner of said 74.507 acre tract, Tract 2, same being the Northeast corner of a called 43.13 acre tract, described as Tract Two in a deed from Charles E. Womble, Trustee of the Richard E. Womble Irrevocable Trust to Charles E. Womble, dated December 5, 2013 and recorded in Document No. 2014-000264, from which an 8" wood fence corner post bears South 86 deg. 56 min. 28 sec. West, a distance of 39.71 feet;**

**THENCE South 89 deg. 17 min. 06 sec. West, with the North line of said 43.13 acre tract, a distance of 1,864.85 feet to a Point in an Oak Tree in the East line of a called 30.86 acre tract as described in a deed from Roy Allen Phillips and Gloria Jean Phillips to Steven D. Kiewit, dated February 25, 2022 and recorded in Document No. 2022-092473 and being at the most northerly Northwest corner of said 43.13 acre tract, from which a 1/2" Iron Rod Found at the Southeast corner of said 30.86 acre tract bears South 01 deg. 20 min. 05 sec. East, a distance of 423.03 feet;**

**THENCE North 01 deg. 20 min. 05 sec. West, with the East line of said 30.86 acre tract and a called 35.96 acre tract as described in a deed from Roy Allen Phillips and Gloria Jean Phillips to R.G. Phillips Revocable Trust, dated May 12, 2017 and recorded in Document No. 2017-004184, passing a 5/8" Iron Rod Found at the East common corner of same at 522.28 feet and continuing for a total distance of 1,562.69 feet to a 2" Steel Post fence corner found at the Southeast corner of a called 17.25 acre tract as described in a deed from the Sheriff of Van Zandt County, Texas to Manuel Gallegos, dated November 5, 2020 and recorded in Document No. 2020-011428;**

**THENCE North 01 deg. 07 min. 07 sec. West, with the East line of said 17.25 acre tract, a distance of 1,873.23 feet to a 3/4" Iron Pipe Found in the South line of a called 31.88 acre tract, described as Tract 1 in said Document No. 2020-095698 at the Northeast corner of said 17.25 acre tract, from which a 1/2" Iron Rod Found at the Southwest corner of said 31.88 acre tract bears South 88 deg. 06 min. 23 sec. West, a distance of 46.19 feet;**

**THENCE North 88 deg. 06 min. 23 sec. East, with the South line of said 17.25 acre tract, said 5.72 acre tract, and said 5.00 acre tract, passing a 1/2" Iron Rod Found at the South common corner of said 5.72 acre tract and said 5.00 acre tract at 1,450.81 feet and continuing for a total distance of 1,866.20 feet to the POINT OF BEGINNING AND CONTAINING 148.12 ACRES OF LAND.**

(1) When the writ is executed:

- (A) deliver possession of the premises to CSD Van Zandt LLC;
- (B) instruct Udo Birnbaum and/or all persons claiming under him to leave the premises immediately, and, if the persons fail to comply, physically remove them;
- (C) instruct Udo Birnbaum to remove, or to allow CSD Van Zandt LLC or other persons acting under your supervision to remove, all personal property from the premises other than personal property claimed to be owned by CSD Van Zandt LLC; and,
- (D) place, or have an authorized person place, the removed personal property outside at a nearby location, but not blocking a public sidewalk, passageway, or street and not while it is raining, sleeting, or snowing, with the exception of circumstances existing under Texas Property Code Sec. 24.0061 (d-1).

The officer serving this *Writ*, at the officer's discretion, may engage the services of a bonded or insured warehouseman to remove and store, subject to applicable law, part or all of the property at no cost to CSD Van Zandt LLC or the officer executing the *Writ*. The officer may not require CSD Van Zandt LLC to store the property.

NOTICE TO OFFICER: Under Section 7.003, Texas Civil Practice and Remedies Code, the officer is not liable for damages resulting from the execution of the *Writ* if the officer executes the *Writ* in good faith and with reasonable diligence.

8/30/2023 4:05:42 pm

SIGNED this \_\_\_\_ day of \_\_\_\_\_ 2023.



