STATE OF INDIANA
LAKE COUNTY
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MICHAEL B. BROWN
RECORDER

COURT RULING STRIKING LIS PENDENS

(Affects Lis Pendens Document No. 2015 074715, recorded 11/5/2015 and filed in Lake Superior Court Cause No. 45D09-1205-SC-01397)

Attached hereto is a certified copy of the Ruling on Defendant's Motion to Dismiss and Stay issued by the Lake Superior Court, County Division III, in Cause No. 45D09-1205-SC-01397. The Lis Pendens Notice referenced above and filed in that case on November 5, 2015 is addressed by the Court on page 11 of the attached Ruling, and with respect to that Lis Pendens, provides as follows:

The Lis Pendens Issue

The court turns now to the Lis Pendens. There was some confusion regarding this pleading during the hearing. Regardless, the court now orders it STRICKEN. To be clear, the court acknowledges that title to real estate cannot be quieted in a small claims action. However, by the same token, it cannot be clouded in one either. Filing this document in a small claims proceeding was, thus, improper.

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The real estate which is the subject of the stricken Lis Pendens is described as:
Lot Numbered 11 in Block One in Palmira Subdivision, as per plat thereof, recorded in Plat Book 51, Page 44 in the Office of the Recorder of Lake County, Indiana.

Patrick A. Schuster
Attorney at Law

State of Indiana)
) SS:
County of Lake)

Before me the undersigned, a Notary Public for Lake County, Indiana, personally appeared Patrick A. Schuster and acknowledged the execution of this document this 24th day of January, 2017.

BARBARA L. BANISH
Notary Public, State of Indiana
Lake County
My Commission Expires
November 17, 2024

, Notary Public

I affirm that I have taken reasonable care to redact each Social Security number in the attached document, unless required by law.

Prepared by: Patrick A. Schuster, Attorney at Law, 1201 N. Main St., Crown Point, IN 46307; Atty. I.D. No. 1651-45

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JAN 25 2017
JOHN E. PETALAS
LAKE COUNTY AUDITOR

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FILED IN OPEN COURT
DEC 08 2015
JUDGE LAKE COUNTY
COURT #3

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE LAKE SUPERIOR COURT
COUNTY DIVISION III
2293 MAIN STREET
CROWN POINT INDIANA

BOBBY SHAH
Plaintiff
v.

JUDITH BONAVENTURA
Defendant

CAUSE NO.: 45D09-1205-SC-01397

RULING ON DEFENDANT'S MOTION TO DISMISS AND STAY

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This matter was before the court for hearing on December 1, 2015. Plaintiff appeared by counsel, Mr. Schuster; Defendant appeared by counsel, Messrs. Giorgi, Medved and Snow. At the conclusion of the hearing, Mr. Snow requested and was granted leave to withdraw, by separate order. Having taken this matter under advisement, the court now issues this ruling. Any factual finding which could be construed as a legal conclusion and any legal conclusion which could be construed as a factual finding should be so construed.

FACTS

This case is somewhat unique in that little live testimony has been received by the court despite this cases' duration. Nonetheless, the court's factual findings are based upon the parties' explicit and implicit stipulations/representations made over the years in open court and via the pleadings.

On August 23, 2011, the parties entered into a "Secured Loan and Leaseback Repurchase Agreement" (hereafter Leaseback Agreement) for the property located at 11504 Belmont Pl., Cedar Lake, IN. This agreement provided that Mr. Shah would loan to Ms. Bonaventura the sum of $110,000.00. The document further states:

> "C. Said indebtedness is evidenced by a Promissory Note ("Note") of Borrower payable to the order of Lender in the original principal amount of One Hundred Ten Thousand Dollars ($110,000.00).
>
> D. In order to save [Mr. Shah] the cost and expense of the foreclosing of the Loan, in the event of default, or breach of the terms, and as security for the Note, [Ms. Bonaventura] has duly made, executed and delivered to the escrow certain good and sufficient Fee Simple of conveyance for [11504 Belmont Pl., Cedar Lake, IN] to hold the deed in escrow for the purposes of this Agreement.
>
> E. Simultaneously with the conveyance of the Property, [Ms. Bonaventura] is entering into a Lease Agreement with [Mr. Shah]."

The term of the lease was to be for 30 years, with monthly rent in the amount of $1837.22 per month, due in advance, on the first of each month, beginning on October 1, 2011.[1] Moreover, the court would note that the monthly rental amount was derived based upon amortizing $110,000.00 over 30 years, with interest at 19.99%. Failure to timely pay rent, after a 10-day grace period, is deemed a default. Any default entitles Landlord, Mr. Shah, to possession of the premises.

