

CAUSE NO. CV07404

UDO BIRNBAUM
Plaintiff,

V.

ROBERT O. DOW
Defendant.

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IN THE COUNTY COURT AT LAW

NO. 1

VAN ZANDT COUNTY, TEXAS

DEFENDANT’S MOTION TO DISMISS

Defendant Robert O. Dow (“Defendant” or “Dow”) brings this, his Motion to Dismiss pursuant to both Texas Rule of Civil Procedure Rule 91a and for lack of subject matter jurisdiction under the Texas Government Code and Texas Property Code, and would respectfully show the Court as follows:

I.

SUMMARY OF MOTION

1. Plaintiff filed the instant suit on the basis of a meritless claim which cannot stand. Plaintiff’s cause of action requesting immediate relief as a result of alleged forcible entry and detainer by home invasion has no basis in law or fact. Further, Plaintiff’s cause of action must be dismissed because Defendant’s substantiated affirmative defense of res judicata bars Plaintiff’s claim.

2. In addition, or in the alternative, the court with proper subject matter jurisdiction to hear Plaintiff’s forcible entry and detainer suit is a Justice of the Peace, not this County Court at Law. Plaintiff’s suit must be dismissed for want of jurisdiction.

II.

BACKGROUND

3. This litigation is just the most recent effort in a long history of illegitimate cases in Van Zandt courts initiated by Plaintiff Udo Birnbaum (“Plaintiff” or “Birnbaum”) to dispute CSD

Van Zandt LLC's (and by extension Dow, as manager) status as the bona fide purchaser and possessor of approximately 150 acres of real property acreage located at and around address 540 Van Zandt County Road 2916, Eustace, Texas (the "Property"). A brief chronicle of these disputes, both past and present, is enumerated below for context.

4. CSD Van Zandt LLC first purchased the Property via warranty deed with vendor's lien from the record title owners on June 24, 2022. CSD Van Zandt LLC was aware at that time that Birnbaum was living on a portion of the Property, so shortly after the purchase, Dow requested by letter that Birnbaum terminate his alleged tenancy and vacate the Property. Birnbaum made no effort to vacate the Property, and in fact repeatedly interfered with CSD Van Zandt LLC's business operations and access to the Property. CSD Van Zandt LLC had no choice but to bring an action for trespass to try title, also seeking declaratory and injunctive relief against Birnbaum related to the Property, on August 24, 2022, entitled Cause No. 22-00105, *CSD Van Zandt LLC v Udo Birnbaum*, in the 294th Judicial District Court, Van Zandt County, Texas (hereinafter "Cause No. 22-00105").

5. After significant discovery in Cause No. 22-00105, on August 17, 2023, The Honorable Chris Martin granted CSD Van Zandt LLC's Traditional Motion for Summary Judgment, and thereafter on September 7, 2023, issued a writ of possession ordering removal of Birnbaum and his personal belongings from the Property. A final judgment reflecting these items was entered by Judge Martin on September 20, 2023 (the "Final Judgment"). Among other relief, the Final Judgment confirmed that CSD Van Zandt LLC was the bona-fide purchaser and title owner of the Property; that Birnbaum's ownership claim was invalid and unenforceable; and permanently enjoined Birnbaum from entering onto or loitering at or near the Property, or harassing or slandering CSD Van Zandt LLC, Dow, its counsel, or any parties associated with

them. The Final Judgment also disposed of all claims and counter-claims in Cause No. 22-00105, closing the action. Birnbaum was subsequently evicted from the Property on or about September 21, 2023, as supervised by Van Zandt County Sheriff Joe Carter.

6. Apparently unhappy with the result of Cause No. 22-00105, Birnbaum chose to exercise his right to appeal. Birnbaum first filed an appeal on October 5, 2023, recorded as No. 12-23-00282-CV, *Udo Birnbaum v. CSD Van Zandt, LLC*, No. 12-23-00282-CV, in the Twelfth Court of Appeals District, Tyler, Texas. After evaluation of his appellate claims, The Honorable Justice Greg Neeley via memorandum opinion on May 31, 2024, affirmed the trial court's judgment in CSD Van Zandt LLC's favor, finding that Birnbaum's various issues related to the Final Judgment were either not supported or waived.

