

UDO BIRNBAUM	No. _____	\$	IN THE JUSTICE COURT
Plaintiff			
v.		\$	PRECINCT 2
ROBERT O. DOW		\$	VAN ZANDT COUNTY, TX
Defendant			

FIRST AMENDED ORIGINAL PETITION

Comes now Plaintiff, UDO BIRNBAUM (“Birnbaum”), complaining of ROBERT O. DOW (“Dow”), of **forcible entry and detainer**, such upon Plaintiff’s 42 year 150 acre homestead (“the premises”) at 540 VZ County Road 2916, in Precinct 2 of Van Zandt County, and dispossessing him.

Plaintiff **UDO BIRNBAUM**, of residence of the premises, may be served at 119 An County Road 2501, Tennessee Colony, TX 75861, a temporary refuge, also BRNBM@AOL.COM and 903-922-5996.

Defendant **ROBERT O. DOW** may be cited at the premises at issue at which he is unlawfully detaining. (i.e. 540 VZ County Road 2916).

1. On or about **June 24, 2022** Defendant **unlawfully and forcibly entered and detained** upon Plaintiff’s 150 acre 42 year homestead premises:

- By skid steer dozer tearing up internal fences, gates, corral, pasture
- By lock and chain locking out Plaintiff’s pasture lessee from access to his cows, and ultimately running him off
- Defendant cutting Plaintiff’s lock and chain and No Trespass signs
- Defendant attempting to tow off Plaintiff’s car, which Plaintiff had parked behind his pasture gate, to physically block entry and exit

2. On or about **August 24, 2023** Defendant trespassed by heavy equipment upon the premises, such by unlawful civil standby, i.e. by bringing an armed public peace officer, such without a court warrant.

3. On or about September 21, 2023 Defendant **unlawfully and forcibly ejected** Plaintiff, having under color of tenant eviction, caused the 294th District Court to do “the action of ejectment”. Property Code 22.001(b): “**The action of ejectment** is not available in this state”.

4. Plaintiff had by this time fled the premises for his own safety and has not been back since.

PRAYER

Plaintiff prays for judicial notice, judgment of possession, writ of possession, and such other relief as the trial may show to be necessary, such trial to be by jury, the jury fee already having been tendered.

September 13, 2024

UDO BIRNBAUM
119 An County Road 2501
Tennessee Colony, TX 75861
903-922-5996
BRNBM@AOL.COM

attach:

- “A” Notice to Vacate
- “B” Signed CMRR Green Card
- “C” Current Pasture lease
- “D” Evidence of long term pasture lease
- “E” Check \$176 – filing, jury, citation
- “F” The Pitfalls of Buying Occupied Land – good law context
- “G” Edom Corner vs It’s the Berryis – the district court has NO jurisdiction over eviction – THE LAW – this instruction to then 294th District Court JUDGE TERESA DRUM in 2008

August 15, 2024

Robert O. Dow and Occupant(s) of the Property
6115 Owens St #201
Dallas, TX 75235

Delivered Via: CMRRR 9589 0710 5270 1308 9477 59

Re: Notice to Vacate Property at 540 VZ County Road 2916 Eustace, TX 75124

Dear Mr. Dow and any other Occupants of the above referenced Property:

NOTICE TO VACATE PREMISES

TO: ROBERT O. DOW AND ANY PARTIES IN POSSESSION OF THE REAL PROPERTY COMMONLY KNOWN AS 540 VZ COUNTY ROAD 2916 EUSTACE, TX 75124 (the "Premises").

YOU ARE HEREBY NOTIFIED:

Notice is hereby given and demand is hereby made that you vacate the Premises by the 3rd day after the date of receipt of this notice. Specifically, **you are demanded to vacate the Premises you currently occupy**. This notice is given and demand is made as provided in sections 24.005 and 91.001 of the Texas Property Code.

If you do not vacate the premises before the 3rd day after the date of receipt of this notice, I will institute a **forcible entry and detainer suit** against you. You are advised that, in addition to the other remedies, a judgment may be entered against you, including attorney fees and costs of suit, as provided in section 24.006 of the Texas Property Code. You are also advised that unless you vacate the premises within this period, I intend to pursue any and all legal remedies I may have against you in a court of appropriate jurisdiction.

