No. 12-23-00282-CV

§

In the Court of Appeals
Twelfth Court of Appeals at Tyler

UDO BIRNBAUM
Defendant, Counter-claimant - Appellant

v.

CSD VAN ZANDT LLC
Plaintiff, Counter Defendant - Appellee

Appeal from the 294th Judicial
District Court of Van Zandt County, Texas
The Honorable Chris Martin
Trial cause no. 22-00105

APPELLANT'S REPLY BRIEF

(with shoert Attach)

UDO BIRNBAUM
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(903) 922-5996

Attach:

("genuine issues of material fact" as in Response (CR185) to Plaintiff MSJ :

A. Affidavit of Robert O. Dow, owner / manager Plaintiff CSD (CR19-20)
B. Deed GWEN THIBODEAUX to Birnbaum 2002, died 2006 (CR197)
C. Judgment of Heirship – GWEN estate - probated 2021 (CR134-136)
D. Deed LOUIS THIBODEAUX to Birnbaum 2017, died 2019 (CR198)

IDENTITY OF PARTIES AND COUNSEL

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Hon. Chris Martin
294th Trial Court Judge – but never a trial

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Plaintiff / Appellee's Brief - failed in its burden

"We review summary judgments de novo . . . on appeal,
"movant still bears the burden of showing that there is no
genuine issue of material fact. *Hughes v. 21st Mortg. Corp.*

Plaintiff / Appellee brought before this Appeals Court NO EVIDENCE of having carried out its initial burden, under traditional summary judgment, of there being NO outstanding "genuine issues of material fact", to its claim of having a "regular chain of conveyance" of titles, such chain as is required under trespass to try title.

Nor evidence, of having in its Motion for Summary Judgment (CR72), in the trial court, even identified the supposed intermediate DEEDS, to connect through the estates they purportedly got their DEEDS through and out of.

And as in the trial court, and as now before this Appeals Court, presenting no actual intermediate DEEDS, no Abstract of Title, not even in its pleadings even identifying such supposed intermediate DEEDS.

NOTE: Throughout a seven (7) page docket sheet, in pleadings, motion for summary judgment, and now before this Appeals Court, Plaintiff for TWO (2) YEARS, continuously co-mingles **title** to land, with **entitlement** to an estate, with no title in it, and certainly no DEEDS came out of.

Thus shot itself in the foot Plaintiff

"Before purchasing the Property, I was aware that Udo Birnbaum was living on a portion of the Property".
Affidavit Robert O. Dow, Plaintiff CSD Van Zandt LLC.
(CR05 First Amended Petition, CR19-20 Exhibit "B" thereto)

RCP 782(e) - That the defendant **afterward** unlawfully **entered upon** and dispossessed him of such premises, **stating the date**, and **withholds from him** the possession thereof.

Plaintiff had NO CAUSE to bring trespass to try title to start with.

INTRO – general (continued)

Defendant / Appellant's Brief – short summary

PLAINTIFF, Dallas land developer ROBERT O. DOW ("Dow"), via his CSD Van Zandt LLC ("CSD"), borrows $850,000 from Sanger Bank ("Sanger") via a Deed of Trust to pay a LISA L. GIROT ("Girot"), despite being made aware that Defendant UDO BIRNBAUM ("Birnbaum") was living on such 150 acres, and perhaps not then aware that Girot was lying to him about her having inherited any such property, but in any case Dow failing to make a reasonable inquiry, whether there even existed a chain of deeds toward and unto such LISA L. GIROT.

> *("Before purchasing the Property, I was aware that Udo Birnbaum was living on a portion of the Property at 540 Van Zandt County Road 2916, Eustace, Texas 75124".* Affidavit of Robert Dow, owner manager of Plaintiff CSD Van Zandt LLC. (CR05 First Amended Petition, CR19-20 Exhibit B)

And PLAINTIFF sues Defendant BIRNBAUM for damages, declaratory judgment, and trespass to try title. Trespass to try title is of course for someone complaining of being dispossessed by someone entering upon to dispossess them **after them having had possession**: (Defendant never "entered upon" Plaintiff)

> RCP 782(d) - That the plaintiff **was in possession** of the premises or entitled to such possession. (emphasis added)
>
> RCP 782(e) - That the defendant **afterward** unlawfully **entered upon** and dispossessed him of such premises, **stating the date**, and withholds from him the possession thereof. (emphasis added)

The hole in the foot: Trespass to Try Title is the **only** remedy to challenge matters of title, Property Code 22.001, and Plaintiff, as a late "comer-upon-one-already-there", been there for 42 years, does not qualify under trespass to try title onto 42 year "visible, open, exclusive, and unequivocal possession". *Madison v. Gordon*, 39 S.W.3d 604.