7. Birnbaum, unwilling to relent, filed a petition for review to the Texas Supreme Court on October 21, 2024. After having been duly considered and finding no error on the judgment of the Twelfth Court of Appeals, the Texas Supreme Court denied Birnbaum's petition for review on or about November 22, 2024. This ruling by the highest court in our state should have ended Birnbaum's inquiries; unfortunately, it did not.

8. Since the Texas Supreme Court's decision, Birnbaum has brought two new cases related to the same, disposed-of issues: (1) the instant litigation, filed January 8, 2025, and (2) an Original Petition for Bill of Review, named Cause No. 25-00024, *Udo Birnbaum v. CSD Van Zandt LLC*, in the 294th Judicial District Court, Van Zandt County, Texas, filed February 6, 2025.

9. Dow was first served a copy of Birnbaum's pleading in the instant suit, the First Amended Original Petition, on March 6, 2025. Dow filed his answer on March 19, 2025, asserting both a general denial and affirmative defenses of res judicata/claim preclusion, issue preclusion

(collateral estoppel), and vexatious litigant. Dow asks this Court to take judicial notice of the current petition and answer on file and incorporates them by way of reference herein.

10. Dow properly brings this Motion to Dismiss under Rule 91a within sixty (60) days after the first pleading containing the challenged cause of action was served on him. TEX. R. CIV. P. 91a.3.

11. For the reasons explained below, Birnbaum's cause of action for forcible entry and detainer is subject to dismissal because it is meritless on the face of his pleadings, because his attempt to relitigate a matter already decided goes against both the letter and spirit of Texas law, and because this Court lacks necessary subject matter jurisdiction to consider it.

III. **ARGUMENT & AUTHORITIES**

A. *Legal Standard: Rule 91a Dismissal of Baseless Cause of Action & Affirmative Defenses*

12. A party may move to dismiss a cause of action under Texas Rule of Civil Procedure 91a on the grounds that it has no basis in law or fact. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." TEX. R. CIV. P. 91a.1. "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.* In evaluating whether Rule 91a dismissal is appropriate, a court must decide the motion based "solely on the pleading of the cause of action." TEX. R. CIV. P. 91a.6. No exhibits or evidence may be considered other than the narrow class of pleading exhibits permitted under TEX. R. CIV. P. 59, such as notes, bonds, or mortgages. *Id.* Plaintiff's exhibits attached to his First Amended Original Petition are not the type permissible under Rule 59, and therefore Defendant objects to their consideration by this Court in coming to a determination on this Motion to Dismiss.

13. “A Rule 91a motion may be granted on an affirmative defense—including res judicata—so long as the defense is ‘conclusively established by the facts in the plaintiff’s petition.’” *Gunn v. Sandalwood Mgmt. Inc.*, No. 02-23-00254-CV, 2024 WL 2202019, at *2 (Tex. App.—Fort Worth May 16, 2024, pet. denied)(quoting *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020)). A defendant can simply argue the facts as the plaintiff pleaded them to show the defendant is entitled to an affirmative-defense-based dismissal. *See Bethel*, 595 S.W.3d 651 at 656. A claim has no basis in law if barred by res judicata, and dismissal is proper where it demonstrated by the pleading that the substance of the plaintiff’s claims have already been addressed by a prior case or court. *See Smale v. Williams*, 590 S.W.3d 633, 637 (Tex. App.—Texarkana 2019, no pet.)(upholding lower court’s dismissal of action under Rule 91a where, in reviewing plaintiff’s petition, it referred to a prior final judgment being made and two previous courts addressing the substance of plaintiff’s demand for accounting claim).

14. The res judicata doctrine seeks to “bring an end to litigation, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery.” *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007). To prove res judicata, the defendant must show “(1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of the parties or those in privity with them, and (3) a second action based on the same claims that were raised or could have been raised in the first action.” *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). Privity exists where parties can control an action even if they are not parties to it; where their interests can be represented by a party to the action; or where they are successors in interest, deriving their claims through a party to the prior action. *See id.* at 653. Collateral estoppel, or issue preclusion, is similar, in that it “precludes relitigating issues decided in a previous action even though a later action is based on a different claim.” *Foster*

v. Mackie Wolf Zientz & Mann, P.C., No. 02-20-00294-CV, 2021 WL 1134452, at *7 (Tex. App.—Fort Worth Mar. 25, 2021, no pet.)(*quoting In re Estate of Howard*, 643 S.W.3d 397, 401 (Tex. App.—Houston [14th Dist.] 2018, pet. denied)). Res judicata and estoppel-based theories are recognized affirmative defenses under Texas law. TEX. R. CIV. P. 94.