The document further states, in Section 12:

> "Upon the expiration of the term of this Lease, or upon early termination by [Ms. Bonaventura] as described herein, so long as [Ms. Bonaventura] has complied with the terms of this Lease by making all payments to [Mr. Shah] contemplated herein, [Mr. Shah] agrees to execute a warranty deed transferring fee simple title to the Premises to [Ms. Bonaventura] by notifying escrow agent that [Ms. Bonaventura] has performed [her] duties under this Agreement and the Deed should be transferred into [Ms. Bonaventura's] name."

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Section 23 of the Leaseback Agreement further clarifies the above, stating that the property is being transferred to Mr. Shah simultaneously with the exchange of the $110,000.00 and that it is the intent of the parties that title shall revert to Ms. Bonaventura upon payment of the principal amount "together with a sum equivalent to interest thereon amortized over 30 years at 19.99%."

On September 2, 2011, the parties executed a document entitled "Joint Order/Court Order Escrow Agreement." This document states, in pertinent part:

> "The accompanying deed from Judith Leigh Bonaventura to Bobby Shah for the real estate located at 11504 Belmont Place, Cedar Lake, IN 46303, is to be deposited with Attorney Patrick Schuster as Escrow Agent to be delivered by him to one or the other of the parties *only upon the joint order of the parties*, their heirs or legal representatives, or upon order of a court of law directing him to deliver the deed." (Emphasis added).

On this same date, Ms. Bonaventura executed the warranty deed, which was then kept in escrow by Mr. Schuster.

On May 16, 2012, Mr. Shah filed the instant suit, a small claims eviction proceeding, against Ms. Bonaventura. Therein, Mr. Shah alleged rent was in arrears $3,674.44 and requested immediate possession. The case was set for eviction hearing on June 13, 2012. Mr. Schuster appeared for Mr. Shah; Mr. Snow appeared for Ms. Bonaventura. At that time the court directed the parties to address the issue of subject matter jurisdiction. Specifically, given the nature of the parties' agreement and the fact that this matter was filed as a small claims case, the court was concerned that this matter

[1] Provisions were made for pro-rated payments between execution of the document and October 1 and for a one-time $10,000.00 transaction service fee.

might properly be characterized as a foreclosure, over which this court lacks jurisdiction. See Footnote 2, *infra*. The matter was then reset to July 5, 2012.

Mr. Shah filed his brief asserting, inter alia,[2] this matter was a landlord-tenant matter and should not be considered a foreclosure. No brief was filed by Ms. Bonaventura.

On July 5, 2012, Mr. Shah asked for possession, Mr. Snow, on Ms. Bonaventura's behalf, specifically indicated that his client had no objection to this request and an eviction order entered; possession was to change hands on August 3, 2012. Moreover, by agreement of the parties, the deed held in escrow was released to Mr. Shah. The parties requested that the issue of rent and damages be continued generally, which the court granted. However, the parties later reached an accord and Mr. Shah never enforced this eviction order.

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On November 26, 2012, Mr. Shah filed a Motion requesting a hearing for Immediate Possession. Therein, he asserted that the parties' accord had been breached. The court set this matter for hearing on December 3, 2012. On that date, Mr. Shuster and Mr. Snow entered into an agreed eviction order, which was never enforced due to yet another accord.

On May 20, 2013, Mr. Shah again filed a Motion requesting a hearing for Immediate Possession, asserting breach of the settlement agreement. The court set this matter for hearing on June 12, 2013. On that date, the parties agreed to continue the matter as they were attempting to reach another settlement agreement. The case was reset to October 12, 2013; all parties failed to appear and no action was taken on that date.

On April 10, 2014, Mr. Shah, again, filed a Motion requesting an Immediate Possession Hearing, urging breach of the previous settlement agreement. This was set for hearing on April 30, 2014. However, on that date, Plaintiff requested, and the court granted, that the hearing be vacated. Plaintiff's motion stated:

> "…the parties have engaged in negotiations which resulted in payment of arrearages and execution of a new lease between the parties, obviating the need for a hearing for immediate possession of the real estate."

