SIXTH DIVISION
March 25, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CLARA F. AZAMIEFAKHRIE, Plaintiff-Appellant, v. MOHAMMED AYOOB ALI; Impac Funding Corp. d/b/a Impac Lending Group, a California Corporation; Countrywide Home Loans, Inc., a New York Corporation; and Bankers Trust Company of California N.A., as Trustee Under the Indenture Relating to IMH Assets Corp.'s Collateralized Asset-Backed Bonds Series 2001-3, Defendants-Appellees, and Ayesha Ali; Shujaad Ali; Moghda Sarwari; Rajiv Aurore, a/k/a Rajiv Arora; Brige Mohan; Bami Mohan; and Ford Motor Credit Company, Defendants.	)	Appeal from the Circuit Court of Cook County 03 CH 09386 Honorable Alexander White, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.

Presiding Justice Garcia and Justice R. E. Gordon concurred in the judgment.

O R D E R

HELD: Where plaintiff in ejectment action did not show she had valid title to Chicago residential building, defendant titleholder/possessor and his privies were entitled to directed verdict; circuit court's judgment for defendants affirmed.

Plaintiff Clara F. Azamiefakhrie commenced this suit on June 3, 2003, alleging she was the sole lawful possessor and titleholder of a 2-story, 2-flat located in Chicago's Rogers Park neighborhood, commonly known as 6438 North Campbell Avenue, even though her adult daughter fraudulently sold the property in July 2001 to investors who quickly resold it to the current occupant and purported titleholder, defendant Mohammed Ayoob Ali. Azamiefakhrie's fifth amended complaint was styled as (1) an action for ejectment with respect to Ali, his wife Ayesha Ali, and other occupants or tenants of the property, and (2) an action for declaratory judgments as to Ali, his mortgage lender, and the lender's assignee to the effect that Ali's loan documents and mortgage liens clouding her title were invalid. Azamiefakhrie made no claims against her daughter, Lida Vincent Mullen, nor any claims against the individuals and entities who participated in or profited from her daughter's purported fraud, and she did not return the funds she herself received from the sale of the property. Because other family members share the same last name, we will refer to the daughter by her first name.

Ali denied the material allegations and asserted numerous affirmative defenses, including (1) the daughter and investors were necessary parties to Azamiefakhrie's ejectment claim, (2) Azamiefakhrie reaped substantial economic benefit when the property was sold to the investors, triggering the principles of waiver and estoppel, (3) the passage of more than two years and Ali's substantial expense rehabilitating the property, triggered the principle of *laches*, (4) the sale to the investors was unassailable due to statutory protections (*see* 755 ILCS 45/2-8 (West 2000) (regarding reliance on agency) or due to the daughter's actual or apparent authority, and (5) Ali was a *bona fide* purchaser. The denials and various affirmative defenses were repeated in

separate answers filed by Ali's mortgage lender Impac Funding Corporation, d/b/a Impac Lending Group (Impac) and Impac's Bankers Trust Company of California N.A., as Trustee Under the Indenture Relating to IMH Assets Corporation's Collateralized Asset-Backed Bonds Series 2001-3. The latter two defendants elaborated, on information and belief, that Azamiefakhrie's mortgage debt to Washington Mutual Bank had been released due to the sale of the property involving her daughter in 2001. Impac's loan servicer Countrywide Home Loans was also named, denied the allegations, and alleged Ali was a *bona fide* purchaser.

A separate case involving Ali and his lender Ford Motor Credit Company was consolidated with the suit but was stayed and is not at issue here.

Azamiefakhrie's suit proceeded to a bench trial on April 7, 8, and 9, 2008. At the close of her case in chief, Ali, his mortgage lender, the lender's assignee, and the loan servicer orally motioned for a directed verdict. *See* 735 ILCS 5/2-1110 (West 2000). The judge took the motion under advisement pending preparation of the record and arguments and then proceeded to hear defendants' evidence. The judge later granted defendants' motion on December 17, 2008, without considering defendants' evidence or reconvening for closing arguments. The judge found Azamiefakhrie did not show the sale to the investors was fraudulent and held that Ali was a *bona fide* purchaser. The judge denied Azamiefakhrie's motion to reconsider, and, because the consolidated action involving Ford Motor Credit Company was still pending, entered Rule 304(a) language. 210 Ill 2d R. 304(a). On appeal from the directed verdict and denial of the motion for reconsideration, Azamiefakhrie contends that she proved her ejectment action and that the various affirmative defenses were ineffective.

We summarize the first half of the bench trial only, beginning with undisputed facts found primarily in a document executed by all the parties and tendered to the trial judge before opening statements.