B. *Legal Standard: Cause of Action for Forcible Entry and Detainer & Subject Matter Jurisdiction*

15. Though it is unclear from the face of his First Amended Original Petition, for the sake of argument, Defendant assumes that Plaintiff’s singular cause of action against Defendant is for forcible entry and detainer. Defendant makes this assumption because plaintiff’s only “count” in his First Amended Original Petition on file states as follows: **“As detailed above, Dow’s actions was forcible entry and detainer by indeed home invasion upon Birnbaum, an elderly long time homesteader. Birnbaum is entitled to immediate relief. Birnbaum demands a jury trial”** (emphasis added).

16. Texas law outlines the non-waivable issue of subject matter jurisdiction. The Van Zandt County Courts at Law have concurrent jurisdiction with the county courts and district courts in criminal and civil cases, depending on the amount in controversy and nature of the allegations. TEX. GOV’T. CODE §§25.0003, 25.2362. But it is justice courts like Van Zandt County’s Justice of the Peace precincts that have original jurisdiction over eviction suits like forcible entry and detainer. TEX. GOV’T. CODE §27.031; TEX. PROP. CODE §24.004. A forcible entry and detainer action to solve the issue of possession must be initially filed in the justice court, and only upon appeal reviewed in a higher court. *See, e.g., Gibson v. Dynegy Midstream Services, L.P.*, 138 S.W.3d 518, 521-22 (Tex. App.—Fort Worth 2004, no pet.); *Fitch v. Wilkins Properties*, 635 S.W.2d 661, 664 (Tex. App.—Fort Worth 1982, no writ).

17. Notwithstanding the jurisdictional issue, “[t]o prevail in a forcible entry and detainer or forcible detainer proceeding, the plaintiff must present sufficient evidence of ownership to demonstrate a superior right to immediate possession.” *Gibson*, 138 S.W.3d at 522. A “forcible entry” means one of the following: (1) an entry without the consent of the person in actual possession of the property; (2) an entry without the consent of a tenant at will or by sufferance; or (3) an entry without the consent of a person who acquired possession by forcible entry. TEX. PROP. CODE § 24.001(b). “The only issue in a forcible detainer action is the right to actual possession of the premises.” *Marshall v. Hous. Auth. Of San Antonio*, 198 S.W.3d 782, 785 (Tex. 2006).

C. *Birnbaum’s Action Must Be Dismissed Because His Pleadings Prove the Issues Complained of Are Meritless and Have Already Been Litigated*

18. Plaintiff’s suit has no basis in fact or law and must be dismissed. The sole cause of action alleged is forcible entry and detainer. *See* Plaintiff’s First Amended Original Petition at ¶ VI. In his petition on file, Plaintiff goes to such extremes as to allege Dow in Cause No. 22-00105 submitted a “fraudulent motion for summary judgment” and “fraudulent lawsuit,” “sprang a trap” and “forcibly stole Birnbaum’s homestead” through “home invasion,” and further “dup[ed]” The Honorable Chris Martin in getting him to “seize” and “dispossess” the Property, among other unsubstantiated contentions. *See* Plaintiff’s First Amended Original Petition at ¶¶ V, VI. Certainly, no reasonable person could believe that such “extreme and outrageous” conduct could have occurred as Birnbaum describes it. *Drake v. Chase Bank*, No. 02-13-00340-CV, 2014 WL 6493411, at *2 (Tex. App.—Fort Worth Nov. 20, 2014, no pet.)(dismissing negligent infliction of emotional distress claim for lack of basis in fact where no reasonable person could believe defendant engaged in the stated allegations, calling such pleadings “patently baseless”). Further, Birnbaum has failed to plead the required elements for forcible entry and detainer, i.e. that Dow without legal authority or by force entered the Property and refuses to surrender possession

following Birnbaum's demand. Dow personally has never possessed the Property, and Birnbaum has not alleged such; it is CSD Van Zandt LLC that was issued possession rights through legal proceedings. All Plaintiff's First Amended Original Petition goes to show is that there was a traditional summary judgment granted against him in Cause No. 22-00105, his appeals of that judgment were unsuccessful, and he has brought a new suit now only because he is unhappy with those results. Even liberally construed, this cannot constitute a legitimate factual basis to support his cause of action.