YOU ARE REQUIRED, BEFORE THE 3RD DAY AFTER YOUR RECEIPT OF THIS NOTICE, TO VACATE AND DELIVER UP POSSESSION OF THE PREMISES TO ME, THE UNDERSIGNED, OR I WILL PROMPTLY BEGIN LEGAL PROCEEDINGS FOR POSSESSION OF THE PREMISES.

Dated: August 15, 2024



UDO BIRNBAUM

119 An County Road 2501

Tennessee Colony, TX 75861

(903) 922-5996

BRNBM@AOL.COM

Attach "B" - Signed
CMRR Green Card

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY												
■ Complete items 1, 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits.	A. Signature   ☐ Agent ☐ Addressee B. Received by (Printed Name) <u>R. Dow</u> C. Date of Delivery D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☒ No												
1. Article Addressed to: <u>Robert O. Dow</u> <u>6115 Owens St # 201</u> <u>Dallas, TX 75235</u>  9590 9402 8400 3156 3388 05	3. Service Type <table border="0"><tr><td>☐ Adult Signature</td><td>☐ Priority Mail Express®</td></tr><tr><td>☐ Adult Signature Restricted Delivery</td><td>☐ Registered Mail™</td></tr><tr><td>☐ Certified Mail®</td><td>☐ Registered Mail Restricted Delivery</td></tr><tr><td>☐ Certified Mail Restricted Delivery</td><td>☐ Signature Confirmation™</td></tr><tr><td>☐ Collect on Delivery</td><td>☐ Signature Confirmation Restricted Delivery</td></tr><tr><td>☐ Collect on Delivery Restricted Delivery</td><td></td></tr></table>	☐ Adult Signature	☐ Priority Mail Express®	☐ Adult Signature Restricted Delivery	☐ Registered Mail™	☐ Certified Mail®	☐ Registered Mail Restricted Delivery	☐ Certified Mail Restricted Delivery	☐ Signature Confirmation™	☐ Collect on Delivery	☐ Signature Confirmation Restricted Delivery	☐ Collect on Delivery Restricted Delivery	
☐ Adult Signature	☐ Priority Mail Express®												
☐ Adult Signature Restricted Delivery	☐ Registered Mail™												
☐ Certified Mail®	☐ Registered Mail Restricted Delivery												
☐ Certified Mail Restricted Delivery	☐ Signature Confirmation™												
☐ Collect on Delivery	☐ Signature Confirmation Restricted Delivery												
☐ Collect on Delivery Restricted Delivery													
2. Article Number (Transfer from service label) <u>9589 0710 5270 1308 9477 59</u>	Restricted Delivery												

PS Form 3811, July 2020 PSN 7530-02-000-9053

Domestic Return Receipt

9589 0710 5270 1308 9477 59

U.S. Postal Service™ CERTIFIED MAIL® RECEIPT Domestic Mail Only	
For delivery information, visit our website at www.usps.com ®.	
Dallas, TX 75235	
Certified Mail Fee \$4.85	0861
Extra Services & Fees (check box, add fee as appropriate)	10
☐ Return Receipt (hardcopy) \$0.00	Postmark Here
☐ Return Receipt (electronic) \$0.00	
☐ Certified Mail Restricted Delivery \$0.00	
☐ Adult Signature Required \$0.00	
☐ Adult Signature Restricted Delivery \$0.00	
Postage \$0.73	08/15/2024
Total Postage and Fees \$9.68	
Sent To <u>Robert O. Dow</u>	
Street and Apt. No. or PO Box No. <u>6115 Owens St. #201</u>	
City, State, ZIP+4® <u>Dallas, TX 75235</u>	
PS Form 3800, January 2023 PSN 7530-02-000-9047 See Reverse for Instructions	

CASH LEASE FOR FARM LAND

Attach "C" - Current
Pasture Lease

THIS LEASE IS ENTERED INTO THIS 1ST DAY
OF JANUARY, 2021. BETWEEN UDO BIRNBAUM,
LANDLORD, OF 540 VZ COUNTY ROAD 2916, EUSTACE,
TEXAS 75124 AND LARRY MORRIS, TENANT, OF
1045 VZ COUNTY ROAD 2916, EUSTACE, TEXAS
75124.