Azamiefakhrie acquired fee simple title to the Campbell Avenue property on June 14, 1991. She moved into the ground-floor apartment, one of her sons moved into the top-floor apartment, and another son moved into the basement. She lived on Campbell Avenue for about nine years before moving to southern California in May 2000 to help care for her minor grandchildren. Her sons moved out before she did. The interior was doused with gasoline and lit on fire twice in October 2000 and became uninhabitable. Azamiefakhrie signed a typewritten document stating:

> "Power of Attorney
>
> I, Clara Azamiefakrie [*sic*] of Chicago, Illinois, hereby appoint Lida Mullen of Scottsdale, Arizona, as my attorney-in-fact to act for me and in my name in any and all aspects relative to my fire loss claim of 5 October and 19 October 2000 to the property located at 6438 N. Campbell, Chicago, Illinois 60645. Said Power of Attorney is applicable to but not limited to acting in my name, place and stead relative to signing contracts, settling loss agreements, signing Proofs of Loss, etc.
>
> This Power of Attorney is effective as of 5 October 2000.
>
> I am fully informed as to all the contents of this form and understand the full import of this grant of powers to my agent."

This document was drafted by Lash, Warner and Associates, Inc. (LWA), a public insurance

adjusting firm that Lida hired to help process a claim to Azamiefakhrie's insurer, Allstate Insurance Company (Allstate). The typewritten spelling of Azamiefakhrie's last name varied from the spelling used in these proceedings (omitting an "h"), but she signed her name as it was then typewritten. The document concluded with the signature and seal of a notary public in San Diego County, California, and indicated the document was subscribed and sworn to before the notary on November 6, 2000. To distinguish this document from a subsequent one, we will refer to this one as the California power of attorney. After a company related to LWA repaired the fire damage, Allstate tendered insurance proceeds exceeding $114,000, in the form of three checks made payable and mailed to Azamiefakhrie at the subject premises: one check for about $80,000 for dwelling damage, one for about $14,000 for loss of rentals or use of the premises, and one check for about $20,000 for contents damage.

Larry Warner, one of the principals of LWA and Donald Singer, the LWA insurance adjustor who was responsible for handling Azamiefakhrie's claim with Allstate, then formed a limited liability company known as North Campbell Investments, L.L.C. (NCI) which bought the subject property on July 17, 2001 for $255,000. NCI received a warranty deed bearing that date which was executed "Clara F. Azamie Fakhrie [*sic*] by Lida Mullen as her attorney in fact." The real estate closing was attended by at least four people: "the closer" David Robles, Lida, the seller's attorney Louis Carnillo who is now deceased, and the buyer's attorney Edward Shenoo.

At the closing, Lida tendered a seven-page form document entitled "Power of Attorney for Property (Illinois) *** Illinois Statutory Short Form Power of Attorney for Property." It is undisputed that the paper she brought to the table was a photocopy or facsimile only which did

not include any original printing, handwritten notation, signature, or seal, and that this document was acceptable to all the parties involved in the closing, including the title insurer. The copy in the record on appeal indicates the power of attorney was recorded in Illinois by the Cook County Recorder of Deeds on September 12, 2001, as document number 0010844775 in conjunction with a warranty deed to NCI recorded on that same date as document number 0010844776 conveying the subject property, which is identified by both its common address and PIN 10-36-429-019. The first paragraph of the form tracks the language of section 45/3-3 of the Illinois Power of Attorney Act (755 ILCS 45/3-3 (West 2000)) and states in part, "THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR 'AGENT') BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE POWERS TO PLEDGE, SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU." Below this statement are paragraphs indicating Azamiefakhrie appointed Lida "as my attorney-in-fact (my 'agent') to act for me and in my name (in any way I could act in person) [for one year beginning May 28, 2001, without any limitation on her powers]." Below this, in the signature space provided on page three for the "principal," is the purported signature of "Clara F. Azami Fakhrie." The May date and principal's signature are repeated on subsequent pages of the seven-page form. Pages three, four and five detail the broad scope of the agent's authority, and near the top of page six is the statement, "I am fully informed as to all the contents of this form and understand the full import of this grant of powers to my agent," followed by the handwritten date "5-28-01" next to the purported signature of "Clara F. Azami Fakhrie." Below this is the