**JUDGE PRESIDING**  
Chris Martin

**RETURN**

Came to hand on the \_\_\_\_ day of \_\_\_\_\_ 2023, at \_\_\_\_\_ o'clock \_\_\_\_ .m., and executed at \_\_\_\_\_, Van Zandt County, Texas, at \_\_\_\_\_ o'clock \_\_\_\_ .m. on the \_\_\_\_ day of \_\_\_\_\_ 2023, by placing CSD Van Zandt LLC in possession of the property described in accordance with the terms of the *Writ*.

\_\_\_\_\_  
CONSTABLE, Precinct \_\_\_\_\_  
VAN ZANDT COUNTY, TEXAS

BY \_\_\_\_\_



### Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Amy Womack on behalf of Celia Flowers  
Bar No. 7175500  
aw@flowersdavis.com  
Envelope ID: 78984965  
Filing Code Description: Proposed Order  
Filing Description: Writ of Possession of Premises  
Status as of 8/31/2023 7:52 AM CST

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Celia C.Flowers		ccf@flowersdavis.com	8/28/2023 3:08:03 PM	SENT
Corey RossKellam		crk@flowersdavis.com	8/28/2023 3:08:03 PM	SENT
Amy Womack		aw@flowersdavis.com	8/28/2023 3:08:03 PM	SENT
Jennifer Wallace		legalassistant@flowersdavis.com	8/28/2023 3:08:03 PM	SENT
Ashley Fortune		alf@flowersdavis.com	8/28/2023 3:08:03 PM	SENT
Shannon MBarber		sb@flowersdavis.com	8/28/2023 3:08:03 PM	SENT
Udo Birnbaum		brnbn@aol.com	8/28/2023 3:08:03 PM	SENT

Notification of Service for Case: 22-00105, CSD VAN ZANDT LLC VS. BIRNBAUM,UDO for filing Proposed Order, Envelope Number: 78984965

From: no-reply@efilingmail.tylertech.cloud

To: brnbn@aol.com

Date: Monday, August 28, 2023 at 03:08 PM CDT

ATTACH 3 - unlawfully forging a Writ - under color of ORDER. Writs do not get "proposed", but are executed by the CLERK, upon a JUDGGMENT, of which there was NONE



## Notification of Service

Case Number: 22-00105

Case Style: CSD VAN ZANDT LLC VS. BIRNBAUM,UDO

Envelope Number: 78984965

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document. If the link does not work, please copy the link and paste into your browser. You can also obtain this document by following the steps on this [article](#).

Filing Details	
<b>Case Number</b>	22-00105
<b>Case Style</b>	CSD VAN ZANDT LLC VS. BIRNBAUM,UDO
<b>Date/Time Submitted</b>	8/28/2023 3:08 PM CST
<b>Filing Type</b>	Proposed Order
<b>Filing Description</b>	Writ of Possession of Premises
<b>Filed By</b>	Amy Womack
<b>Service Contacts</b>	CSD VAN ZANDT LLC: Celia Flowers (ccf@flowersdavis.com) Corey Kellam (crk@flowersdavis.com) Amy Womack (aw@flowersdavis.com) Jennifer Wallace (legalassistant@flowersdavis.com) Ashley Fortune (alf@flowersdavis.com) Shannon Barber (sb@flowersdavis.com)

	BIRNBAUM,UDO:
--	---------------

	Udo Birnbaum (brnbn@aol.com)
--	------------------------------

Document Details	
------------------	--

<b>Served Document</b>	<a href="#">Download Document</a>
------------------------	-----------------------------------

This link is active for 30 days.	
----------------------------------	--

NOTE: This case law originated out of and upon this very 294th District Court, then under Hon. Teresa Drum.

ATTACH 4 - The District Court does NOT have jurisdiction over "possession" - only the JP Court of the precinct.

No. 07-06-0390-CV  
Court of Appeals of Texas

## It's the Berrys, LLC v. Edom Corner, LLC

271 S.W.3d 765 (Tex. App. 2008)  
Decided Oct 28, 2008

No. 07-06-0390-CV.

October 28, 2008.

Appeal from the District Court, Van Zandt County,  
766 Teresa Drum, J. \*766

Larry M. Lesh, Dallas, Dan J. Anderson, Canton,  
for Appellant.

Katherine A. Ferguson, Renshaw, Davis and  
767 Ferguson L.L.P., Greenville, Richard \*767 L. Ray,  
Ray Elliott, P.C., Canton, for Appellee.

Before QUINN, C.J., and CAMPBELL and  
HANCOCK, JJ.