INTRO – general (continued)

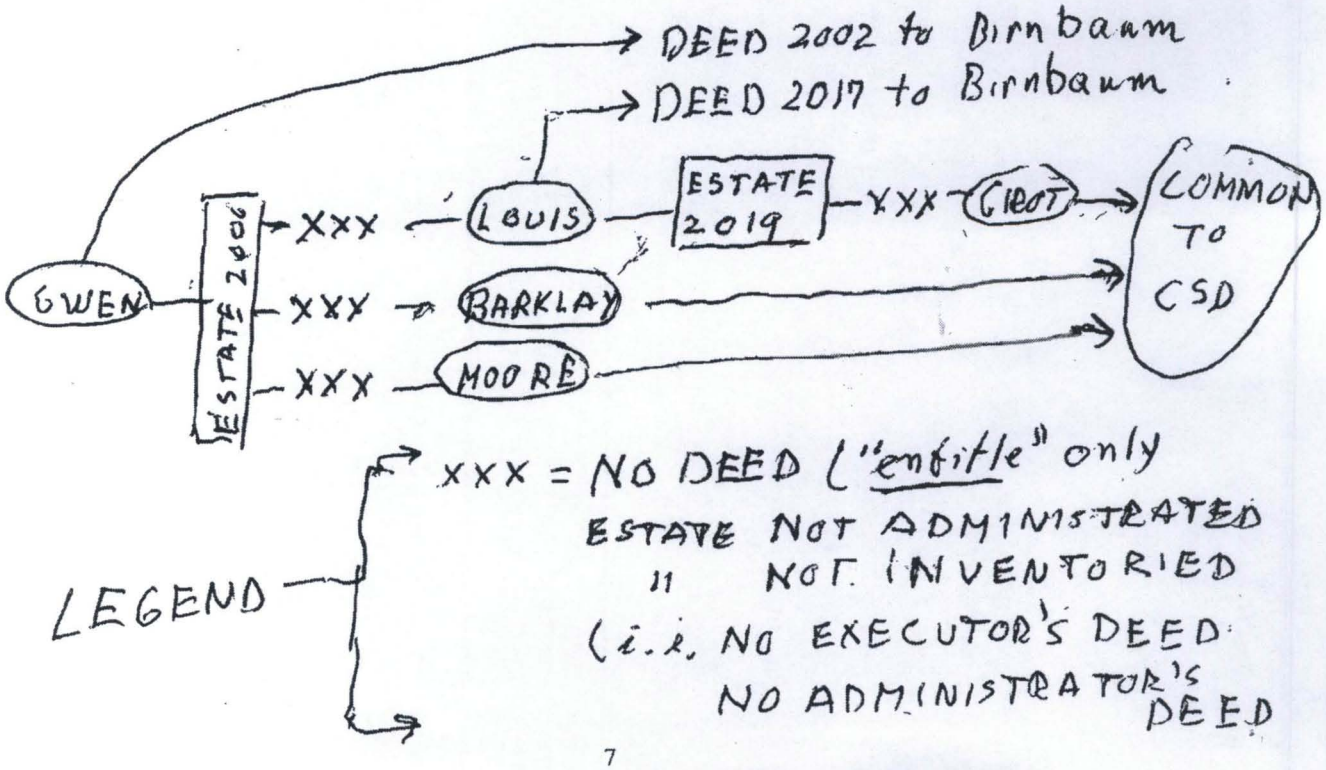
A PICTURE IS WORTH A THOUSAND WORDS

Plaintiff CSD VAN ZANDT LLC pleaded a regular chain of conveyance of a 150 acres (CR09), out of the intestate estate of a GWENDOLYN WRIGHT THIBODEAUX (CR134-136), to niece PATRICIA MOORE BARCLAY, nephew JAMES MOORE, and husband LOUIS THIBODEAUX, hence out of the estate of LOUIS, onto a LISA LEGER GIROT.