statement, "THIS POWER OF ATTORNEY WILL NOT BE EFFECTIVE UNLESS IT IS NOTARIZED AND SIGNED BY AT LEAST ONE ADDITIONAL WITNESS BELOW." Below this is the handwritten date "5-28-01" next to the signature and seal of David Leyva, a notary public in Maricopa County, Arizona, followed by the handwritten date "5-28-01" next to what appears to be the signature of Ginger Dell as "witness." The final section of this page is an optional section for providing signature exemplars, and although the "agent" and "successor agent" sections are blank, what again appears to be the signature of "Clara F. Azami Fakhrie" is affixed as the "principal" who certifies that the (nonexistent) agent signatures are "correct." Additional space for specimen signatures on page seven is completed with the signatures of Lida as agent and "Clara F. Azami Fakhrie" certifying that Lida's signature is correct. These signatures are followed by the handwritten date "5-28-01" and the signature and seal of notary Leyva. We will refer to this recorded document as the Arizona power of attorney.

According to the parties' statement of undisputed facts, the NCI sale proceeds were distributed by First American Title Insurance Company as checks payable (1) to Azamiefakhrie in the respective sums of $108,289 and $14,000, (2) to Washington Mutual Bank in amount of $79,384 as repayment of Azamiefakhrie's mortgage debt, (3) to First USA in the amount of $30,000, (4) to Louis Carnillo (now deceased) in the amount of $800 for his representation as the seller's attorney, (5) to Amy Pellini in the amount of $7,000, (6) to Maria Mullen in the amount of $3,000, and (7) to Mary Lamoit in the amount of $1,500. Lida endorsed the $108,289 check to American National Bank in her capacity as her mother's attorney-in-fact in exchange for $9,000 cash for herself and a $60 charge for issuing four smaller cashier's checks: one for

$30,000 payable to Azamiefakhrie, one for $23,722 payable to Rochelle Kelly, one for $6,000 payable to Bahrarn Azami, and one for $39,507 payable to Ginger Dell. Azamiefakhrie made no property tax or mortgage payments that would have been due and payable after the July closing with NCI. The parties' stipulation specifies she "first became aware of the July closing not later than October 17, 2001."

Also undisputed is that on September 25, 2001, Ali paid $340,000 to NCI for a warranty deed to the property. He borrowed $300,000 of the purchase price from Impac and executed and delivered a mortgage to secure the loan. The parties' have stipulated, "At that time, both Ali and [Impac] had constructive notice of the [Arizona power of attorney] because [it was a publically recorded document but] neither Ali nor [Impac] had notice of any claim by [Azamiefakhrie] that she did not sign [the Arizona power of attorney]." Ali's warranty deed and mortgage were recorded with the Cook County Recorder of Deeds on October 20, 2001.

Ali testified at trial that he, his wife, and their three children had been renting an apartment in the neighborhood for about four years when he saw a for-sale-by-owner sign posted at 6438 North Campbell Avenue. He was unaware of the arson fires and knew nothing about Azamiefakhrie, her experience with the property, or her daughter. When he toured the building with his real estate agent, it was vacant, clean, and freshly painted. It appraised at $360,000, which was more than the $340,000 contract price. He first learned of Azamiefakhrie and her daughter about two years after he moved in, when he was served with process in June 2003.

David Azami, the plaintiff's son and Lida's brother, testified that on July 17, 2001 (the date the NCI-to-Ali transaction closed), Lida gave him a $6,000 check which she said was part of

the $50,000 their mother's insurer paid for the fire loss. She also said their brother Sharam/Tony who was in jail or prison for dealing drugs was receiving $30,000 toward his legal expenses, and their mother was receiving the remaining $14,000. Their mother was in Iran at the time. She went to Iran on May 20, 2001, and returned to the United States on August 1, 2001, but stayed in Escondido, California for about 3 weeks and then with David in Racine, Wisconsin, while she waited for the Campbell Avenue property to be restored so she could move back in. Every time she asked about the property, Lida would respond that the fire repairs were still in progress, until finally, David and his mother lost patience, "really got mad," and took the insurance adjustor's phone number so they could call him (Donald Singer) directly. Singer told David in mid October 2001 that the house had been sold and attorney Shenoo faxed David copies of the sale documents. Lida denied that the property had been sold and said "she never did anything like that." She faxed a letter to that effect to David and, because he had lived in Mesa, Arizona, he recognized that it was transmitted from an Arizona area code (408). Because Azamiefakhrie "can't read, she can't write, she hardly understands English," David complained on his mother's behalf to the police and other government agencies in Illinois and Arizona and then hired a private attorney to file suit. He said he could not recognize his mother's signature if he saw it, but "always," or a "majority of the time," she would just sign her name "Clara Azami or Clara F. Azami, never Fakhrie." He used the $6,000 he received from Lida to pay for a road encircling 160 acres of Arizona land that he bought in 1993, and then he gave the acreage to his mother.