### OPINION

JAMES T. CAMPBELL, Justice.

Appellant It's the Berry's, LLC d/b/a Mary Ellen's (Berry's) complains of a district court judgment granting possession of its leasehold to its landlord, appellee Edom Corner, LLC. Brought as an action for forcible detainer in justice court, the case was transferred to district court and there tried as though that court possessed original subject matter jurisdiction. Finding the district court lacked original subject matter jurisdiction to try an eviction suit, we will sever, vacate and dismiss the forcible detainer suit and affirm the remainder of the judgment.

### Background

The legal complaints of the parties before us arise from a commercial lease between Edom Corner as lessor and Berry's as lessee. The leased property

was retail space located in a building that also housed a restaurant known as Edom Bakery.

At the time the parties executed the lease, the principal members of Edom Corner were Earl A. Berry, Jr. and his wife, Ann Thornton Berry. Mr. and Mrs. Berry were also the sole members of Edom Bakery, LLC, which did business as Edom Bakery. Berry's was owned by Mary Ellen Malone.

Edom Corner, Edom Bakery, and Berry's were formerly owned in equal shares by Mr. and Mrs. Berry and Malone.<sup>1</sup> But the parties found joint operation of the companies difficult and divided their interests. Under the agreed division, Mr. and Mrs. Berry acquired ownership of Edom Corner and Edom Bakery and Malone acquired ownership of Berry's.

<sup>1</sup> Earl A. Berry, Jr. and Mary Ellen Malone are brother and sister.

Berry's operated a retail merchandise store known as Mary Ellen's in the space it leased from Edom Corner. According to trial testimony, problems developed among the parties after execution of the lease. Disagreements escalated after Malone purchased a nearby restaurant, known as "the Shed," a competitor of Edom Bakery. About eighteen months after execution of the lease, an attorney for Edom Corner notified Berry's by letter that because of multiple alleged breaches of the lease it must vacate the premises by a specified date or face a forcible detainer suit.



When Berry's did not vacate the lease-hold, Edom Corner commenced a forcible detainer suit in a justice court of Van Zandt County. By its original petition entitled "Plaintiffs Original Petition for Forcible Detainer," Edom Corner sought possession of the property, a writ of possession, and attorney's fees.

Before Berry's answered the suit, Edom Corner filed a "Motion to Transfer" in the justice court requesting transfer of the case to the 294th judicial district court of Van Zandt County. In its motion, Edom Corner asserted a suit was already pending in district court concerning a dispute among other entities owned by Malone and Mr. and Mrs. Berry. The justice court responded with an order transferring the case to district court "because the matter concerns issues within its jurisdiction." Thereafter, Berry's answered and filed a counterclaim for declaratory relief and attorney's fees.<sup>2</sup> \*768 About three weeks later, Edom Corner filed a supplemental petition requesting the district court to issue "without notice" a temporary restraining order enjoining Berry's from locking a passageway in the building, leaving the door of Mary Ellen's open while the air conditioning operated, and interfering in efforts to change building locks. The supplemental petition requested a temporary injunction and on trial a permanent injunction because "when [Edom Corner] prevails in its suit for Forcible Detainer there is a period of time between the Court's judgment and the actual physical evacuation of the premises. . . ." No temporary restraining order or temporary injunction issued.<sup>3</sup>

<sup>2</sup> Berry's sought declarations that it was not in default of the lease, Edom Corner breached the lease, and Edom Corner's claims were barred by waiver. As the issue is not before us, we express no opinion on the propriety of the grounds for declaratory relief Berry's urged.

<sup>3</sup> Edom Corner's request for permanent injunctive relief was not tried or expressly embraced by the court's judgment. As the

judgment was signed following a trial on the merits and no order for trial of separate issues appears of record we presume the judgment is final for appellate purposes. *Moritz v. Preiss*, 121 S.W.3d 715, 719-20 (Tex. 2003). The parties do not argue otherwise.

Following a bench trial, the district court signed a judgment awarding Edom Corner possession of the leased premises, a writ of possession, costs and attorney's fees. The judgment also decreed that Berry's take nothing by its counterclaims.