Plaintiff however, in its motion for summary judgment (CR72), as in its pleading, **not even identified a single one of such supposed land DEEDS**.

Defendant, by Response (CR185), raised this issue, **even presented DEEDS** onto him (CR197, CR198), proving that the property never entered the estate of GWENDOLYN, nor LOUIS.

Plaintiff never replied, nor was there ever a hearing upon its MOTION.



INTRO – to this Reply Brief

This Appellant's Reply Brief tries to detail exactly why the judgment should be reversed, namely because Plaintiff was not entitled to summary judgment because, 1) Plaintiff failed in his initial burden to show there was NO "genuine issue of material fact, and 2) Defendant raised genuine issues, like Plaintiff having no intermediate DEEDS, and Defendant showing TWO deeds (CR197, CR198), also statute of limitations upon long time possession.

This Reply brief also details how Plaintiff failed in its burden before this Court, to carry its here burden under determination *de novo* per *Hughes*, to prove that there were indeed NO "genuine issues of material fact" outstanding, in the trial court, and to anew show such to this Appeals Court.

Then there is of course the issue of whether Plaintiff had a trespass to try title case to start with, i.e. WHO exactly "entered upon" WHOM, and exactly WHEN.

REPLY ARGUMENT

1.
Plaintiff failed to show entitlement to summary judgment, both in its MSJ, and now in its Brief, to this Appeals Court

The central issue in this Appeal, upon a trespass to try title suit (CR05 First Amended), is the matter of the Plaintiff invoking summary judgment (CR72 MSJ) to dispossess Appellant UDO BIRNBAUM, an 87 year old handicapped, retired electrical engineer then rancher, to EVICT him from his 42 year 150 acre homestead, and take it (CR281 Judgment).

Plaintiff, however, in its Motion for Summary Judgment (CR72), never met its initial burden, i.e. never showed nor even identified **DEEDS** supposedly in their pleaded *"regular chain of conveyance"* (CR09 paragraph 14). Plaintiff only addressed supposed **"entitlement"** (CR09), Texas conveyance of title being solely by actual DEED. "A purchaser takes title to real property solely through a deed." *Smith v. Davis*, No. 12-12-00169-CV, (Tex.App.—Tyler 2013).

Defendant, in his Response (CR185) in the trial court, to Plaintiff's Motion for Summary Judgment (CR72), countered with TWO (2) Texas compliant real DEEDS (CR197, CR198), both notarized. Details subsection IV, below).

2.
Falsehoods in Appellee's Brief to this Appeals Court

1. *"Birnbaum's grounds do not warrant reversing the trial court's judgment"* (Appellee page 2)

2. *"Birnbaum's case did not merit a jury trial, because Birnbaum raised no genuine issues of material fact"* (Appellee page 2)
3. *"Birnbaum cites no proof supporting his issues of fact"* (Appellee page 2, page 12)
4. *"Birnbaum has not challenged material aspects of the judgment"* (Appellee page 2)

It is now Plaintiff's burden, in this Court's determination *de novo*, to defend its Motion for Summary Judgment (CR72), i.e. that there were indeed NO *"genuine issues of material fact"* at issue. (see Section V below).

But Plaintiff's Motion for Summary Judgment (CR72) itself on its page 2 (CR73) introduces, and provides Attachment 8 (CR125):

"Attachment 8: Warranty Deed Purporting to Convey Subject Property from Louis Thibodeaux to Defendant." (emphasis added)

This of course raises the genuine material issue, of whether such property ever entered into Louis Thibodeaux's estate, that Plaintiff claims it got my 150 acres out of. (See Section VI below)

3.

Regarding Appellant supposedly "has not challenged" - No. 4

Appellee briefed to this Court on page 2, *"Birnbaum has not challenged material aspects of the judgment"*.

The following, however, exactly as in Appellant's Brief, page 12, how Appellant / Defendant, in Brief for Appellant, "challenged" the judgment:

* * * * START OF PASTE * * * *

And again, as indicated by the docket sheet, ever since CSD Van Zandt LLC bringing suit on **8-24-2022**, there was abundant filings, but NEVER A TRIAL, NEVER A HEARING, the right to trial by jury being sacred.

Such is inconsistent with due process, and Defendant so indicated such to the Court by the following deadline-extending motions on **10-3-2023**:

- *Request for Findings of Fact and Conclusions of Law*
- *Motion for New Trial because there never was a first*
- *Motion to Modify Correct and Reform the Judgment*

And never a response, neither by the Plaintiff, nor the Court.