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[2] Therein, Mr. Shah also asserted that, because County Div. 3 is a Superior Court, were this matter to be deemed a foreclosure action, this court could exercise unlimited jurisdiction and still hear this case. The court would note now, as it did at the hearing of December 1, 2015, that although it is a Superior Court, it cannot exercise unlimited jurisdiction, pursuant to *Superior Construction Co. v. Carr* 564 N.E.2d 281 (Ind.Ct.App. 1990). Moreover, after the legislature converted all county courts to full superior courts, Lake County codified the strictures of *Carr* and portions of the previous statutory sections addressing County Courts' jurisdiction within the Lake County Local Rules regarding weighted caseload. See LR 45-AR 01(7) and (15) thru (19). Regardless, the present case is and has always been a Small Claims case; with the exception of replevin and eviction actions, equitable relief, such as foreclosure, is unavailable on a Small Claims docket. See *Nielsen Buick Jeep Eagle Subaru v. Hall*, 726 N.E.2d 358, 360-61 (Ind.Ct.App. 2000).

However, again on October 7, 2014, Mr. Shah requested a Possession Hearing due to Ms. Bonaventura's alleged breach of the settlement agreement. Therein, Mr. Shah stated that the parties had entered into a new lease agreement (The 2014 Lease) after the previous court date and attached a copy to his Motion. As such, the court now finds that the 2014 Lease is part-and-parcel of the April 30, 2014 settlement agreement.

Although the 2014 Lease addresses terms of purchase, unlike the Leaseback Agreement rent is not considered payment toward the purchase of the residence. Rather, the 2014 Lease contemplates Ms. Bonaventura obtaining independent financing to purchase the residence from Mr. Shah for a price of $190,000.00 and gives her the right of first refusal should a third-party make an offer on the residence. Moreover, the 2014 Lease is for one year. It was signed by both parties on April 30, 2014.

On October 29, 2014, when this matter was set, again, for eviction hearing, Messrs. Schuster and Snow appeared and entered into another agreed eviction order, which was stayed, again by agreement, to December 1, 2014 at noon.

On November 25, 2014, Mr. Snow filed a "Verified Application for Temporary Restraining Order and Complaint for Preliminary Injunction." (hereafter Verified Application). Therein, he asserts that Ms. Bonaventura entered into the Leaseback Agreement for the benefit of her brother, Michael Bonaventura, and that her brother was the beneficiary of the monies from Mr. Shah. He asserts that when Ms. Bonaventura signed that agreement she did so "arguably without being fully informed," and that "she had not previously been aware that the agreement that she signed regarding the Property actually transferred title to the Property to Shah and gave him the authority to evict her…"

However, to be clear, at no time has Ms. Bonaventura asserted to this court that duress, coercion or fraudulent inducement was exercised upon her to obtain her signatures on the Leaseback Agreement or the 2014 Lease. Nor has it ever been suggested that her signatures were forged. Finally, there has never been any indication that Ms. Bonaventura cannot read, write or understand English nor that she is under any mental incapacity.[3]

The Application further states that Mr. Snow had been litigating this case at the direction of Mr. Michael Bonaventura, and that Mr. Bonaventura was authorized to speak on his sister's behalf. Furthermore, the Application states that it was Mr. Michael Bonaventura "who was actually making payments, albeit inconsistently, on the loan."

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[3] As such, Ms. Bonaventura is presumed to understand and assent to the terms of the contracts she signed. *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411 (Ind.Ct.App. 2004). "At common law, one who signs a contract may not, [in the absence of fraud or deceit], avoid the contract on the grounds that he or she did not read it, or that he or she took someone else's word as to what it contained." *Mayflower Transit, Inc. v. Davenport*, 714 N.E.2d 794 (Ind.Ct.App. 1999).

Counsel further states that, although Ms. Judith Bonaventura had notice of the October 29, 2014 Eviction Hearing, "she did not attend…nor did she contact [Mr. Snow] prior to said hearing. As had been the case at all times throughout his involvement in this matter, [Mr. Snow] communicated exclusively with Michael Bonaventura regarding the current state of affairs and desired course of action."

The Verified Application further states that once Ms. Bonaventura received the most recent eviction notice, she contacted Mr. Snow, advising that she would not have agreed to the October 29, 2014 eviction order. However, the Verified Application specifically acknowledges that the 2014 Lease has been breached, although blame for same is laid at the feet of Michael Bonaventura for not making payments on time. Perhaps most importantly, the Verified Application makes no claim that Ms. Bonaventura is entitled to remain in the property as a matter of right nor did she claim that she has an equitable interest in the property.

Nonetheless, Mr. Snow requested the eviction order be stayed thru February 2015 to allow Ms. Bonaventura time to "allow her to make efforts to purchase the Property and, in the process, satisfy the demands of Shah…" Mr. Snow further indicated his intent to withdraw, in light of the conflict between the Bonaventuras, and allow both Mr. and Ms. Bonaventura to obtain alternative counsel.