Berry's timely filed a notice of appeal to the Twelfth District Court of Appeals at Tyler. It also filed a motion with the trial court requesting a supersedeas bond exceeding the aggregate of attorney's fees awarded Edom Corner under the judgment, post-judgment interest, and the monthly rental and utility charges payable according to the terms of the lease. Edom Corner objected, arguing the case was a forcible detainer suit not involving a party's principal residence and execution of a writ of possession could not be superseded. *See* Tex.R. Civ. P. 755. The trial court ordered a supersedeas bond in an amount sufficient only to supersede enforcement of the monetary portion of its judgment.

Berry's petitioned the Tyler Court for a writ of mandamus arguing the trial court did not set the amount of bond necessary to supersede the writ of possession, contrary to the requirements of Rule of Appellate Procedure 24.1. Tex.R.App. P. 24.1(a)(3); *In re It's The Berry's, LLC*, No. 12-06-00298-CV, 2006 WL 3020353, \*3, 2006 Tex.App. Lexis 9146, \*9-11 (Tex.App.-Tyler Oct.25, 2006, orig. proceeding) (not designated for publication). Edom Corner again took the position the writ could not be superseded under Rule of Civil Procedure 755 because it was not a party's principal residence. Berry's countered that Rule 755 was not applicable to the case because the appeal was not from a judgment of the county court. 2006 WL 3020353, at \*3, 2006 Tex.App. Lexis 9146, at \*10. Edom Corner responded that





**Government Code section 24.471** established a "special relationship" between the county court and district court of Van Zandt County, authorizing adjudication of its forcible detainer suit in district court. Therefore, Rule 755 applied, disallowing suspension of the writ of possession. 2006 WL 3020353, at \*4, 2006 Tex.App. Lexis 9146, at \*10-11. The Tyler Court disagreed, finding Rule 755 inapplicable because Berry's was appealing not from a judgment of the county court after a trial de novo on appeal from the justice court, but a judgment of the district court, exercising its original jurisdiction. 2006 WL 3020353, at \*4, 2006 Tex.App. Lexis 9146, at \*12.

769 The court concluded the trial <sup>\*769</sup> court abused its discretion by not setting a bond for suspension of the entire judgment, and conditionally granted the writ of mandamus. 2006 WL 3020353, at \*4, 2006 Tex.App. Lexis 9146, at \* 12-13. After the trial court complied with the requirements of the conditional grant, the Tyler Court dismissed the original proceeding as moot. *In re It's The Berry's, LLC*, No. 12-06-00298-CV, 2006 WL 3313659, 2006 Tex. App. Lexis 9920 (Tex.App.-Tyler November 15, 2006, orig. proceeding) (not designated for publication). By docket equalization order of the Supreme Court, the appeal of the case was thereafter transferred to this court. See **Tex. Gov't Code Ann. § 73.001** (Vernon 2005).

## Issues

Berry's raises twenty-two issues on appeal. We find issues one and eleven dispositive of the appeal.

## Discussion

In its first issue Berry's argues the district court lacked subject matter jurisdiction to try Edom Corner's forcible detainer action.

Whether a trial court possessed subject matter jurisdiction is a question of law we review de novo. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). The existence of subject matter jurisdiction may be raised for the first time

on appeal by the parties or the court on its own motion. *University of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004), *superseded by statute on other grounds*, **Tex. Gov't Code Ann. § 311.034** (Vernon Supp. 2008).

An action for forcible detainer is the judicial procedure for determining the right to immediate possession of real property. *Kennedy v. Highland Hills Apartments*, 905 S.W.2d 325, 326 (Tex.App.-Dallas 1995, no writ). It exists to provide a speedy, simple and inexpensive means for settling the right to possession of premises. *Id.*

A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person:

- (1) is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant's right of possession;
- (2) is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease; or
- (3) is a tenant of a person who acquired possession by forcible entry.

**Tex. Prop. Code Ann. § 24.002(a)(1)-(3)** (Vernon 2000). A prevailing landlord in a suit for forcible detainer "is entitled to a judgment for possession of the premises and a writ of possession." **Tex. Prop. Code Ann. § 24.0061(a)** (Vernon 2000).