* * * * END OF PASTE * * * *

4.
Regarding supposed "no genuine issues of material fact" - No. 1, No. 2, No. 3

Birnbaum presented the following, to the trial court, in his Response (CV185) to Plaintiff / Appellee's Traditional Motion for Summary Judgment (CR82):

1. **Deed Gwendolyn Wright Thibodeaux to Udo Birnbaum** - shows that the 150 acres were never in the estate that Appellant / Plaintiff CSD Van Zandt LLC claim as their source (CR197)
2. **Judgment of Heirship** (CR134-136) – shows that the belated probate never administrated nor inventoried the estate of "Gwendolyn", the document so indicates, and that no executor's deed nor administrator's deed came or could have come out, Texas conveyance of title being **solely by deed**. All that came out was ***entitlements*** – such even to "Louis", a then DEAD, "CSD's" claimed next link – *"50 percent, Louis Thibodeaux, a deceased"*.
3. **Deed Louis Thibodeaux to Udo Birnbaum** (CR198) - with GIROT ("grantor" to CSD) as the notary – shows that the 150 acres

(supposing that Louis even once had them – which he did not) could not have conceivably be in his estate – the estate GIROT told Appellee's ROBERT O. DOW - that she inherited out of – which conversation Dow recorded – and which got spun into this whole sorry mess.

5.
Regarding the burden of proof on the MSJ even shifting

Plaintiff / Appellee Brief correctly cited *Hughes v. 21st Mortg. Corp.*, (2022 Tex. App), upon the issue of a court being able to grant summary judgment even in a trespass to try title case, in that case also involving, as in this case, a pro se.

But *Hughes* also states what a plaintiff HAS TO SHOW, to be entitled to such, i.e. that the burden of poof indeed got SHIFTED ONTO THE NON-MOVANT, and in *Hughes* the pro se failed to by WRITTEN RESPONSE, failed to raise a "genuine issue of material fact".

So here, per *Hughes v. 21st Mortg. Corp.*, (2022 Tex. App), as to WHO has to do WHAT, regarding summary judgment, emphasis added:

> *"Standard of Review*
>
> **"We review summary judgments de novo**, taking as true evidence favorable to the nonmovant and indulging reasonable inferences and resolving doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A motion for summary judgment must stand or fall on the **grounds expressly presented in the motion**, and a trial court considering such a motion is restricted to the issues presented in the motion, response, and replies. *See* Tex.R.Civ.P. 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341-42 (Tex. 1993).
>
> "A traditional **summary judgment is proper if the movant establishes** that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See* Tex.R.Civ.P 166a(c); *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014); *Provident Life &Accident Ins. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003). **If the movant meets this burden**, the burden shifts to the nonmovant to raise a fact issue. *Amedisys*, 437 S.W.3d at 511.

"As is the case here, the nonmovant on appeal need not have responded to a traditional motion for summary judgment to contend that the movant's summary judgment proof was insufficient as a matter of law to support summary judgment. *See id.* (noting that **if movant fails to meet this burden, "the burden does not shift** and the non-movant need not respond or present any evidence"); *Rhone-Poulenc Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999) *5 (explaining that "[s]ummary judgments must stand on their own merits" and that **on appeal, "movant still bears the burden of showing that there is no genuine issue of material fact** and that the movant is entitled to judgment as a matter of law").

"A trespass-to-try-title action "is the method of determining title to lands, tenements, or other real property." Tex. Prop. Code § 22.001. "To recover in a trespass to try title action, the **plaintiff must recover upon the strength of his own title**." *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994); *see Lance v. Robinson*, 543 S.W.3d 723, 736 (Tex. 2018) ("[T]he 'plaintiff in a trespass to try title action must allege and prove the right to present possession of the land.'" (quoting *City of Mission v. Popplewell*, 294 S.W.2d 712, 714 (Tex. 1956))). Among the ways of proving title in a trespass-to-try-title action, a plaintiff may prove a regular chain of conveyances **from the sovereign** or superior title **out of a common source**. *See Rogers*, 884 S.W.2d at 768; *see also Brumley v. McDuff*, 616 S.W.3d 826, 832 (Tex. 2021) (listing different ways that plaintiff may prove legal title in trespass-to-try-6 title action).