THE LANDLORD LEASES TO THE TENANT, TO
USE FOR AGRICULTURAL PURPOSES, THE FOLLOWING
PROPERTY, LOCATED IN VAN ZANDT COUNTY, STATE
OF TEXAS, AND COMMONLY KNOWN AS UDO BIRNBAUM
PLACE AND CONSISTING OF 149 ACRES, MORE OR LESS,
FOR THE AMOUNT OF \$1,000 PER YEAR.

THE TERM OF THE LEASE SHALL BE 5 YEARS
FROM JANUARY 1, 2021 TO DECEMBER 30, 2026.

Udo Birnbaum

LANDLORD

Larry Morris

TENANT

Attach "D" - Long time
pasture lease

MORRIS FARM ACCOUNT
1045 VZCR 2916
EUSTACE, TX 75124
PH. 903-479-3410

7475
88-2285/1131-174

DATE 11/20/12

PAY TO THE ORDER OF UDO BIRNBAUM \$ 500. ⁰⁰/_{FX}

FIVE HUNDRED + ^{NO}/₁₀₀ DOLLARS

PROSPERITY BANK*
CANTON
207 S. ATHENS • CANTON, TX 75103
903-567-4181

FOR PASTURE LEASE Darryl Morris

⑈007475⑈ ⑆113122655⑆ 1280708⑈

MORRIS FARM ACCOUNT
1045 VZCR 2916
EUSTACE, TX 75124
PH. 903-479-3410

7521
88-2285/1131-174

DATE 5/23/13

PAY TO THE ORDER OF UDO BIRNBAUM \$ 500. ⁰⁰/_{FX}

FIVE HUNDRED + ^{NO}/₁₀₀ DOLLARS

PROSPERITY BANK*
CANTON
207 S. ATHENS • CANTON, TX 75103
903-567-4181

FOR PASTURE LEASE Darryl Morris

⑈007521⑈ ⑆113122655⑆ 1280708⑈

MORRIS FARM ACCOUNT
903-479-3410
1045 VZCR 2916
EUSTACE, TX 75124

7823
88-2285-1131

Date 11-12-15

Pay to the order of UDO BIRNBAUM \$ 500. ⁰⁰/_{FX}

FIVE HUNDRED + ^{NO}/₁₀₀ Dollars

PROSPERITY BANK
WWW.PROSPERITYBANKTX.COM

FOR PASTURE LEASE Darryl Morris

⑈007823⑈ ⑆113122655⑆ 1280708⑈

Attach "E" - Check \$176
- filing, jury, citation

UDO H BIRNBAUM 540 VZ CR 2916 EUSTACE, TX 75124		218 88-944/1119 03
Date <u>8-27-2024</u>		CHECK AMOUNT
Pay to the Order of	<u>Clerk Justice Court PET #2 VZ</u>	\$ <u>176.00</u>
<u>One hundred seventy six and 00/100</u>		Dollars
FIRST STATE BANK BEN WHEELER P.O. Box 97 Ben Wheeler, Texas 75754 903-833-5861		Photo Safe Deposit Details on back
For	<u>Filing, Jury, Citation</u>	
<u>Udo H. Birnbaum</u>		
⑆ 111909443⑆ 0218⑈9614265⑈		

Pitfalls of Buying Occupied Property

/ Blogs / By Ian D. Ghrist

The more savvy real estate investors tend to have a **hard rule against buying occupied property** unless the occupant signed a written lease agreement, the seller had a detailed payment ledger, and there is a transferable security deposit. Even then, best practice would be to also personally ask the tenant whether the tenant claims any interest in the property other than a leasehold. The buyer should also possibly put the request in writing or get the tenant to sign a waiver or release of any title claims. Real estate wholesalers often think that they can get a steal of a deal by offering to evict a non-paying occupant for a beleaguered seller. However, this road often leads to problems bigger than the buyer anticipates.