19. Moreover, the forcible entry and detainer claim has no basis in law because the face of Birnbaum's pleading demonstrates that his claim to possession has been finally decided and is precluded. Birnbaum admits that "over a full year court papers battle" occurred in Cause No. 22-00105 ahead of the summary judgment ruling, after which Birnbaum was evicted and possession and title on the Property was awarded to his opponent CSD Van Zandt LLC. *See* Plaintiff's First Amended Original Petition at ¶¶ V, VI. Res judicata and/or collateral estoppel are conclusively established by the facts of the pleading. A prior judgment was issued on the merits by a court of competent jurisdiction, the 294th Judicial District Court in Van Zandt County. The parties involved are the same or in privity, i.e. Birnbaum, CSD Van Zandt LLC, and Dow. And this current action is based on the same claim—Birnbaum's alleged right to possession—that was or could have been raised in Cause No. 22-00105, under which CSD Van Zandt LLC sought superior title and possession of the Property through a request for declaratory judgment, temporary injunction, and trespass to try title claim. The issues Plaintiff complains of have already been decided through Cause No. 22-00105 and that matter's subsequent unsuccessful appeals; Birnbaum has substantiated through his own pleading Dow's affirmative defenses, which bar the forcible entry and detainer claim from being brought again now.

D. *Birnbaum's Action Must Be Dismissed Because This Court Lacks Jurisdiction to Determine Possession of the Property*

20. If this Court finds that dismissal is not warranted on the basis of Rule 91a, Defendant argues that this Court must dismiss the litigation as it lacks proper subject matter jurisdiction. As explained above, only Van Zandt County's Justice of the Peace courts could consider Plaintiff's forcible entry and detainer claim. Birnbaum himself admits this, stating "possession is solely upon prior possession and/or dispossession, and only by the JP Justice Court of the precinct." *See* Plaintiff's First Amended Original Petition at p. 6 SUMMARY. Birnbaum claims he attempted to file an eviction suit against Dow on August 27, 2024, and had a hearing on same on September 19, 2024, but that Judge Don Ashlock of Justice of the Peace Precinct 2 "refused to take the complaint, and handed back Birnbaum's check." *See* Plaintiff's First Amended Original Petition at ¶ IV. It appears no cause number was ever issued in this alleged eviction suit, and no judgment was ever handed down. Therefore, there can be no *de novo* appellate review by this Court, because nothing was decided in the justice court. Because Plaintiff's sole cause of action seeks possession only, this Court lacks subject matter jurisdiction to consider it.

**IV.
REQUEST FOR ATTORNEY'S FEES & COSTS**

21. Under Rule 91a, the prevailing party in prosecuting or defending a motion to dismiss baseless cause of action is entitled to an award of all costs and reasonable and necessary attorney's fees incurred. Tex. R. Civ. P. 91a.7. To the extent Defendant is the prevailing party here with respect to this Court dismissing the challenged cause of action, Defendant seeks an award in his favor for reasonable and necessary attorney's fees and costs in preparing this Motion to Dismiss, and preparing for and attending any hearing on same. Plaintiff's litigation is completely meritless and Plaintiff has caused Defendant to incur unnecessary fees and costs in having to

respond to his continuous legal proceedings, including the instant suit. Defendant submits herewith as **Exhibit 1** an affidavit from counsel in support of the fees and costs.

V.
CONCLUSION

22. Plaintiff Udo Birnbaum has brought another action to this Court despite the issues he complains of having already been decided against him after being afforded due appellate process. This Court should send a message to Plaintiff through dismissal of his suit in entirety, and an award of attorney's fees and costs levied against him, that it will not entertain such meritless proceedings. In addition and in the alternative, this Court is not the proper place for Plaintiff to attempt to relitigate, as it lacks subject matter jurisdiction to hear Plaintiff's possession claim.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant Robert O. Dow respectfully requests that this Court grant his Motion to Dismiss pursuant to Texas Rule of Civil Procedure 91a and all other applicable Texas law, enter an order dismissing Plaintiff's challenged cause of action with prejudice, award Defendant reasonable and necessary attorney's fees and costs in pursuing this Motion to Dismiss, and grant Defendant any other and further relief, general or special, at law or equity, to which Defendant may be justly entitled.