6.
Appellee / Plaintiff did not even plead a chain of DEEDS only a chain of non inventoried entitlements

"A purchaser takes title to real property solely through a deed." *Smith v. Davis*, No. 12-12-00169-CV, (Tex.App.—Tyler 2013).

Plaintiff's First Amended (CR05), however, identifies no chain of **intermediate** DEEDS, only passage of entitlement to or interest in or onto, but not DEEDS (CR09):

Conveyance of title in Texas of course only by DEEDS. Plaintiff pleads ONLY as follows, NO reference to **DEEDS**, everything magically got ***"passed"***:

"14. Plaintiff adopts and incorporates the foregoing paragraphs herein for all purposes. Plaintiff does not believe that a title issue exists. However, out of an abundance of caution, **Plaintiff pleads Trespass to Try Title** in the alternative. "A trespass to try title action is the method of determining title to lands, tenements, or other real property." Tex. Prop. Code §22.001(a). To prevail, a plaintiff must

> typically prove 1) a regular chain of conveyance from the sovereign; 2) **superior title out of a common source**; 3) title by limitations; or 4) title by prior possession coupled with proof that possession was not abandoned. *Lance v. Robinson*, 543 S.W.3d 723, 735 (Tex. 2018) (quoting *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004)). (CR09 emphasis added)
>
> 15. Plaintiff obtained title to the Property via a regular chain of conveyance **from the sovereign**, as explained hereinabove. To reiterate, Mr. and Mrs. Travis conveyed the Property to Defendant, who conveyed same to Gwendolyn Wright Thibodeaux. **Upon her death, the Property passed to Louis Thibodeaux**, Patricia Moore Barclay, and James T. Moore, III. Subsequently, Lisa Leger Girot **inherited Louis Thibodeaux's interest** in the Property upon his death. Plaintiff then purchased the Property from Lisa Leger Girot, Patricia Moore Barclay, and James T. Moore, III. As such, Plaintiff is entitled to immediate possession of the Property and a declaration of title in Plaintiff's favor and against Defendant. (CR09 emphasis added)

From the sovereign? The king of Spain? Santa Ana at the battle of San Jacinto? And what about all the ever after in and betwixt chain of deeds?

But even presuming, for the moment, that Plaintiff meant No. 2 "out of a common source"? **Where is the common source?** Plaintiff pleads out of the ESTATE of Gwendolyn Wright Thibodeaux. Appellant shows his title by DEED from Gwendolyn herself, while still alive of course, raising the surely real "genuine issue of material fact", that the 150 acres **was NOT in that estate**.

Furthermore, Appellant shows the probate Judgment of Heirship itself (CR134-136), wherein is stated *"no administration is necessary"* (or possible because of statute of limitations on 2021 probate on 2006 death), so that there was **no inventory taken**, and **no DEED came or could come out**, neither executor's DEED, nor administrator's DEED, even if the 150 acre property had been in there, which it was not.

Also note the entitlement as to *"LOUIS THIBODEAUX, a now deceased 50%"*, as a supposed HEIR? **From a DEAD to a DEAD?** (CR134-136)

Anyhow, all this aside, where is the COMMON SOURCE? Birnbaum by DEED from GWENDOLYN (CR197), CSD by non inventoried entitlement out of a not administrated not inventoried estate? *"no administration is necessary"* (CR134-136)

Plaintiff never satisfied its burden of proof. The burden never shifted. Defendant / Appellant BIRNBAUM, nevertheless, presented, "genuine issues of material fact", on paper and on file (CR197), (CR198), CR134-136)

Same argument to the 150 acres having been in the ESTATE of LOUIS THIBODEAUX, Louis Thibodeaux having DEEDED to Birnbaum (CR198), GIROT notary (CR198), so how could GIROT have inherited my 150 acres out of that estate?

7.
Swift Recap

Plaintiff / Appellee utterly failed in its initial burden, both in its First Amended pleading, and in its RCP 166a(i) Motion for Summary Judgment (CR72) in the trial court. And now, with its burden shifted into this Appeals Court, to show this Appeals Court, how it supposedly met its initial burden, under trespass to try title, as to:

> **Section 8. Trespass to Try Title**
> **RULE 783. REQUISITES OF PETITION**
> (d) That the plaintiff **was** in possession of the premises or entitled to such possession.
> (e) That the defendant **afterward** unlawfully **entered upon** and dispossessed him of such premises, **stating the date**, and withholds from him the possession thereof. (emphasis added)

When by Affidavit of ROBERT O. DOW (CR19-20), manager / owner of CSD, it admitted that BIRNBAUM was there, **before** CSD ever came on the scene. Birnbaum had been there for 42 YEARS.