This Application was reviewed by Judge Julie Cantrell and Commissioner R. Jeffrey Boling,[4] who ruled as follows:

> "Defendant by counsel, files Verified Application for Temporary Restraining Order and Complaint for Preliminary Injunction. DENIED without a hearing. All facts alleged in the Defendant's complaint were known or should have been known at the time of the agreement."

Nonetheless, the eviction order was not enforced as, once again, the parties reached an accord. That is, until March 16, 2015, when Mr. Shah filed another request for Hearing for Immediate Possession. The basis for this eviction request was two-fold: 1) Ms. Bonaventura had breached the previous accord, and 2) the 2014 Lease had expired on February 28, 2015, extinguishing her tenancy rights. The court set the hearing for April 6, 2015.

On that date, this court entered the following order:

> "This matter is before the court for eviction hearing on April 6, 2015. Plaintiff (Landlord) appeared by counsel, Mr. Schuster; Defendant (Tenant), appeared by counsel, Mr. Snow. Tenant requested a continuance of the hearing in order to finalize sale of the residence in question. Landlord objected.
>
> This court had earlier granted an eviction by agreement that was to go into effect on December 1, 2014. However, the parties agreed to an extension, contingent on

[4] Apparently, I was out of the office on that date.

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Tenant purchasing the property back from Landlord. Tenant has failed to carry through on this promise.

Tenant assures the court that the sale can be completed within the next few weeks. In light of this, the court will grant one final continuance, over Landlord's objection. The parties are cautioned in the strictest of terms that the court will grant no further continuances nor brook any further delays, barring extreme unforeseen circumstances. This matter is set for final eviction hearing on MAY 19TH, 2015 AT 9:30 A.M."

On May 19, 2015, Messrs. Schuster and Snow appeared and requested the court dismiss the case, ***without prejudice***, as they had reached a settlement agreement. During that hearing, Mr. Michael Bonaventura testified that he would be obtaining funds for the purchase of the property within a matter of days. It was based on this representation that Mr. Shah agreed to dismissal. The request was granted.

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However, on July 1, 2015, Shah filed a "Request to Reopen Case for the Purpose of Determining Whether Michael Bonaventura Should Be Held In Contempt for Making Misrepresentations to the Court during the Hearing held on May 19, 2015." The issue was set for hearing on August 4, 2015. On that date, Messrs. Schuster and Snow appeared, the court reinstated the case, directed the parties to file the appropriate motions, set a briefing schedule and reset the matter for further proceedings on October 5, 2015.

On August 31, 2015, Mr. Shah, filed a request for hearing on Immediate Possession, asserting a breach of the previous settlement agreement, inter alia. The court confirmed the October 5, 2015 hearing date. At that hearing, Messrs. Schuster and Snow appeared as did Mr. Bonaventura and Ms. Bonaventura. The parties, again, agreed to an order of possession, which was stayed by agreement until October 20, 2015. Mr. Bonaventura had presented a check for the purchase of the home to Mr. Schuster and the understanding was, that as long as the check cleared, the eviction would be halted and the case dismissed. The issue of contempt, vis-a-vis Michael Bonaventura, was held in abeyance.

This eviction order was executed and enforced. Ms. Bonaventura was removed from the property on or about October 20, 2015. As no party has suggested otherwise, the court finds that the check failed to clear and, as a result, the eviction moved forward.

On November 3, 2015 Messrs. Geoffrey Giorgi and Keith Medved entered appearances for Ms. Bonaventura and filed a Motion to Dismiss Eviction Pursuant to 12(B)(1) and to Stay all Prior Orders as well as a Lis Pendens under the instant cause number.

Mr. Shah filed, on November 19, a "Request for Order to Clerk to Enter a Satisfaction or Dismissal of Defendant's Lis Pendens." In essence, Mr. Shah requests that the Lis Pendens be stricken. He also filed his Memorandum in Opposition to Defendant's Motion.

LEGAL CONCLUSIONS

Defendant's pending motion rests on the following premise: The Leaseback Agreement was actually a mortgage. A mortgage requires foreclosure as opposed to eviction as a remedy. A court hearing a small claims case has no subject matter jurisdiction over foreclosures and, as such, all subsequent orders and proceedings in this case are a nullity.

