

Coastal Ventures, et al.,

Plaintiffs

v.

**DECISION AND JUDGMENT**

Alsham Plaza, LLC, et al.,

Defendants

This matter was heard on the parties' Pleading by Agreement on January 7, 8, 9, 12 & 15, 2009. Attorney Fred Badger represented the Plaintiffs. Attorney Charles Gilbert represented the Defendants.

In this action, the parties seek a declaration of certain rights under the terms of a written agreement to which they are parties regarding the sale of business property in Columbia, Maine. The parties also seek to recover damages for the alleged breach of the agreement. Defendants further contend that they sustained damages as the result of misrepresentations that were purportedly made before the sale of the property.

After consideration of the evidence, the Court finds as follows:

Findings of Fact

1. Plaintiffs Jane and William Bush are the sole shareholders of Plaintiff Coastal Ventures.
2. In 1984, Coastal Ventures purchased property known as the four corners shopping center on Route 1 in Columbia, Maine.
3. The shopping center included a gas station, a grocery store, a clothing store and a hardware store.

4. While Coastal owned the shopping center, Plaintiffs sold cigarettes, cleaning supplies and pet supplies at the hardware store.

5. The water for the gas station was supplied by a well on Plaintiffs' property on the opposite side of Route 1 from the gas station. In 2006, Plaintiffs capped the existing well, and had a new well drilled on the same property. The gas station's water was supplied by the new well.

6. In 2000, Plaintiffs Jane and William Bush determined that eventually they would like to sell the shopping center, or at least a portion of the shopping center.

7. In late 2005 or early 2006, Plaintiffs Jane and William Bush contacted Scott Christopher, a commercial real estate broker in the area, to discuss the possible sale of the shopping center. As the result of those discussions, the Plaintiffs and Mr. Christopher entered into an agreement by which Mr. Christopher would attempt to sell the shopping center.

8. From 2004 through 2006, Defendant Basil Soukarieh looked at a number of supermarket-type stores for possible purchase. As part of his search, through an internet listing, Defendant Soukarieh, who at the time was residing in Connecticut, became aware that the shopping center was for sale. Defendant Soukarieh had prior experience in the supermarket business outside the state of Maine.

9. In June 2006, Defendant Soukarieh traveled to Columbia, Maine, to look at the shopping center. At that time, although he did not introduce himself to the owners of the shopping center, he visited the stores of the shopping center. He also visited Elmer's, a grocery-type store that is located across from the supermarket.

10. Upon returning to Connecticut, Defendant Soukarieh contacted Mr. Christopher to express interest in the shopping center and the supermarket in particular.

11. During his conversations with Mr. Christopher, Defendant Soukarieh requested certain financial information about supermarket. After Defendant Soukarieh signed a confidentiality agreement, Defendant Soukarieh received the requested financial information and a floor plan for the supermarket.

12. Defendant Soukarieh, and his business partner, Greta Yazbec, a certified public accountant, reviewed the financial information. After that review, Defendant Soukarieh informed Mr. Christopher that he wanted to meet the owners and discuss the possible purchase of the supermarket.

13. On the day on which Defendant Soukarieh wanted to meet with the owners (Jane and William Bush), because Plaintiffs Bush had plans to travel out of state on personal business, the parties agreed to meet at the supermarket at 7 a.m.

14. At various points during the meeting, Plaintiffs Jane and William Bush, Defendant Soukarieh, Greta Yazbec and Mr. Christopher were present. At the start of the meeting, Defendant Soukarieh was provided with a tour of the property. When Defendant Soukarieh decided to make a formal offer to purchase the supermarket and possibly other parts of Plaintiffs' business, the parties retired to separate locations, and Mr. Christopher served as an intermediary for the negotiations.

15. As the result of the negotiations in July 2006, Defendant Soukarieh and Plaintiff Coastal Ventures, through its principals, Plaintiffs Jane and William Bush, entered into a contract for the sale of a portion of the shopping center. In particular, in consideration for the payment of \$1.725 million, Plaintiff Coastal Ventures agreed to transfer to Defendant Soukarieh the real estate on which the shopping center is located, excluding the real property on which the gas station is located. According to the agreement, Plaintiff Coastal Ventures was also to convey to Defendant Soukarieh the supermarket business and the clothing store business, both of which businesses the Plaintiffs had been operating on the property to be transferred to Defendant Soukarieh.

16. The parties included a non-competition term in the agreement that they signed in July 2006. Subsequent to the execution of the initial agreement, the parties executed a separate "Non-Compete Agreement". Paragraph 12 of the Non-Compete Agreement provides, "[t]his Agreement shall inure to the benefit of and be binding upon the Parties and their respective heirs, personal representatives, successors, and assigns."