"Before purchasing the property, I was aware that Birnbaum was living on a portion of the property" (CR72)

Regarding Appellee's burden under *Hughes*, a quick recap:

> **"We review summary judgments de novo**, taking as true evidence favorable to the nonmovant and indulging reasonable inferences and resolving doubts in the nonmovant's favor.
>
> "To recover in a trespass to try title action, the plaintiff must recover **upon the strength of his own title**.
>
> "[s]ummary judgments must stand on their own merits" and that **on appeal, "movant still bears the burden of showing that there is no genuine issue of material fact** and that the movant is entitled to judgment as a matter of law").

Appellee's Brief utterly failed to even address the matter of its burden. in this Appeals Court, upon a trial court summary judgment.

Issues at issue, as Attach:

1. **Affidavit of Dow** – that Birnbaum was living there BEFORE Dow ever came on the scene. Birnbaum been there for 42 YEARS
2. **Deed by Gwen** – that "the property" never entered Gwen's estate
3. **Judgment of Heirship** – Gwen's estate was never administrated, never inventoried, no DEEDS came or could have come out .
4. **Deed by Louis** – that "the property" never entered Louis' estate so Girot could not have inherited it and had it to convey to CSD

Conclusion and Prayer

This case is the poster child of the abuse of summary judgment, abuse of the elderly, and abuse of the judicial system itself.

Udo Birnbaum, an 87 year old handicapped, retired electrical engineer, his 42 year 150 acre homestead taken, because somebody writes up a fraudulent deed, and by summary judgment, with never a hearing, even as to the summary

judgment, such by "hearing by submission", Birnbaum is out on the street, his homestead stolen.

Plaintiff's Brief blaming Birnbaum for all kinds of matter he should or should not have done, in self representing himself in the court.

But Plaintiff never met its initial burden of showing there were NO "genuine issues of material fact", i.e. that Plaintiff was entitled to "judgment as a matter of law", i.e. summary judgment.

As shown in this Reply Brief, Plaintiff / Apellee's burden now has shifted into this Appeals Court, to defend their summary judgment, that there were indeed NO "genuine issues of material fact".

As this Reply shows, they utterly failed to address even the matter of their burden. Such despite them themselves raising their own disputed issue, of whether that duly notarized **DEED Louis Thibodeaux to Birnbaum** (CR198), might be material, as to whether there indeed was that 150 acres in Louis' estate.

> **"Attachment 8: Warranty Deed Purporting to Convey Subject Property from Louis Thibodeaux to Defendant." (CR198)**

Despite such in Plaintiff's MSJ (CR72), as Exhibit C (CR198).

Also material of course is whether that 2002 DEED from Gwendolyn Wright Thibodeaux (CR197) might bear as to whether there indeed was that property in that 2006 estate (CR134-136) in the first place.

Also:

> *"**Before purchasing** the Property, I was aware that Udo Birnbaum was living on a portion of the Property".* Affidavit Robert O. Dow, Plaintiff CSD Van Zandt LLC (CR19-20)

Defendant / Appellant never **entered upon** Plaintiff. Defendant Birnbaum had been there 42 years, in "visible, open, exclusive, and unequivocal possession". *Madison v. Gordon*, 39 S.W.3d 604.

Plaintiff had no cause for summary judgment, nor cause to start with. Appellant prays for reversal.

Udo Birnbaum

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Certificate of Service

Today May 3, 2024, CMRR 9589 0710 5270 1308 9477 28, to Twelfth Court of Appeals, 1517 West Front Street Suite 354, Tyler, Texas 75702

Today May 3, 2024, CMRR 9589 0710 5270 1308 9477 35, to Gregory Smith, Smith Legal PLLC, 110 N. College Ave., Suite 1120, Tyler, TX 75702

Today May 3, 2024, CMRR 9589 0710 5270 1308 9477 42, to District Clerk, Karen L. Wilson, Courthouse, 121 E. Dallas St., Suite 302, Canton TX, 75103

UB