A forcible detainer action depends on the existence of a landlord-tenant relationship. *Haith v. Drake*, 596 S.W.2d 194, 196 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.). Only proof of a superior right to immediate possession must be proved for the plaintiff to prevail in a forcible detainer action. *Goggins v. Leo*, 849 S.W.2d 373, 377 (Tex.App.-Houston [14th Dist.] 1993, no writ). Accordingly, the sole matter in issue for resolution in a forcible detainer action is which party has the superior right to immediate



access to the property. *Fandey v. Lee*, 880 S.W.2d 164, 168 (Tex.App.-El Paso 1994, writ denied); *Goggins*, 849 S.W.2d at 377.

District courts in Texas are courts of general jurisdiction, presumably having subject matter jurisdiction over a cause unless a contrary showing is made. *Subaru, of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. \*770 2002), citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000). Under our constitution and by statute, the district court's jurisdiction "consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by [the constitution] or other law on some other court, tribunal, or administrative body." Tex. Const. art. V, § 8; *Tex. Gov't Code Ann. § 24.007* (Vernon 2004).<sup>4</sup> The legislature has committed jurisdiction of a forcible detainer suit, however, exclusively to a justice court in the precinct where the property in question is located. *Tex. Prop. Code Ann. § 24.004* (Vernon 2000); *Tex. Gov't Code Ann. § 27.031(a)(2)* (Vernon 2004) (justice court has original jurisdiction of cases of forcible entry and detainer); *McGlothlin v. Kliebert*, 672 S.W.2d 231, 232 (Tex. 1984) (referring to exclusive jurisdiction of justice court in forcible entry and detainer case); *Haginas v. Malbis Memorial Foundation*, 163 Tex. 274, 354 S.W.2d 368, 371 (Tex. 1962) (forcible entry and detainer action must be instituted in justice court); *Rice v. Pinney*, 51 S.W.3d 705, 712 (Tex.App.-Dallas 2001, no pet.) (jurisdiction "expressly" given to justice court); *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex.App.-Houston [1st Dist.] 1995, writ denied) (jurisdiction of forcible detainer suit is in justice court and on appeal, county court); *McCloud v. Knapp*, 507 S.W.2d 644, 647-648 (Tex.Civ.App.-Dallas 1974, no writ).

<sup>4</sup> "Basically, district courts are tribunals of general jurisdiction with exclusive, appellate, and original jurisdiction in all

causes unless the domain has been constitutionally or statutorily specified elsewhere." 1 Roy W. McDonald Elaine A. Grafton Carlson, *Texas Civil Practice: Courts* § 3:30 n. 1 (2d ed. 2004) (quoting *Texas Courts, A Study By the Texas Research League: Report One (The Texas Judiciary: A Structural-Functional Overview)* pp. 29, 30 (1990)). The Government Code further provides that a district court "may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity." *Tex. Gov't Code Ann. § 24.008* (Vernon 2004).

Where a claimed right of immediate possession necessarily requires resolution of a title dispute, the justice court lacks subject matter jurisdiction. *Rice*, 51 S.W.3d at 709; *Tex.R. Civ. P. 746*. Because a forcible detainer action is not exclusive of other remedies, another possessory action, such as a suit for trespass to try title, may be brought in district court. *Scott v. Hewitt*, 127 Tex. 31, 90 S.W.2d 816, 819 (Tex. 1936) (title may not be adjudicated in forcible entry and detainer proceeding but remedy is cumulative of any other remedy); *Rice*, 51 S.W.3d at 709; *Tex. Prop. Code Ann. § 24.008* (suit for forcible detainer does not bar a suit for "trespass, damages, waste, rent, or mesne profits."). And the district court may adjudicate a suit to try title concurrently with a forcible detainer action in justice court. *Haith*, 596 S.W.2d at 196; *Rice*, 51 S.W.3d at 709.

Here the parties and trial court looked to *Government Code § 24.471(b)* as the origin of jurisdiction of the district court to try the forcible detainer suit. In pertinent part the statute provides:



The 294th District Court has concurrent jurisdiction with the county court in Van Zandt County over all matters of civil and criminal jurisdiction, original and appellate, in cases over which the county court has jurisdiction under the constitution and laws of this state. Matters and proceedings in the concurrent jurisdiction of the 294th District Court and the county court may be filed in either court and all cases of concurrent jurisdiction \*771 may be transferred between the 294th District Court and the county court. However, a case may not be transferred from one court to another without the consent of the judge of the court to which it is transferred, and a case may not be transferred unless it is within the jurisdiction of the court to which it is transferred.

