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CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

TRANIN INVESTMENT COMPANY;)
LOUIS D. PACK, FLORENCE G. PACK AND)
JAY A. PACK, CO-TRUSTEES OF THE STEVE)
S. PACK TRUST; ROBERT A. BERNSTEIN;)
HERBERT M. KOHN; AND)
ROBERT G. HUDSON,)

Plaintiffs,)

v.)

IPC RETAIL PROPERTIES MANAGEMENT,)
INC.; NORMANDIE VILLAGE)
ASSOCIATES, L.P.; and LYNN ALLEN,)

Defendants.)

COPY

Case No. 07 CV 1260

Pursuant to Chapter 60
Kansas Statutes Annotated

**JOURNAL ENTRY ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT ON DAMAGES**

NOW on this 14th day of January, 2010, this matter comes before the Court on Defendants' Motion for Summary Judgment on Damages. Plaintiffs appear by and through their counsel, John Terry Moore of Moore Martin L.C., Greer S. Lang, and Leonard Rose of Lathrop & Gage L.C. Defendants appear by and through their counsel, Amy Fellows Cline of Triplett, Woolf & Garretson, LLC and Bobby Pryor of Pryor & Bruce. There are no other appearances.

WHEREUPON, the Court, having reviewed the submissions of counsel and considered counsel's oral arguments, makes the following findings of fact and conclusions of law:

1. Based upon the pleadings, deposition testimony, answers to interrogatories, attached exhibits, and arguments presented, the Court finds there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law on all of the claims set forth by Plaintiffs, except for the breach of contract claim asserted by Plaintiff Louis D. Pack, Florence G. Pack and Jay A. Pack, Co-Trustees of the Steve S. Pack Trust against Defendants IPC Retail Properties Management, Inc. and Normandie Village Associates, L.P.

2. The Court finds the statements of fact set forth in Paragraph 1 of Defendants' Uncontroverted Facts are uncontroverted. The Court overrules Plaintiffs' objections to Paragraph 1 of Defendants' Uncontroverted Facts.

3. The Court finds that Paragraph 2 of Defendants' Uncontroverted Facts is uncontroverted. The Court also finds the additional information provided by Plaintiffs in response to Paragraph 2 of Defendants' Uncontroverted Facts is immaterial since Plaintiffs did not set forth any facts or evidence which reveal any monetary value to the intangible benefits alleged by Plaintiffs.

4. The Court finds that Paragraphs 3 and 4 of Defendants' Uncontroverted Facts are uncontroverted.

5. The Court finds that Paragraph 5 of Defendants' Uncontroverted Facts is uncontroverted. Further, the Court overrules Plaintiffs' objections to Paragraph 5 of Defendants' Uncontroverted Facts and finds that Plaintiffs' allegations in their response to this Paragraph are immaterial, since Plaintiffs concede they would have suffered the same tax consequences if they had exercised their right of first refusal and would have had to renegotiate the parties' contract in order to avoid those tax consequences.

6. The Court finds that Paragraph 6 of Defendants' Uncontroverted Facts is uncontroverted. The Court overrules Plaintiffs' objections to Paragraph 6 of Defendants' Uncontroverted Facts. The Court finds that Plaintiffs did not have the right to purchase the Normandie Village Shopping Center (the "Retail Property") for its alleged fair market value rather than the purchase price allocated to (and paid for) the Retail Property in the sale of that property. The Court adopts the legal authority and arguments presented by Defendants in this regard and finds the legal authority presented by Plaintiffs is unpersuasive and unresponsive to their claim. Despite Plaintiffs' remotely connected, non-controlling authority, the Court finds that in order to exercise their right of first refusal, Plaintiffs would have had to pay the same purchase price as the buyer paid for the Retail Property – \$9.5 million – if they had exercised any right of first refusal.¹

7. The Court finds Paragraph 7 of Defendants' Uncontroverted Facts is uncontroverted. The Court overrules Plaintiffs' objections to Paragraph 7 of Defendants' Uncontroverted Facts. The Court finds that Plaintiffs' contention that Defendant IPC Retail Properties Management, Inc. may have renegotiated the parties' contract to allow Plaintiffs to avoid tax recapture by purchase of partnership interests instead of the Retail Property is mere speculation and is unsupported by the facts presented. Furthermore, the Court finds that the additional information Plaintiffs provide in response to Paragraph 7 of Defendants' Uncontroverted Facts is immaterial since Plaintiffs concede they would have had to renegotiate the parties' contract in order to avoid the tax consequences they claim as damages.

¹While the existence of Plaintiffs' alleged right of first refusal was not before the Court on Defendants' Motion, the Court assumed this right existed and was held by Plaintiffs for the purpose of making its ruling on Defendants' Motion.

sale of the Retail Property through their right of first refusal. The Court also finds Plaintiffs admitted they have no evidence establishing the value of this damage claim and waived this damage claim in footnote six on page seven of their response brief.