Donald Singer, a licensed public adjustor, testified that he went to the property the day of the first fire to solicit business for LWA and that the neighbors put him in touch with Lida in

Arizona. Lida said the property belonged to her mother, who was either in San Diego or Iran, but regardless, she did not speak English and Lida could represent her. Singer sent or faxed adjusting and repair contracts and a power of attorney form to Lida in Arizona, and the completed documents were faxed back to LWA from an Arizona area code (408). When NCI agreed to buy the property, the title company would not accept the California power of attorney, so Lida obtained the power of attorney that was notarized in Arizona.

Azamiefakrie testified that Azamie or Azami and Fakrie were two family names and she was also known as Clara F. Azami. She could not recall when, but before the fire occurred she moved to California for more than a year to help care for her grandchildren because the youngest developed a seizure disorder. From there she took one of her periodic trips to Iran and stayed there between May 20, 2001 and August 1, 2001, as corroborated by her passport, to collect her widow's pension and cash from the sale of family real estate. Her daughter telephoned from Arizona with news about the fire damage and offered to "take care of the fire" if Azamiefakrie signed a power of attorney. Azamiefakrie could read Farsi but not English, so her daughter-in-law read the form to her before she signed it and had it notarized in California. She understood the California power of attorney to be for Lida to "take *** the insurance money and fix the house, something like that." She denied visiting Lida in Arizona or going to Arizona in 2000 or 2001, signing papers in Arizona in 2000 or 2001, or signing papers in Iran in 2000 or 2001 that were "about [the] house." She did not, however, specifically deny or admit to signing the Arizona power of attorney. A friend of her son Tony called to say the house was for sale, and in disbelief, Azamiefakhrie went to the property, saw the for-sale sign, and called her daughter

about it. Lida said the sign was for the company that was fixing the house. Azamiefakhrie "grew tired" waiting for the repairs to be finished, so Lida gave her the telephone number for the company that was fixing the house, and then David took the information and told her the house had been sold. When Azamiefakhrie, her son David, and her son Tony received $50,000 in sale proceeds, she believed the funds were insurance money.

Edward G. Shenoo testified that he was the buyer's attorney in the property sale to NCI. He lacked the expertise to recognize whether the Arizona power of attorney was valid, so he left that determination to the title company. Looking at a photocopy of a facsimile or photocopy, he acknowledged that one of the notarized pages included principal and witness signatures, but the blank line above, where the person's name would have been spelled out, was blank or the line was "partly missing, [and had been] whited out *** [or] whatever happened to it." Similarly, on another notarized page bearing the same date, all the information was filled in, with the exception of a line for the principal's name, which was left blank. When shown additional copies of what appeared to be the same two pages, Shenoo acknowledged that the blank lines had been filled in. It was unclear from Shenoo's testimony how these documents were connected to the NCI sale and at one point the defense attorney objected on the basis of relevance because at least one of the pages was not recorded. The court responded, "I will allow it for whatever weight there is." Although we have surmised that Shenoo was testifying about the last two pages of the recorded Arizona power of attorney, it remains unclear where Azamiefakhrie obtained the other versions of these documents, and, thus, why they are relevant. On cross examination, Shenoo said Azamiefakhrie was represented at the closing by Lida and attorney Carnillo. Shenoo

was regularly involved in Illinois real estate transactions and recognized the forms as the ones that were customarily used. He sent the forms to the title company prior to the closing because he wanted to ensure that his client, NCI, would receive good title and title insurance. The title company rejected one set of power of attorney forms but approved a subsequent set. He deferred to the title company's expertise in this regard. At the closing, NCI received a warranty deed of good title, and when NCI sold the property to Ali, it executed a warranty deed of good title, rather than a quitclaim.

David Robles testified that he was a senior escrow officer with First American Title, a notary public, and the closing officer on the sale to NCI and the sale to Ali. Robles participated in hundreds of closings per year and had no recollection of the one at issue. He acknowledged that some of the power of attorney forms he was shown included blank lines for the signators' names and that some of the dates were unclear, and that if he were notarizing the documents he would have filled in the blank lines. Also, one of the recorded powers of attorney spelled the seller's name as "Azamifakhrie" rather than "Azamiefakhrie," and if Robles had noticed the discrepancy at the time he would have asked that it be "corrected" so that "the chain of title is as perfect as possible." However, a title officer at First American Title, Chris Kaufman, reviewed and approved all the recorded documents. On cross examination, Robles stated that some of the blank lines on the forms were for specimen signatures that were optional and did not need to be filled in.