Plaintiff counters that the Leaseback Agreement was a lease not a mortgage. As such, eviction proceedings were appropriate. Regardless, the court did not order the transfer of title, the parties did so by agreement, which changed the nature of the parties' business relationship from one of potential mortgagee and mortgagor to one unequivocally of landlord and tenant, which Ms. Bonaventura, repeatedly over the years, admitted and acknowledged, particularly when she entered into the 2014 Lease.

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This court is all too aware of the legal principle that a lack of subject matter jurisdiction cannot be waived. Moreover, the court is also cognizant of the fact that the parties cannot confer subject matter jurisdiction on the court, by agreement, when it is lacking. With that said, the court is satisfied that this case centers on the issue of what specific rights are sought to be enforced here: those of a mortgagee or those of a landlord.

The Validity of the Agreed Eviction Order

First, the court finds and concludes that the Leaseback Agreement is, at worst, a hybrid form of lease and mortgage. As such *Hoang v. Jamestown Homes, Inc.*, 768 N.E.2d 1029, 1034-1035 (Ind.Ct.App. 2002), makes clear that in such situations, a small claims ejectment action remains a proper remedy and that even in such hybrid situations, a small claims court does not lack subject matter jurisdiction. Moreover, in order to give full force and effect to the parties' Leaseback Agreement, as the court is required to do, see *Colonial Penn Insurance Co. v. Guzorek*, 690 N.E.2d 664 at 669 (Ind. 1997) and *First Fed. Sav. Bank of Ind. v. Key Mkts., Inc.*, 559 N.E.2d 600, 603-04 (Ind. 1990), the court must take into consideration that it was the intent of the parties to avoid the necessity of pursuing foreclosure in the event of a default. The Leaseback Agreement specifically states:

> D. In order to save [Mr. Shah] the cost and expense of the foreclosing of the Loan, in the event of default, or breach of the terms, and as security for the Note, [Ms. Bonaventura] has duly made, executed and delivered to the escrow certain good and sufficient Fee Simple of conveyance for [11504 Belmont Pl., Cedar Lake, IN] to hold the deed in escrow for the purposes of this Agreement.
>
> E. Simultaneously with the conveyance of the Property, [Ms. Bonaventura] is entering into a Lease Agreement with [Mr. Shah]."

Thus, the clear intent of the parties was to create a landlord-tenant relationship as opposed to one of mortgagee and mortgagor. Thus, at best, this business relationship is not even a hybrid that would raise subject matter jurisdiction concerns. As such it is the rights of a landlord that the court is addressing.

Second, by agreeing to transfer of title on July 5, 2012 and then by entering into a settlement agreement which included executing what is clearly and unequivocally a lease and not a mortgage (the 2014 Lease), Ms. Bonaventura has removed any doubt about this court exercising subject matter jurisdiction over this case. Thus, even if the Leaseback Agreement could be construed as a mortgage, Ms. Bonaventura by her own actions changed the nature of this case from one of mortgagee and mortgagor to one of landlord and tenant. Accordingly, the analysis of whether the Leaseback Agreement was a mortgage has become wholly academic.

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Ms. Bonaventura's argument rests heavily on the case of *Parker v. Hubbell*, 75 Ind. 580 (1881), for the proposition that this matter requires foreclosure proceedings. However, that case is inapposite to the present facts. Specifically, the *Parker* Court held:

> "Our conclusion is that the provision of the statute under consideration means simply that, by virtue of the mortgage alone, the mortgagee can not claim possession of the mortgaged premises, unless the instrument specially so provides; *but it does not forbid that the parties may agree, either in a separate writing or by parol, that the possession shall accompany the mortgage; and may effectually execute that agreement, by an actual delivery of the possession under the mortgage...*" *Id.* at 584 (emphasis added).

Here, by surrendering the title, executing the 2014 Lease and then entering into an Agreed Possession Order on October 6, 2015 and allowing it to be executed, thereby delivering possession back to Mr. Shah, the parties have, in fact, adhered to the lesson of law in *Parker*.

The case of *Federal Land Bank of Louisville v. Schleeter*, 194 N.E. 628 (1935), also relied upon by Ms. Bonaventura, suffers from the same infirmity. That is, *Schleeter* relied upon the case of *Wilson v. Carpenter*, 62 Ind. 495 (1871), regarding the doctrine of "once a mortgage, always a mortgage." However, even *Wilson* allowed an exception to this premise for situations such as the present one, stating:

> 'This [premise] does not preclude any subsequent *bona fide* agreement in respect to the estate between the parties; and where a mortgagor voluntarily cancelled the instrument of defeasance which he held, it gave to the deed which it was intended to defeat the effect of an original absolute conveyance as between the parties.
>
> In the case of *Remsen* v. *Hay,* 2 Edw. Ch. 535, it is, also, said: 'There is nothing in the policy of the law to prevent a mortgagee from acquiring an absolute ownership, by purchase, from a mortgagor at any time subsequent to the taking of

the mortgage and by a fresh contract to be made between them. Courts view with jealousy and suspicion any dealing between mortgagor and mortgagee to extinguish the equity of redemption; *but if it be fair and honest, on the part of the mortgagee , the purchaser will not be disturbed.* The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage deed, or in a separate instrument made at the same time, or of some covenant or agreement, forming a part of the same transaction with the loan and the taking of the security, by which he shall attempt, upon the happening of some event or contingency, to render the estate irredeemable and obtain an absolute ownership." *Id.* at 501 (emphasis added).

Again, this is precisely what has transpired here. The Leaseback Agreement was executed on August 23, 2011. The agreement to surrender title occurred on July 5, 2012, in open court. The 2014 Lease was executed on April 30, 2014 and the final agreement for an eviction order to enter took place in open court on October 5, 2015. All of these agreements are separate and distinct transactions. As such, they resulted in the valid transfer of possession to Mr. Shah, within the parameters of *Wilson, supra*; the law will not disturb the parties' freedom of contract on these facts.

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Third, Ms. Bonaventura, by agreeing to numerous ejectment orders has, by implication if not expressly, agreed that 1) Mr. Shah is the undisputed owner of the property and 2) that Ms. Bonaventura is not entitled to and/or is relinquishing any right to possession of the property.[5] These agreements also implicitly and, via the Verified Application, ***explicitly***, acknowledge that Ms. Bonaventura has breached the previous settlement agreements and the 2014 Lease. The court would reiterate that the Verified Application explicitly acknowledges the landlord/tenant relationship.

Moreover, even were the court to revisit the merits of the Verified Application and determine that all prior agreed eviction orders which predate its filing should be held for naught, the court cannot overlook the settlement agreements made thereafter. The court would reiterate that Ms. Bonaventura was present in court when the final Agreed Eviction Order of October 5 was entered. Thus, this leads inevitably to the doctrine of judicial estoppel. See *Wabash Grain, Inc. v. Smith*, 700 N.E.2d 234, 237-238 (Ind.Ct.App. 1998).

As was stated in *Wabash Grain*:

"judicial estoppel prevents a party from asserting a position in a legal proceeding inconsistent with one previously asserted....Unlike equitable estoppel, which focuses on the relationship between the parties, judicial estoppel focuses on the relationship between a litigant and the judicial system. The purpose of

[5] In actions for eviction, only the owner of real property, or his assignee, has standing to pursue ejectment. See *Holiday v. Chism*, 25 Ind. App. 1; 57 N.E. 563 (1900). See also Black's Law Dictionary, 517 (6th ed. 1990), which defines "ejectment," in pertinent part, as: "an action to restore possession of property to the person entitled to it. Not only must the plaintiff establish a right of possession in himself, but he must also show that the defendant is in wrongful possession."

judicial estoppel is to protect the integrity of the judicial process rather than to protect litigants from allegedly improper conduct by their adversaries."

As Ms. Bonaventura has repeatedly acknowledged Mr. Shah's ownership of the property ***as a landlord***, and her lack of rights thereto ***as a tenant***, she cannot now be heard to contest these facts.[6]

Moreover, the court would offer a few words expanding and clarifying its earlier ruling denying the relief sought in the Verified Application. The 2014 Lease, which was part of the April 30 settlement agreement, was signed by Ms. Judith Bonaventura ***before*** the Verified Application was filed. As discussed in the fact section and in Footnote 3, *supra*, the court concludes that the 2014 Lease is binding upon her. As such, her execution of this Lease weighs heavily against the suggestions made in the Verified Application that she was unaware of the consequences of her actions. In simple terms, Ms. Bonaventura's argument appears akin to an "ostrich defense." See *United States v. Green*, 648 F.3d 569, 582 (7th Cir. 2011).

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Throughout these proceedings, Mr. Snow had the authority to bind his client as a matter of law. *Thompson v. Pershing*, 86 Ind. 503, 510 (1882).[7] Likewise, Mr. Michael Bonaventura, as the agent of Ms. Judith Bonaventura, had this same authority. *Maxitrol Co. v. Lupke Rice Ins. Agency, Inc.*, 924 N.E.2d 179, 183 (Ind. Ct. App 2010). While Ms. Judith Bonaventura is free to take issue with the decisions made on her behalf by her attorney and/or her agent, she cannot escape the binding effect of the agreements into which they entered. *Id.*

In *Thompson*, our Supreme Court held:

"An Attorney may without express authority, bind his client by agreement that judgment may be taken against him, and that, too, though the Attorney knows that his client has a good defense to said action. If [the Attorney] acts contrary to the express directions of his client, or to his injury, the client must look to the Attorney for redress."