The problems arise from claims that the occupant may have to the property. If you look at Schedule B to your owner's title policy from your title insurance company of choice, then you will probably find language similar to the following: "We do not cover loss, costs, attorney's fees and expenses resulting from . . . [t]he following matters and all terms of the documents creating or offering evidence of the matters (we must insert matters or delete this exception): . . . Rights of parties in possession." So, your title company will not cover any claims raised by anyone who is in possession of the property at the time that you purchase the property. Bet you wish you knew that when you bought your title insurance? But alas, most people do not read their policy, would not understand it even if they did read it, and their escrow officer or title agent probably put little to no effort into explaining what the policy does and does not cover. Knowledge is power and if you know what types of title disputes you cannot insure against, then you can take steps to protect yourself from those types of disputes.

To understand what you need to do to protect yourself since your title company will not protect you, the best case to review is *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001): "One purchasing land may be charged with constructive notice of an occupant's claims. This implied-notice doctrine applies if a court determines that the purchaser has a duty to ascertain the rights of a third-party possessor. See *Collum v. Sanger Bros.*, 98 Tex. 162, 82 S.W. 459, 460 (Tex. 1904); *American Surety Co.*, 82 S.W.2d at 183. When this duty arises, the purchaser is charged with notice of all the occupant's claims the purchaser might have reasonably discovered on proper inquiry. *Dixon v. Cargill*, 104 S.W.2d 101, 102 (Tex. Civ. App.—Eastland 1937, writ ref'd); see also *Flack*, 226 S.W.2d at 632. The duty arises, however, only possession is visible, open, exclusive, and unequivocal." *Madison*, 39 S.W.3d 604. The form of

constructive notice described here is known as “inquiry notice,” which is notice of claims that one could discover through reasonable inquiry made to the occupant of the property.

Generally, a bona fide purchaser of real property for value (“BFP”) will acquire the property free of any unrecorded claims. Texas has codified BFP doctrine at Tex. Prop. Code § 13.001.

Madison is a fascinating case in the Texas Supreme Court where the Court of Appeals found that the occupancy of a guy who “resided on the property, had possession of the premises, and collected rents on the property before and after [the BFP’s] purchase” of the property defeated the BFP’s claim to the property due to his occupancy. *Gordon v. Madison*, 9 S.W.3d 476, 480 (Tex. App.—Houston [1st Dist.] 2000). The Court of Appeals found that “even minimal inquiry by [the BFP] would have made her aware of Gordon’s claim, either by Gordon himself or the tenants who were paying rent. A purchaser who fails to make reasonable inquiry is charged with notice of all claims and facts that the inquiry would have disclosed Gordon’s residence on the property, his possession of the premises, and his past and continuing collection of rents established constructive notice to [the BFP] as a matter of law. We therefore conclude that Gordon disproved [the BFP’s] affirmative defense of good faith purchaser status as a matter of law” *Id.* Amazingly, the Texas Supreme Court reversed the Court of Appeals because the Supreme Court found that Gordon’s possession of the property was not exclusive or unequivocal. *Madison v. Gordon*, 39 S.W.3d 604, 607 (Tex. 2001). In reversing the Court of Appeals and rendering judgment in favor of the BFP, the Supreme Court seemed to assign great weight to the fact that the property was a multi-unit rental property. Accordingly, Gordon’s occupancy was “compatible with [the record title holder’s] assurances of ownership” because “[a]s a rental property, one would expect occupants on the property.” *Id.* Seemingly, the mere fact that a property is a rental property is enough to defeat an occupant’s inquiry notice claim, even where the occupant is residing in the property and collecting rents from the other occupants. In *Madison*, the occupant’s possession was “‘ambiguous or equivocal possession which may [have] appeared subservient or attributable to’ [the owner of record].” *Id.*; *Strong v. Strong*, 128 Tex. 470, 479, 98 S.W.2d 346, 350 (1936).