17. Initially, the parties agreed to close the sale on September 29, 2006. The parties subsequently agreed to change the closing date to October 17, 2006. The closing on the supermarket actually occurred on October 19, 2006.

18. After the execution of the agreement and before the sale was closed, Defendant Soukarieh spent time in and around the businesses, including the supermarket. During this time, Defendant Soukarieh had access to additional information about the supermarket operation.

19. Subsequent to the execution of the parties' agreement, the parties retained legal counsel to assist with the completion of the sale. Initially, an attorney in Milbridge, which is located approximately 10 miles from Columbia, represented Defendant Soukarieh. He later retained an attorney who practices in Bangor.

20. Defendant Soukarieh formed two corporations to which the property and businesses would be transferred. Defendant Alsham Plaza, LLC, was to own the real estate, and Defendant Alsham Supermarket, LLC, was to own the supermarket business.

21. The parties agreed that before they could complete the sale of the clothing store business, they had to arrange for an inventory in order to determine the items that would be transferred as a part of the sale. The parties were unable to complete the inventory before the October 19, 2006, closing date.

22. Although the parties did not complete the inventory before the closing date, the parties agreed to complete the remaining terms of the sale with the understanding that \$50,000 would be held by Defendant Soukarieh's attorney in anticipation of the subsequent sale of the clothing store inventory. The parties designated \$50,000 as the amount that would be held based on the parties' agreement, which provided, "[a]lso included in the sale is the business know as Bush's Family Clothing along with all personal property used in the business and the business inventory which shall be capped at \$50,000."

23. After the closing, the parties continued their efforts to arrange for inventory of the clothing store. Plaintiffs wanted the inventory to be performed at a time that was consistent with Plaintiffs' plans for a liquidation sale in one of its other businesses (a furniture store). The parties were, however, unable to conduct the inventory in November 2006 as they had hoped. The parties continued their discussions about an inventory date through December. Although it appeared that the parties had agreed for the inventory to be conducted on January 6, 2007, Defendant Soukarieh informed Plaintiffs Jane and William Bush that he could not participate in the inventory on that date because he was out of state.

24. The inventory was never conducted. Therefore, the parties never completed the portion of the sale related to the clothing store inventory. Plaintiffs operated the clothing store until January 2007. Defendant Soukariah used the \$50,000 that had been held for completion of the sale of the clothing store inventory for other purposes.

25. One of Plaintiffs' former employees, who expected to work in the clothing store for Defendant Soukariah, set aside \$50,000 in clothing store inventory. The employee set aside inventory that she believed the clothing store would be able to sell upon transfer of the business to Defendant Soukariah. Plaintiffs sold the remaining inventory to Marden's stores for \$39,000.

26. Included as part of the sale to Defendants was an apartment that was located on the property on which Plaintiffs operated the clothing store. The parties agreed that Plaintiffs Jane and William Bush could remain in the property rent-free for one month following the sale. Defendant Soukariah did not receive the key to this property until April 2, 2007. Plaintiffs paid rent for one month after October 19, 2006.

27. At the time of the sale of the supermarket, a television set was located in the supermarket as Plaintiffs had used the television in connection with the supermarket. Plaintiffs had previously maintained the television set at the hardware store and used it in part in training exercises. Following the closing, Plaintiff Jane Bush removed the television set from the supermarket without Defendants' permission. Plaintiffs have declined to return the television set to the Defendants.

28. The parties' agreement also provided, "Buyer agrees to provide a utility easement across the subject premises to the Citgo Station to allow water service from the existing well to the Citgo Station." In 2007, under the belief that he needed a special certification in order to supply water from the well to Plaintiffs' property, Defendant Soukariah stopped the flow of water from the well to the Citgo Station.

29. Soon after Defendant Soukariah assumed ownership of the supermarket, he changed the major supplier of the supermarket's product.

30. In Machias, which is located approximately 19 miles from Columbia, Hannaford operates a large grocery store business.

31. Elmer's, which is business located across from the supermarket, sells many of the same products as are sold in the supermarket.

32. In June or July 2006, Hannaford announced a large expansion of the Bayside grocery store in Milbridge. The expansion, which was commenced before the closing of the parties' sale, was completed in March 2007.

33. Because Defendant Soukariéh believed that competition from the expanded Bayside store was having or would have a negative effect on the sales of the supermarket, Defendant Soukariéh changed some of the pricing strategy and marketing strategy for the supermarket.

34. Defendant Soukariéh's management style is different from the management style of Plaintiffs Jane and William Bush.

## Discussion

### I. Plaintiffs' Claims

#### **A. The Non-competition Agreement**

In the Pleading By Agreement, Plaintiffs seek a declaratory judgment as to their rights and obligations under the terms of the parties' non-competition agreement. In particular, Plaintiffs ask the Court to determine that the non-competition agreement does not limit the business activity in which any person or entity to which Plaintiffs sell the remaining shopping center property can engage. In other words, Plaintiffs contend, and ask the Court to declare, that the non-competition agreement does not apply to subsequent purchasers of Plaintiffs' remaining shopping center property.