Respectfully submitted,

/s/ Corey Kellam

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on May 5, 2025, a true and correct copy of the foregoing document was served electronically through the E-file system to all parties and/or counsel of record.

/s/ Nicole Feragen

Nicole Feragen

EXHIBIT 1
CAUSE NO. CV07404

UDO BIRNBAUM
Plaintiff,

V.

ROBERT O. DOW
Defendant.

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IN THE COUNTY COURT AT LAW

NO. 1

VAN ZANDT COUNTY, TEXAS

ATTORNEY'S FEES AFFIDAVIT

Before me, the undersigned notary, on this day personally appeared Nicole Feragen, the affiant, who, being personally known to me or first properly identified to me, and being duly sworn, deposed and stated:

1. “My name is Nicole Feragen. I am over 21 years of age, I have never been convicted of a crime, I am of sound mind, and I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am an attorney and have been licensed to practice law in the State of Texas since October 25, 2019. I have over five years of experience in civil litigation.

3. I, along with other attorneys with Sullivan Law Offices, have been employed by Defendant in the above-referenced lawsuit. I have personal knowledge of this case and the work performed, including but not limited to: correspondence with the client; review of documentation; review of the opposing party’s pleadings; legal research; drafting and filing of various pleadings; drafting of, researching for, and filing the instant Defendant’s Motion to Dismiss (the “Motion”); and preparation for hearing on same.

4. I am familiar with the fees customarily charged by practicing attorneys in Texas counties such as Van Zandt County in matters like these. The rates charged for my time and the

time of the other attorneys working on this matter are reasonable for the above-described services performed in this case.

5. Attorney's fees and costs for services performed by Nicole Feragen as of the date of this affidavit amount to at least \$3,607.50. I anticipate an additional \$1,300.00 in attorneys' fees will be required to amend or supplement the Motion or related pleadings, and/or prepare for and attend a hearing on the Motion. At this time, the total of reasonable and necessary attorneys' fees that Defendant Robert Dow is entitled to is \$4,907.50.

6. In the event an appeal is made to the court of appeals from the judgment reached on this Motion, I anticipate at least an additional \$3,250.00 in attorneys' fees and expenses will be expended by Defendant Robert Dow. In the event petition for review is made to the Supreme Court of Texas, I anticipate at least an additional \$4,875.00 in attorneys' fees and expenses will be expended by Defendant Robert Dow.

7. Based upon my knowledge and experience in matters of this sort, it is my opinion and belief that all of the services provided by Sullivan Law Offices were and are reasonable and necessary in order to protect the interests of Defendant Robert Dow in this matter. It is my further opinion that the attorneys' fees and expenses incurred to date are a fair and reasonable sum for the representation of Defendant Robert Dow in this matter. In determining the attorneys' fees to be charged, the following factors have been considered:

- a. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- b. the likelihood that the acceptance of the particular employment would preclude other employment by the attorneys;
- c. the fees customarily charged in the locality or for the circumstances;

- d. the amount involved and the results obtained;
- e. the time limitations imposed by the client or by the circumstances;
- f. the nature and length of the professional relationship with the client;
- g. the experience, reputation, and ability of the attorneys performing the services;
- h. that the fee is fixed by the relevant hourly rates; and
- i. the amount in controversy, the nature of this case, and the amount of time spent in this cause.

8. A claim for attorney's fees may be included in prosecuting or defending a Motion to Dismiss Baseless Causes of Action to the prevailing party pursuant to Tex. R. Civ. P. 91a.7. The Court can take judicial notice of the usual and customary attorney fees and the contents of the case file without receiving any further evidence. Tex. Civ. Prac. & Rem. Code § 38.004.

9. The attached billing statements reflect accurate time entries and hourly rate charges for the reasonable and necessary legal services provided by Sullivan Law Offices. All the services were reasonable and necessary in the prosecution or defense of claims or defenses for which attorney's fees are properly awarded to the prevailing party."

FURTHER AFFIANT SAYETH NOT.

SIGNED this 5 day of May 2025.

Nicole Feragen
Nicole Feragen

SUBSCRIBED AND SWORN TO before me, the undersigned notary, on the 5th day of May 2025 by Nicole Feragen.

[Signature]
Notary Public, State of Texas