Chris Kaufman testified that he previously worked at First American Title as a title officer and had approved the power of attorney before the closing. He did not attend closings

and had no way of knowing that what was recorded in the sale to NCI appeared to be a faxed copy, rather than an original document. Kaufman had no formal training regarding powers of attorney and was not a notary public. If he had noticed the discrepancy in the spelling of the seller's name at the time, he would have "probably want[ed] a second opinion."

Jeffrey H. Singer testified he was a Chicago real estate broker. He evaluated the property for his brother Donald Singer and Larry Warner, found it to be in good repair, recommended an asking price of $354,900, and became the listing agent. The property went under contract shortly after it went on the market.

The testimony of Arizona residents Shirley Ann Myer and David Leyva was presented by way of evidence deposition transcripts. Myer recognized her signature and notary seal on a typewritten document dated June 8, 2001, which stated "I, Clara Azamiefahkrie [*sic*], have agreed to sell my home at 6438 North Campbell, Chicago Illinois 60645 To [*sic*] Larry Warner under *** [certain] conditions." This half-page document concludes with what appear to be the signatures of Lida and her mother. Myers' notarization is affixed to a typewritten power of attorney bearing the same date which states "I, Clara Azamiefahkrie [*sic*], hereby grant to Lida Mullen power of attorney to sign in my name, place and stead whatever documents necessary to sell the property located at 6438 North Campbell Avenue, Chicago, Illinois, including, but not limited to, any sales contracts, deeds, trust documents, bill of sale, etc. It is, however, unclear to this reviewing court why these documents became the subject of testimony and part of the record on appeal because the appellant does not explain where they came from and neither one is the form contract in which NCI agreed to purchase the Campbell Avenue property or the power of

attorney used in the sale to NCI. Myer testified that her notary journal indicated she notarized Lida's signature on multiple documents on June 8, 2001, but not her mother's signature, and that the documents she notarized were not powers of attorney. Leyva acknowledged that his signature and notary seal appeared on the Arizona power of attorney. His notary journal had entries for Lida and Ginger Dell for powers of attorney on June 27, 2001, but not for Lida's mother. The journal was no longer in his possession, only a copy of the pages for June 27, 2001, and he had not reviewed the journal for other entries for Lida, Ginger Dell, or Lida's mother before he returned the book to the company that employed him in 2001. That company no longer existed and the journal was either with a different company or had been destroyed after the statutory retention period. Leyva's brother would sometimes deal with customers and then bring their document and identification to Leyva to complete the notarization. Also, at the time, perhaps three or four of Leyva's co-workers were notaries. Because Myer and Leyva were not qualified as handwriting or document experts their opinions regarding handwriting and possible alterations to the documents were barred by the trial judge pursuant to a motion *in limine* and have been disregarded by this appellate court.

The Code of Civil Procedure sets out the standard applicable in a bench trial when a defendant moves for directed verdict at the conclusion of the plaintiff's case, and states that "[i]n ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence." 735 ILCS 5/2-1110 (West 2002). According to the supreme court, the trial judge should engage in a two-step analysis. *Prevendar v. Thonn*, 166 Ill. App. 3d 30, 34, 518 N.E.2d 1374, 1377 (1988), citing *Kokinis v. Kotrich*, 81

Ill.2d 151, 155, 407 N.E.2d 43, 45 (1980). The trial judge must first determine whether the plaintiff has presented at least some evidence on every element essential to her cause of action. *Kokinis*, 81 Ill. 2d at 45, 518 N.E.2d at 1377. If the plaintiff has failed in her burden to make out a *prima facie* case, the motion should be granted and judgment entered in favor of the defense. *Prevendar*, 166 Ill. App. 3d at 34, 518 N.E.2d at 1377. If the judge rules that the plaintiff has failed to present a *prima facie* case as a matter of law, the standard of review is *de novo*. *People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 275-76, 786 N.E.2d 139, 148 (2003). However, if the judge determines the plaintiff has made out a *prima facie* case, the judge, as the finder of fact, must then weigh the plaintiff's evidence as specified in the statute. *Kokinis*, 81 Ill. 2d at 155, 407 N.E.2d at 45. "This weighing process may result in the negation of some of the evidence necessary to the plaintiff's *prima facie* case, in which event the court should grant the defendant's motion and enter judgment in his favor." *Kokinis*, 81 Ill. 2d at 155, 407 N.E.2d at 45. If there is sufficient evidence after the weighing process to establish the plaintiff's cause of action, the judge should deny the motion and proceed with the trial as if the motion had not been made. *Kokinis*, 81 Ill. 2d at 155, 407 N.E.2d at 45. In weighing the evidence, the judge must consider all of the evidence, including any favorable to the defendant, determine the credibility of the witnesses, draw reasonable inferences from their testimony, and generally consider the weight and quality of the evidence. *Kokinis*, 81 Ill. 2d at 154, 407 N.E.2d at 44. When appealed, the judge's ruling will not be reversed unless it is contrary to the manifest weight of the evidence. *Kokinis*, 81 Ill.2d at 154, 407 N.E.2d at 44. Manifest weight has been described as the weight of the evidence which is clearly evident, plain, and indisputable. *In re Estate of LaCasse*, 265 Ill.