[6] Nowhere is this more clear than in the Verified Application, wherein Ms. Bonaventura acknowledges the landlord/tenant relationship and her lack of rights to the premises. Moreover, it is devoid of any claim to equity in the home.

[7] While it may have been the case that communications had broken down between Judith Bonaventura and her attorney and Judith Bonaventura and her brother, it is clear that she had adequate notice of the proceedings and acquired Mr. Snow's representation or, at the least, acquiesced thereto since the commencement of suit. This is underscored by her presence at the October 5, 2015 hearing in which the final Agreed Eviction Order was entered.

Thompson remains good law to this day, as was explained in *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1306 (Ind. 1998):

> "The reason behind this rule stems from the setting of an in-court proceeding and the unique role of an attorney-agent in that setting. Proceedings in court transpire before a neutral arbiter in a formal and regulated atmosphere, where those present expect legally sanctioned action or resolution of some kind. A rule that did not enable an attorney to bind a client to in-court action would impede the efficiency and finality of courtroom proceedings and permit stop-and-go disruption of the court's calendar."

And, once again, the final settlement agreement (the Agreed Eviction Order of October 5, 2015) was entered into by Messrs. Schuster and Snow, with Ms. Bonaventura's full knowledge and consent.

Both the doctrine of judicial estoppel and an attorney's ability to bind his client during in-court hearings rest upon the bedrock principal that the integrity of judicial proceedings must be maintained. Given Ms. Bonaventura's conduct throughout this case, the court cannot, in good conscience, allow her to change course now.

As a final alternative rationale for this court's ruling, the court is satisfied that, throughout this proceeding, it has retained jurisdiction to enforce the parties' numerous settlement agreements, regardless of the status of this court's subject matter jurisdiction. That is, once the parties entered into a settlement agreement, it is that "contract" over which the court always retains jurisdiction to enforce. See *Germania v. Thermasol, Ltd.*, 569 N.E.2d 730, 732 (Ind.Ct.App. 1991).[8] Thus, in this context, the specific rights sought to be enforced by Mr. Shah are those under the settlement agreement(s), and not of the Leaseback Agreement, were it to be shown that the Leaseback Agreement is properly considered a mortgage.

For all of the reasons set out above, Ms. Bonaventura's Motion to Dismiss Eviction Pursuant to 12(B)(1) and to Stay all Prior Orders is DENIED.

The Lis Pendens Issue

The court turns now to the Lis Pendens. There was some confusion regarding this pleading during the hearing.[9] Regardless, the court now orders it STRICKEN. To be clear, the court acknowledges that title to real estate cannot be quieted in a small claims action. However, by the same token, it cannot be clouded in one either. Filing this document in a small claims proceeding was, thus, improper.

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[8] At no time has this case been dismissed with prejudice.

[9] There was a suggestion that the Lis Pendens was not filed in the case at bar. However, this belief was in error.

Damages, Law of the Case and Res Judicata

The issue of damages remains outstanding. At request of either party, this matter will be scheduled for a damages hearing. However, the court acknowledges that damages may exceed the small claims jurisdictional limit of $6000.00. Moreover, Ms. Bonaventura may still attempt to claim a right to monies via any right to equity[10] in the property she may have had prior to her surrender of the title and her execution of the 2014 Lease. In light of these potential issues, the court may entertain a motion to transfer to a court of general jurisdiction, by either party, as to the issue of damages. Moreover, the court would note that there are no mandatory counterclaims in small claims proceedings. *Buckmaster v. Platter*, 426 N.E.2d 148 (Ind.Ct.App. 1981). However, upon transfer to a court of general jurisdiction, that would no longer be the case as the Indiana Trial Rules would then become applicable.

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Nonetheless, in light of the fact that this matter may well finally be resolved in another court as well as Ms. Bonaventura's concern regarding res judiciata vis-à-vis a declaratory judgment action to construe the parties rights under the Leaseback Agreement, and taking into consideration the likelihood that there may be additional, separate litigation between the parties in the future, this court would add the following:

Upon transfer of this matter to a court of general jurisdiction, this case would be assigned a new cause number and a new judge. However, it would remain the "same" case, as a matter of procedural history.[11] In light of this, the law-of-the-case doctrine is applicable.