13. Plaintiffs have not alleged any cause of action against Defendants IPC Retail Properties Management, Inc. and Normandie Village Associates, L.P. which entitles Plaintiffs to disgorgement of profits from Defendants IPC Retail Properties Management, Inc. and Normandie Village Associates, L.P. Plaintiffs offer no argument or legal authority supporting recovery in the form of disgorgement of profits from Plaintiffs' breach of contract or breach of the duty of good faith and fair dealing claims. Furthermore, Kansas law does not allow disgorgement of profits on Plaintiffs' conspiracy and aiding and abetting theories against Defendants IPC Retail Properties Management, Inc. and Normandie Village Associates, L.P.; those causes of action only permit recovery of a party's actual damages. To recognize Plaintiffs' disgorgement theory of damages against Defendants IPC Retail Properties Management, Inc. and Normandie Village Associates, L.P. would be to expand this damage theory to causes of action to which it has never been applied in Kansas and to which the Court is unwilling to now apply.

14. While Kansas law allows a party to recover disgorgement of profits as an element of damages in a breach of fiduciary duty claim under certain circumstances, Plaintiffs presented no evidence that Defendant Lynn Allen received any profits from the Sale at issue. Indeed, Plaintiffs admit Defendant Lynn Allen did not receive any such profits. Furthermore, Kansas law does not allow Plaintiffs to recover any alleged profits earned by Defendants IPC Retail Properties Management, Inc. and Normandie Village Associates, L.P. from Defendant Lynn Allen.

15. Even if a disgorgement theory of damages was legally available to Plaintiffs, there are no profits proximately caused by the complained-of action. Plaintiffs would have had to pay the same purchase price as the buyer allocated to (and paid for) the Retail Property – \$9.5 million – if they had exercised their purported right of first refusal. Therefore, Defendants did not earn any profit out of the actions they took which Plaintiffs allege resulted in a denial of Plaintiffs' alleged right of first refusal.

16. Even were Plaintiffs entitled to recover Defendants' alleged profits, the evidence they have submitted in support of such alleged profits does not prove with reasonable certainty the amount of Defendants' alleged profits. Plaintiffs offer no evidence of the amount the Buyer would have been willing to pay for the Retail Property independent of the other properties included in the sale. Without any evidence of such valuation, market value is insufficient to determine Defendants' benefit. This failure by the Plaintiffs to prove their damages with reasonable certainty independently precludes them from recovering such damages.

17. This Court's factual findings and legal conclusions mentioned in paragraphs 9-16, above, apply equally to Plaintiffs' claims for damages in the form of disgorgement of Defendants' alleged profits (including "the difference between the fair market value of the property on December 15, 2005 (\$6,300,000 to \$7,200,000) and the purchase price (\$9,500,000) – \$2,300,000 to \$3,200,000" and "the amount by which the total purchase price for the five properties (\$94,000,000) exceeded the fair market value of those properties or, the amount by which the purchase price exceeded the next best offer for each such property when the properties were sold in December 2005"). Kansas law does not support Plaintiffs' recovery of such damages against Defendants, and Plaintiffs have failed to provide sufficient evidence establishing these forms of damages with reasonable certainty.

18. The Court finds the damages claimed by Plaintiff Tranin Investment Company, Plaintiff Robert Bernstein, and Plaintiff Louis D. Pack, Florence G. Pack and Jay A. Pack, Co-Trustees of the Steve S. Pack Trust in the form of taxes incurred on the recapture of previously reported losses are not legally recoverable because these Plaintiffs would have incurred the very same losses if they had exercised their right of first refusal and purchased the Retail Property. Plaintiffs' claim that Defendants may have renegotiated the parties' contract to allow these Plaintiffs to avoid tax recapture by purchase of partnership interests instead of the Retail Property is not credible and not supported by the facts presented. The Court further finds that it would not constitute a violation of the duty of good faith and fair dealing for Defendant IPC Retail Properties Management, Inc. to refuse to renegotiate the parties' contract to include a provision not contained therein and which Plaintiffs had knowingly failed to negotiate as a provision into the contract at the time of entering into the agreement.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that Defendants are entitled to judgment as a matter of law on all of the claims asserted by Plaintiffs except the breach of contract claim asserted by Plaintiff Louis D. Pack, Florence G. Pack and Jay A. Pack, Co-Trustees of the Steve S. Pack Trust against Defendants IPC Retail Properties Management, Inc. and Normandie Village Associates, L.P. Further, because no claims remain against Defendant Lynn Allen, she is dismissed from this action.

IT IS SO ORDERED.

TIMOTHY HENDERSON

HONORABLE TIMOTHY H. HENDERSON

SUBMITTED BY:

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