App. 3d 847, 858-59, 638 N.E.2d 1163, 1171 (1994).

A plaintiff in an ejectment action asserts the right to possess real property against a defendant who is in actual but wrongful possession. 25 Am. Jur. 2d Ejectment §1 (2004). In order to maintain an ejectment claim, the plaintiff must show (1) she had possession of the subject premises after obtaining legal title, (2) the defendant subsequently took possession of the premises, and (3) the defendant presently and unlawfully withholds possession from the plaintiff. *Bulatovic v. Dobritchanin*, 252 Ill. App. 3d 122, 128, 625 N.E.2d 2d 26, 31 (1993); 735 ILCS 5/6-109 (West 2002) (providing a statutory action for ejectment); 25 Am. Jur. 2d, Ejectment § 18 (2004).

The plaintiff recovers possession by demonstrating the strength of her title rather than the weakness of her adversary's title. *Bulatovic*, 252 Ill. App. 3d at 128, 625 N.E.2d at 31; *Miller v. Frederick's Brewing Co.*, 405 Ill. 591, 597, 92 N.E. 108, 112 (1950) (in an ejectment action, the plaintiff must prove title to the premises and recover on the strength of her own title); *Whitham v. Ellsworth*, 259 Ill. 243, 248, 102 N.E. 223, 224 (1913) (ejectment is a possessory action, and the plaintiff, to recover, must have a title or interest in the property that entitles her to present possession).

The plaintiff will prevail if her interest in the premises is shown to be " ' higher and better' " than the defendant's claim and entitle her to present possession, but in no event can she recover property from a defendant who is in lawful possession. *Bulatovic*, 252 Ill. App.3d at 129, 625 N.E.2d at 32, quoting *Whitham*, 259 Ill. at 246, 102 N.E. at 224; *Miller*, 405 Ill. at 597, 92 N.E.2d at 112 (plaintiff will recover, if at all, on the strength of her own title and not on some

frailty in the defendant's position). Unless the plaintiff shows proof of title sufficient to entitle her to take possession of the premises, the defendant cannot be ejected from the property whether he holds title or not. *Bulatovic*, 252 Ill. App. 3d at 128, 625 N.E.2d at 32.

Although the purpose of an ejectment suit is to obtain possession of land and involves a question of which party holds legal title (*Dagit v. Childerson,* 391 Ill. 611, 614, 63 N.E.2d 706, 707 (1945)), an action for ejectment is not an action to quiet title. 28A C.J.S. Ejectment § 2, § 18 (2008). In an action to quiet title, the plaintiff remains in actual possession of the property or it is vacant and undeveloped, but there is a dispute over ownership or a cloud upon the plaintiff's title. *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill. 3d 792, 811-12, 480 N.E.2d 1312, 1327 (1985).

Our *de novo* review of the evidence indicates Azamiefakhrie failed to establish a *prima facie* case for ejectment. She established that she had possession of the subject premises after obtaining legal title and that Ali subsequently took possession of the premises; however, she failed to provide evidence that Ali was unlawfully withholding possession from her.

Citing *Resolution Trust Corp v. Hardisty*, 269 Ill. App. 3d 613, 646 N.E.2d 628 (1995), she concedes that an instrument which has been acknowledged by a notary and is in substantial compliance with the notary statute may not be impeached except in instances of fraud. Since it is presumed that all transactions are fair and honest, it is necessary to prove common law fraud by clear and convincing evidence. *Avery v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 100, 191-92, 835 N.E.2d 801, 856 (2005); *Gordon v. Dolin*, 105 N.E.2d 319, 324, 434 N.E.2d 341, 345 (1982) (a plaintiff seeking to establish common law fraud carries "a heavy