771

[Tex. Gov't Code Ann. § 24.471\(b\)](#) (Vernon 2004). We do not find this statute ambiguous. It does not authorize, nor could it authorize, consistent with [Property Code § 24.004](#), trial of a forcible detainer suit in the 294th district court.<sup>5</sup>

<sup>5</sup> Further, trial of this forcible detainer suit in district court precludes appeal by trial de novo, Tex.R. Civ. P. 751, and places appeal in the courts of appeals, when the legislature intended final appellate resolution by the county court. See [Tex. Prop. Code Ann. § 24.007](#) (Vernon 2000) (final judgment of county court in forcible entry and detainer action not appealable on issue of possession unless property in question is exclusively residential).

Edom Corner argues the Tyler Court's conditional grant of mandamus resolved any question of the district court's subject matter jurisdiction and we are, therefore, precluded by the "law of the case" doctrine from considering the question of subject matter jurisdiction. We disagree.

The "law of the case" doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. By narrowing the issues in successive stages of the litigation, the law of the case doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency. The doctrine is based on public policy and is aimed at putting an end to litigation.

*Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) (citations omitted). The doctrine is not a limitation on the power of the court. *Devilla v. Schriver*, 245 F.3d 192, 197 (2d Cir. 2001). Rather, as Justice Holmes long ago noted, it "merely expresses the practice of the courts generally to refuse to reopen what has been decided." *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). Application of the doctrine lies with the discretion of the court. *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003).

The Fourteenth Court of Appeals rejected a contention like that made by Edom Corner here in *Gantt v. Gantt*, 208 S.W.3d 27 (Tex.App.-Houston [14th Dist.] 2006, pet. denied). There, a party contended the law of the case doctrine precluded the Fourteenth Court from dismissing an appeal for lack of subject matter jurisdiction, based on a late notice of appeal. *Id.* at 30 n. 4 According to the party's argument, the Corpus Christi Court of Appeals, by issuing an opinion and judgment in a prior appeal in the case, must necessarily have concluded it had jurisdiction, establishing the law of the case. *Id.* The Fourteenth Court found the Corpus Christi Court had not expressly considered and decided the late-notice-of-appeal question, and found that court's *sub silentio* exercise of jurisdiction was not law of the case. *Id.*

Our circumstance is similar. While it might be said that implicit in the Tyler Court's opinion is recognition that the trial court exercised subject







772 matter jurisdiction by adjudicating the case, this was clearly not the narrow question presented or decided in the mandamus proceeding. Indeed, the Tyler Court's opinion states, "Edom [Corner] states that it agreed to the transfer [from justice court] and does not contend that the transfer was improper." \*772 *In re It's the Berry's*, 2006 WL 3020353, at \*3, 2006 Tex.App. Lexis 9146, at \*9. We decline to utilize the law of the case doctrine to avoid review of the district court's exercise of subject matter jurisdiction in the forcible detainer action.

Edom Corner also argues that Berry's is judicially estopped to now challenge the subject matter jurisdiction of the trial court because in its petition for writ of mandamus it alleged the lawsuit was one over which a district court has original jurisdiction. Edom Corner asserts that Berry's thus took inconsistent positions in the mandamus action and the instant appeal, and is estopped to do so. We disagree for two reasons. First, "[s]ubject matter jurisdiction cannot be conferred by consent, waiver, or estoppel at any stage of a proceeding." *Tourneau Houston, Inc. v. Harais County Appraisal Dist.*, 24 S.W.3d 907, 910 (Tex.App.-Houston [1st Dist.] 2000, no pet.) (citing *Fed. Underwriters Exch. v. Pugh*, 141 Tex. 539, 174 S.W.2d 598, 600 (Tex. 1943)). Second, and assuming Berry's mandamus and appellate positions were contradictory, the mandamus proceeding is part of the present case and not a prior proceeding. See *Pleasant Glade, Assembly of God v. Schubert*, 264 S.W.3d 1, 8 (Tex. 2008). The doctrine of judicial estoppel has no application to contradictory positions taken in the same proceeding. *Id.* (citing *Galley v. Apollo Associated Servs., Ltd.*, 177 S.W.3d 523, 529 (Tex.App.-Houston [1st Dist.] 2005, no pet.)).