Our Supreme Court discussed the distinction between res judicata and the law of the case doctrine in *State v. Lewis*, 543 N.E.2d 1116 (Ind. 1989):

> "In 1922, the United States Supreme Court stated that 'there is a difference between [adherence to the law of the case] and *res judicata;* one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission.' More recently, that Court stated that: 'the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power." A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" (Internal citations omitted).

Furthermore, the considerations governing the "binding" nature of a court's prior rulings in a case seem equally applicable at the trial level as they do at the appellate level. Those considerations (in the appellate context) were addressed in *Am. Family Mut. Ins.*

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[10] See *Hoang*, supra.

[11] One might think this goes without saying, however, this court has repeatedly had to reject the argument that a small claims case transferred to the Plenary Docket is a separate and/or different proceeding.

Co. v. Federated Mut. Ins. Co., 800 N.E.2d 1015 (Ind.Ct.App. 2004), wherein the Court of Appeals held:

> "While the purpose of the doctrine is not to foreclose legitimate appeals of issues not previously decided, it should be invoked in the interests of judicial economy and prompt dispensation of justice to preclude the promotion of potentially endless litigation and appeals…
>
> In general, facts established at one stage of a proceeding, which were part of an issue on which judgment was entered and appeal taken, are unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage. Even if the judgment is erroneous, it nevertheless becomes the law of the case and thereafter binds the parties unless successfully challenged on appeal. All issues decided directly or by implication in a prior decision are binding in all further portions of the same case."

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Thus, given that, even after transfer this matter would remain the same case for our purposes, the newly-assigned judge would have the same discretion to review the rulings made here as if they were his or her own prior rulings. However, until and unless the new judge altered or vacated the previous rulings, the parties would remain bound by them.

As for new, separate litigation between the parties in the future, Small Claims Rule 11(F) controls. Although 11(F), on its face, would appear to severely limit the res judicata affect of small claims judgments, the case law makes clear that this is not the case. In fact, Small Claims Rule 11(F) acts as a complete bar to relitigation by a party of the same cause of action that was previously adjudicated in a small claims proceeding. However, the Rule does not bar the filing of independent actions which could be construed as counterclaims or affirmative defenses to the original small claims action that were not actually litigated. See *Johnson v. Anderson*, 590 N.E.2d 1146, 1149-1150 (Ind.Ct.App.1992); citing *Cook v. Wozniak*, 500 N.E.2d 231 (Ind.Ct.App. 1986) aff'd 513 N.E.2d 1223 (Ind. 1987). See also *In the Matter of Ault*, 728 N.E.2d 869 (Ind. 2000).

For example, in *Johnson*, Mr. Anderson had previously sued Ms. Johnson, in a small claims action for breach of contract. Although Ms. Johnson could've counterclaimed asserting that Mr. Anderson had violated the Deceptive Consumer Sales Act, she did not, nor did she attempt to raise this statute as an affirmative defense. Judgment entered against Ms. Johnson. After paying the judgment, she then filed suit in Superior Court against Anderson for violating the Deceptive Consumer Sales Act. The trial court dismissed her case, asserting that the small claims judgment was res judicata. The Court of Appeals reversed, holding that even though Johnson's claim could've been raised in the small claims action, she was not barred from doing so now in a separate lawsuit.

However, in *Cook*, the Wozniaks had earlier sued Cook in a small claims action involving a car crash, seeking $2000.00. They sought purely property damages and were

awarded $1201.50. Cook had filed suit in Circuit Court regarding the same collision. The Wozniaks counterclaimed for property damages as well as personal injuries. The Court of Appeals ruled that the Wozniaks' counterclaim as to property damages was barred by the small claims judgment; that portion of their counterclaim regarding personal injury, which was not previously litigated, was not barred.

Thus, the lesson which the court gleans from these cases is that the issue that must be addressed in subsequent suits between the parties regarding the same subject matter is whether the new claim or defense was actually litigated in this suit, not whether it could have or should have been litigated in this suit.

CONCLUSION

One final note. The court is not unsympathetic to Ms. Bonaventura's plight. However, it appears that her grievance is properly with her brother, and not Mr. Shah.

Pursuant to Indiana Trial Rule 54(B), this order is final and appealable; there is no just reason for delay. Accordingly, the court directs entry of judgment on all issues resolved herein.

SO ORDERED

MICHAEL N. PAGANO
MAGISTRATE, DIVISION III

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