responsibility"). Citing *Krueger v. Dorr*, 22 Ill. App. 2d 513, 161 N.E.2d 433 (1959), Azamiefakhrie also acknowledges that a notarization "apparently regular in form and in compliance with the statute, cannot be overcome by the unsupported testimony of an interested party to the instrument; [and] the certificate of acknowledgment is *prima facie* proof of the execution of the instrument." The burden of proof is on the party seeking to impeach the notarization. *Krueger*, 22 Ill. App. 2d at 528, 161 N.E.2d at 440. The notarization may be overcome only by "clear, convincing, and satisfactory proof by disinterested witnesses." *Krueger*, 22 Ill. App. 2d at 528, 161 N.E.2d at 440. This is because citizens "act on the faith of that certificate, and public policy, the security of titles, and the peace of society require that in the absence of [satisfactory proof of] fraud or collusion it be entitled to full credit." *Krueger*, 22 Ill. App. 3d 513, 161 N.E.2d at 528. In a case involving a purported forged signature on a warranty deed, the supreme court stated:

> "[Evidence of fraud in a record of conveyance and notarization] must be of the clearest, strictest, and most convincing character, and that proof must come from the testimony of disinterested witnesses. *** [If courts permitted] unsupported testimony of an interested witness, who conceives that a very material gain is within his grasp, to offset and destroy the deliberate act of certification under oath *** [then cases would conclude unjustly] and create chaos in land titles." *Koepke v. Schumacher*, 406 Ill. 93, 98, 92 N.E. 152, 155 (1950).

Azamiefakhrie's trial evidence did not come close to meeting this strict standard. More specifically, Azamiefakhrie showed that her daughter Lida, purporting to act pursuant to the

Arizona power of attorney, sold the property to NCI in July 2001, but she did not establish that Lida lacked authority to execute this transaction and that the power of attorney was void because it was fraudulent.

One flaw in her case was that she never denied signing the Arizona power of attorney. She only denied visiting Lida in Arizona or going to Arizona in 2000 or 2001, signing papers in Arizona in 2000 or 2001, or signing papers in Iran in 2000 or 2001 that were "about [the] house." She erroneously cites the following for the proposition that she denied signing the Arizona power of attorney:

> "Q. Now, between the time that Lida sent you *** this power of attorney [to] California, San Diego, besides this paper, did Lida or anybody else send you any other papers and ask you to sign them and send them back to Lida or anybody, [LWA,] or Singer or anybody?
>
> A. No.
>
> Q. Did you ever talk to anybody named Singer?
>
> A. No.
>
> Q. Today Mr. Singer was here. Had you ever seen him before today?
>
> A. No.
>
> Q. Have you ever talked to a man named Warner?
>
> A. No.
>
> Q. You['ve] never seen him either, right?
>
> A. No, no.

Q. Now, were you in the state of Arizona at any time in the years 2000, 2001? At any time, did you ever go to Arizona in 2000 -- the year 2000 and the year 2001? Did you go, you know, after the fire and visit Lida?

A. No.

Q. Did you ever sign any papers in 2000 and 2001 in the state of Arizona?

A. No, I['ve] never been there.

Q. Did you ever sign any papers in 2000 and 2001 in Iran about your house?

A. No."

The plaintiff's own testimony left open the possibility that she executed the power of attorney in California, Wisconsin, or some location other than Arizona or Iran before giving it to Lida to effect the sale to NCI in Illinois

Other significant flaws in the plaintiff's case are that (1) no handwriting expert compared Azamiefakhrie's signature on the Arizona power of attorney with signature exemplars and offered an expert opinion that the signature was not Azamiefakhrie's and (2) no document expert testified that the document had been falsified or altered.

Azamiefakhrie acknowledges that when a case involves allegedly forged signatures on real estate documents, a handwriting expert is a helpful, disinterested witness. See *In re Estate of Bontkowski*, 337 Ill. App. 3d 72, 785 N.E.2d 126 (2003). She excuses her failure to call such an expert in this case by stating, "A handwriting expert's testimony is of no use where a person cannot write." This is the first time she has suggested she cannot write and this is not a contention we can take seriously when the record indicates she wrote her own name on the

California power of attorney. She testified that she could not *read* the California power of attorney because it was in English. She also testified the document was read to her before she signed it and had her signature notarized.