The relief Edom Corner sought in the trial court was exclusive to Chapter 24 of the Property Code. Tex. Prop. Code Ann. Chapter 24 Forcible Entry

and Detainer (Vernon 2000 Supp. 2007). The district court was without subject matter jurisdiction to try Edom Corner's forcible detainer suit. We sustain Berry's first issue.

In its eleventh issue, Berry's challenges the award of attorney's fees for Edom Corner and the denial of its request for attorney's fees. Specifically, Berry's asserts it should have prevailed in the trial court and recovered attorney's fees while Edom Corner should not have prevailed and was not entitled to recover attorney's fees. Because the district court lacked subject matter jurisdiction to adjudicate the forcible detainer action, that cause, including the award of statutory and contractual attorney's fees and costs to Edom Corner', must be set aside and dismissed. In the same way, the trial court had no jurisdiction to award attorney's fees to Berry's for defense of a forcible detainer action. Berry's does not contend the absence of an award of attorney's fees under the Uniform Declaratory Judgments Act, [Tex. Civ. Prac. Rem. Code § 37.009](#) (Vernon 1997), was error. We sustain Berry's eleventh issue as to the recovery of attorney's fees by Edom Corner. We overrule Berry's eleventh issue as to its claim for attorney's fees.

## Conclusion

When a trial court lacks subject matter jurisdiction to render a judgment, the proper procedure on appeal is for the appellate court to set the judgment aside and dismiss the cause. See *Dallas County Appraisal Dist. v. Funds Recovery*, 887 S.W.2d 465, 471 (Tex.App.-Dallas 1994) (citing *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961)). Finding the trial court lacked subject matter jurisdiction, we sever the forcible detainer case, vacate the judgment in the forcible detainer case, and dismiss the forcible detainer case. Otherwise, we affirm the district court's judgment.



ATTACH 5 - if the Court on 8-17-2023 already granted Plaintiff "all relief requested", why are we doing it again, today, 9-20-2023?

CAUSE NO. 22-00105

CSD VAN ZANDT LLC  
*Plaintiff*

§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

v.

294<sup>th</sup> JUDICIAL DISTRICT

UDO BIRNBAUM  
*Defendant*

VAN ZANDT COUNTY, TEXAS

FINAL JUDGMENT

1. On August 17, 2023 the Court Granted all relief requested in Plaintiff's Traditional Motion for Summary Judgment.

2. Specifically, the Court grants judgment as a matter of law on Plaintiff's declaratory judgment and suit to quiet title claims.

3. Accordingly, the Court ORDERS, ADJUDGES AND DECREES that Plaintiff was a bona-fide purchaser of the Property and the Warranty Deed with Vendor's Lien, recorded on June 24, 2022 as document number 2022-007473 in the Official Public Records of Van Zandt County, Texas, conveying the subject Property from Lisa Leger Giro, Patricia Moore Barclay and James T. Moore, III to CSD Van Zandt LLC (Plaintiff) is valid and conveys full and complete legal title to Plaintiff, unencumbered by any interests asserted by Defendant.

4. The Court further ORDERS, ADJUDGES AND DECREES that the Warranty Deed Purporting to convey the subject Property from Louis Thibodeaux to Defendant, recorded on July 20, 2022 as document number 2022-008580 in the Official Public Records of Van Zandt County, Texas, along with any other unrecorded deed or instrument affecting title to the Property, are invalid and unenforceable.

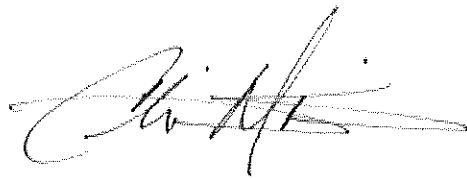
5. The Court also ORDERS, ADJUDGES AND DECREES that Defendant is permanently enjoined from: 1) entering onto or loitering at or near the Property for any reason, 2)

harassing or slandering Plaintiff or Plaintiff's legal counsel, or any director, officer, employee, agent, or contractor of Plaintiff or Plaintiff's legal counsel.

6. Further, the Court AWARDS to Plaintiff attorney's fees in the amount of sixteen thousand five hundred and eighty two dollars (\$16,582.00).

7. Lastly, the Court denies and disposes of any and all other claims, counter claims and relief requested by or against any party, individual or entity named or otherwise implicated in any pleadings which are pending in this suit.