Equitable Title. Counter-intuitively, the State of Texas gives buyers under an executory contract for purchase of real property an ownership interest in the property called “equitable title.” See *Johnson v. Wood*, 138 Tex. 106, 157 S.W.2d 146 (1941). So, in Texas, if you sign a contract as a buyer, or even just an option agreement, or a lease-option, then you arguably have “equitable title,” which you can convert to official, legal title by suing on the contract within the limitations period (generally four years from contract execution date). See *New York & T. Land Co. v. Hyland*, 8 Tex. Civ. App. 601, 604 (Tex. Civ. App. Austin 1894). So, non-real estate attorneys might assume that anyone without a deed to property cannot be the owner of that property. Life would be easier if that were true.

In conclusion, the primary concerns for the buyer of occupied property are whether the occupant

an option to purchase the property; an executory contract to purchase the property, *i.e.*, a contract to buy the property that remains open because the deadlines have not passed yet or payments remain to be made, or for whatever reason, the right to purchase the property may possibly still exist; or any other unrecorded claim of ownership to or interest in the subject property. The savvy buyer needs to worry about every potential claim of an occupant, regardless of whether the claim is valid or not. Even an occupant who has clearly defaulted on an executory contract can claim equitable title through “substantial performance” (See 18-270 Dorsaneo, Texas Litigation Guide § 270.22 (2017); *O.W. Grun Roofing & Constr. Co. v. Cope*, 529 S.W.2d 258, 261–262 (Tex. Civ. App.—San Antonio 1975, no writ) or through application of the contract-for-deed regulations (see Subchapter D, Chapter 5 of the Texas Property Code).

The reason that the buyer needs to worry about invalid claims as well as valid claims is that the presence of any claim, whether valid or not, can deprive the Justice of the Peace Courts of jurisdiction over an eviction suit. See *Espinoza v. Lopez*, 468 S.W.3d 692, 696-97 (Tex. App.—Houston [14th Dist.] 2015, no pet.). An eviction, from start to finish, in a Texas Justice of the Peace Court (“JP Court”) can end in under sixty days, easily. The owner of property seeking to evict an occupant in JP Court generally does not even need the help of an attorney. If, however, a title dispute exists, even a title dispute where the occupant has little chance of success on the merits, then the JP Court lacks jurisdiction and will dismiss the eviction suit.

At this point, the owner of the property will need to turn to higher courts to have the occupant evicted. In those higher courts, either a county court at law or a district court, the case will probably have a Level Two Discovery Control Plan (See Tex. R. Civ. P. 190.3), which means that there will be a nine (9) month long discovery period followed by a trial that may be reset multiple times. The owner will be lucky to have the occupant evicted within a year. In the meantime, the judgment-proof, deadbeat occupant will simply occupy the property for free unless the record owner can get the occupant evicted before trial through an injunction. Pre-trial injunctions, however, are very hard to get and are not granted easily. Most importantly, the time and effort, from an attorney’s fees standpoint, between getting an occupant evicted in a district court versus a JP Court is vast. Many attorneys will handle JP Court evictions for a relatively small flat fee or the record owner can handle the JP Court eviction themselves. In a district court, however, the owner definitely needs an attorney to ensure compliance with the Texas Rules of Evidence and Procedure and the attorney will probably demand a substantial retainer with an hourly billing arrangement because quoting a flat fee for a district court lawsuit is extremely difficult due to the extreme open-endedness of district court litigation where the parties can bring all manner of counter and cross-claims and argue over nearly every bit of minutia. Also, predicting the amount of pre-trial hearings, depositions, discovery, legal research, briefing, factual research, mediation, and other time-consuming matters in district court is nigh impossible in most instances.

The prudent buyer will take every possible step to avoid getting into a situation where an occupant in the property to be purchased may have any sort of claim against the property. This means making adequate inquiry and obtaining adequate assurances from the seller that the seller has good and marketable title that is superior to and consistent with any of the occupant's claims.

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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.¹ 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.

¹ 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

768 fees.² *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.³

² 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.

³ 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 *769 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, 220 770 (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).⁴ 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).

⁴ "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.

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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.⁵

⁵ 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



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 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.