She argues the Arizona power of attorney is defective because it includes "blanks, erasures, white-out and write-overs." She concedes the document she takes issue with was "faxed at least once prior to recording by the recorder of deeds, the type size was reduced with loss of clarity and it is not as easy to read as a full sized, original." We can confirm that several lines on the seven-page copy in the record are blank, but these are minor, immaterial omissions within a document which is substantially complete and presumed to be valid. We can also confirm that in two instances the number "5" in the handwritten date "5-28-01" is marked with a heavier hand and partly obscure another mark, however, when this same May date appears consistently and plainly throughout the document in both numeric and text formats ("5-28-01" and "May 28, 2001"), the discrepancies have no apparent significance. Furthermore, as we pointed out above, no expert testified the document was tampered with or falsified. It is impossible for us to conclude on the basis of a copy of a copy or facsimile transmission whether there are any "erasures" or "white-out" on the notarized document. We are also mindful that Azamiefakhrie is an interested party and the disinterested witnesses who were involved in hundreds of other Illinois real estate transactions and were familiar with the customary forms acknowledged the discrepancies but did not indicate they were material variances or rendered the document inadequate. Attorney Shenoo testified that the power-of-attorney form was the customary form in Illinois real estate transactions and that he deferred to the expertise of the

independent title insurance company with regard to the out-of-state notarization. The employees of the title insurer, Robles and Kaufman, corroborated Shenoo's testimony that the Arizona power of attorney had been scrutinized and approved by their firm. Azamiefakhrie offered the testimony of the two Arizona notaries, Myers and Leyva, regarding handwriting styles and various marks on the Arizona power of attorney, but neither notary was qualified as a handwriting or forgery expert, or had an opinion that carried any weight in these proceedings. In fact, all of their opinion testimony was barred by the trial judge and is not a proper basis of any argument on appeal.

Azamiefakhrie's personal, unskilled, and biased opinion of insignificant details in a lengthy document which is presumed valid is not enough to meet her "heavy responsibility" (*Gordon*, 105 Ill. App. 3d at 324, 434 N.E.2d at 345) of showing that the sale to NCI was tainted by a fraudulent, legally deficient power of attorney and conveyance, and thus, that NCI's subsequent sale to Ali was ineffective. She failed to put on evidence that Ali was unlawfully withholding possession of the Campbell Avenue property from her. Absent proof of an essential element of the ejectment action, the defendants were entitled to a directed verdict. *Prevendar*, 166 Ill. App. 3d at 36, 518 N.E.2d at 1373.

Even assuming that Azamiefakhrie put on a *prima facie* case for ejectment, the record supports the judge's decision. Although Azamiefakhriei essentially sought to undo the sale of the property from herself/her daughter to NCI, she intentionally kept the benefits of the transaction. She did not return the funds deposited into her own bank account and she deliberately did not sue the other recipients the sale proceeds, including her mortgage lender

Washington Mutual Bank, her children David, Tony, and Lida, and other individuals and entities. She contends she was "well advised" not to sue any one who received money from the sale of her property, because bringing suit to force the return of the proceeds would "constitute ratification in and of itself." This is a peculiar argument. We fail to see how demanding the return of improperly disbursed funds would amount to ratification of their dispersal. Furthermore, the authority she cites actually works against her. In each case, a principal contended his agent delivered goods or conveyed property without authority to do so, however, the principal also demanded that the buyer pay the agreed-upon price, that is, the principal enforced the terms of the deal, and affirmed the agent's alleged unauthorized transaction. In each instance, the court indicated the principal could not have it both ways. *Karetzkis v. Cosmopolitan National Bank*, 37 Ill. App. 2d 484, 490-91, 186 N.E.2d 72, 75 (1962) (if an agent acts for his principal outside the scope of his authority, the principal is not bound thereby but may give express or implied assent and ratify the action, which is the equivalent of original authority and confirms what was originally an unauthorized and illegal act), citing *Vetesnik v. Magull*, 347 Ill. 611, 180 N.E. 390 (1932); *Bailey v. Pardridge*, 134 Ill. 188, 27 N.E. 89 (1890). In fact, these cases could be cited for the proposition that when Azamiefakhrie did not return the $14,000 sale proceeds she received and pursue her mortgage lender, her children, and all the other recipients to return the sale proceeds they pocketed, she effectively ratified the sale from herself/her daughter to NCI. See also *Krueger*, 22 Ill. App. 2d at 527, 161 N.E.2d at 439-40 (the principal that where a signature is forged or made without authority is not a relevant principal where the note has been ratified). Furthermore, her failure to make mortgage and real estate tax payments that would

have been due and payable after the sale to NCI is another form of ratification. Her nonpayments legitimized the transaction.

Given these conclusions, we do not reach the parties additional contentions. Since Azamiefakhrie has failed to meet her burden of proving her ejectment suit and because she cannot recover property from one who is in lawful possession (*Bulatovic*, 252 Ill. App. 3d at 129, 625 N.E. 2d at 32), we affirm the trial judge's decision.

Affirmed.