SIGNED this 20<sup>th</sup> day of September 2023.



---

JUDGE PRESIDING  
Chris Martin, 294th District Court

ATTACH 6 - MOTIONS FOR DUMMIES: Motions is Court PROCESS, granting more or less Court PROCESS, it is not an OUTPUT by the Court at all. Granting of PROCESS is in fact indication that the PROCESS is ongoing. Motions dispose of PROCESS, or trigger other MOTIONS. Granting a motion does not AWARD to a PARTY. It rides HERD on the LAWYERS. That is all that it does.

CAUSE NO. 22-00105

CSD VAN ZANDT LLC  
*Plaintiff*

v.

UDO BIRNBAUM  
*Defendant*

§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT  
294<sup>th</sup> JUDICIAL DISTRICT  
VAN ZANDT COUNTY, TEXAS

2023 AUG 17 AM 11:00  
RECORDED  
KAREN WILSON  
DIST CLERK VAN ZANDT CO. TX  
BY Kara DEP

ATTACH 6

**ORDER GRANTING  
PLAINTIFF'S TRADITIONAL MOTION FOR SUMMARY JUDGMENT**

On August 17, 2023, came on to be considered *Plaintiff's Traditional Motion for Summary Judgment*. The Court, having considered said *Motion*, and all Responses and Replies, if any, is of the opinion that Plaintiff is entitled to judgment as a matter of law.

**IT IS THEREFORE ORDERED, ADJUDGED, and DECREED** that *Plaintiff's Traditional Motion for Summary Judgment* is hereby **GRANTED** in all things.

IT IS SO ORDERED.

SIGNED this the 17th day of August 2023.

Judge Chris Martin

MOTIONS FOR DUMMIES: Motions is Court PROCESS, granting more or less Court PROCESS, it is not an OUTPUT by the Court at all. Granting of PROCESS is in fact indication that the PROCESS is ongoing. Motions dispose of PROCESS, or trigger other MOTIONS. Granting a motion does not AWARD to a PARTY. It rides HERD on the LAWYERS. That is all that it does. PERIOD.

\*

UNLESS IT ON SAME DAY VIA TODAY'S INSTANTANEOUS COMMUNICATION, TRIGGERS SOME IDIOTS LIKE ROBERT O. DOW, AND HIS COREY KELLAM, BY UNLAWFUL "CIVIL STANDBY", TO INVADE MY PROPERTY, UNDER COLOR OF "HAVING WON". GOD SAVE AMERICA. AMEN.

(Previous invasion was by BULLDOZER tearing up 3000 feet of fences and gates, this time by flatbed truck and private ARMED GUARD)

ATTACH 7 - WARNING that the Writ of Possession is unlawful and that this is not a "tenant" in a "unit" - but a 42 year 150 acre HOMESTEAD

No. 22-00105 294th

# **WARNING**

TO ANY OFFICER EXECUTING, be warned that I am clearly NOT a “tenant” in a “unit”. Here lives UDO BIRNBAUM, a native born Texan. I have uninterruptedly lived for 42 YEARS on my 150 acre

## **42 YEAR HOMESTEAD**

Any Officer sent to execute be warned that this writ is **UNLAWFULLY** perpetrated **under color of law** by signature of a JUDGE. True writs are under authority, Seal, and signature of the CLERK.

Furthermore, **this writ is UNLAWFUL** because it is issued by a District Court. Only the JUSTICE COURT of the PRECINCT is authorized to issue Writs of Possession.

An **execution** is a process of the court from which it is issued. **The clerk** of the **district** or **county** court or the **justice** of the peace, as the case may be, shall tax the costs in every case in which a **final judgment** has been rendered and **shall issue execution to enforce such judgment** and collect such costs. The execution and subsequent executions shall not be addressed to a particular county, but shall be addressed to any sheriff or any constable within the State of Texas. Tex. R. Civ. P. 622 , As Amended August 7, 2023

Eviction Cases must be filed in the **Justice Court in the Justice of the Peace Precinct in the county in which the real property is located**. See Section 24.004, Texas Property Code.

**OFFICER**, you have a duty to NOT obey papers that you recognize or should recognize as being UNLAWFUL, particularly upon such specific and detailed Warning as above. (i.e. the **fraudulent writ** which produced **Attach 1**)

**UDO BIRNBAUM, *Landlord***