The non-competition agreement provides in pertinent part that "[t]his Agreement shall inure to the benefit of and be binding upon the Parties and their representative heirs, personal representatives, successors, and assigns." (Non-competition Agreement, p. 3). When a court is asked to determine the terms of a contract and whether the contract has been breached, the court must first determine as a matter of law whether the disputed term is ambiguous. *Reliance Nat'l Indem. v. Knowles Indus. Servs. Corp.*, 2005 ME 29, ¶ 24, 868 A.2d 220, 228. "A contractual provision is ambiguous if it is reasonably possible to give that provision at least two different meanings." *Id.*

In this case, Plaintiffs maintain that the non-competition agreement is unambiguous and, therefore, the Court should not consider any evidence as to the parties' intent at the time of the execution of the agreement.<sup>1</sup> More specifically, Plaintiffs contend that the term does not restrict the way in which Plaintiffs' successors in title to the remaining shopping center property can use the property.<sup>2</sup> Rather, according to the Plaintiffs, the language is intended to require that any individual to whom Plaintiffs' personal rights and obligations are transferred or upon whom they are imposed by law must fulfill Plaintiffs' personal obligations under the terms of the non-competition agreement. Conversely, Defendants argue that by including the language, the parties contemplated that a subsequent purchaser of Plaintiffs' shopping center property would be bound by the terms of the non-competition agreement. In other words, Defendants argue for a broader interpretation of the agreement than the interpretation urged by Plaintiffs.

In the Court's view, both arguments have some merit. Consequently, the Court concludes that "it is reasonably possible to give that provision at least two different meanings." *Id.* The term is, therefore, ambiguous. "Construction of an ambiguous contract is a question of fact for the fact-finder." *Halco v. Davey*, 2007 ME 48, ¶ 9, 919 A.2d 626, 629 (citing, *Reliance v. Nat'l Idem. v. Knowles Indus. Servs. Corp.*, 2005 ME 29, ¶ 24, 868 A.2d 220, 228)

Based on the record evidence, the Court does not believe that the parties intended to include subsequent purchasers of Plaintiffs' property to be within the scope of the non-competition agreement. In fact, there is no evidence to suggest that the parties actually discussed that possibility. To the contrary, the commercial real estate broker involved in the transaction, Scott Christopher, testified emphatically that the parties did not discuss the issue, and that the parties did not agree to such a restriction.

The language of the first addendum to the sales contract, which the parties signed in July 2006, also demonstrates that the non-competition agreement was intended to be a personal obligation of the Plaintiffs, and was not a restriction that was in some way attached to Plaintiffs' property. In the addendum, the parties agreed as follows: "*Seller* as part of this Agreement shall enter into a 10

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<sup>1</sup> Plaintiffs raised the issue before trial and thus preserved the issue for the Court's consideration. The Court deferred ruling on the issue, and allowed evidence of the parties' intent subject to possible exclusion should the Court determine that the term was unambiguous.

<sup>2</sup> Presumably, Defendants maintain that the agreement's restrictions also apply to any property that Plaintiffs own within the 20-mile radius described in the agreement.

year Covenant Not to Compete for all food, supermarket, and clothing related sales within a 20 mile radius. This Covenant shall include ownership, investment, or management of any food related businesses within the territory.” (emphasis supplied) (Addendum to Contract, p. 2). In the Court’s view, this language clearly shows that the parties intended to restrict the Plaintiffs (i.e. the “Seller”) from using their expertise, experience and good will to compete with Defendants. Significantly, in both the addendum and the non-competition agreement, the parties make no reference to the restrictions applying to Plaintiffs’ remaining shopping center property.

Indeed, to include subsequent purchasers of a party’s property within the scope of a non-competition agreement would be inconsistent with the basic objective of a non-competition agreement. Generally, a non-competition agreement is designed to prevent one party from using the good will, experience and expertise that the party has developed to compete with the other party. This objective can be, and was in this case, achieved without restricting the activities of an unknown persons (i.e., subsequent purchasers) who are not parties to the non-competition agreement.

Finally, even if the Court were persuaded that the parties had intended to include subsequent purchasers within the scope of the agreement, the Court would not enforce such a broad agreement. Non-competition agreements, while enforceable, are “contrary to public policy”, and will be enforced only to the extent that they are reasonable. *Chapman & Drake v. Harrington*, 545 A. 2d 645, 647 (Me. 1988) (citing, *Lord v. Lord*, 454 A.2d 830, 834 (Me. 1983)). Construction of the term as urged by Defendants would result in a provision that is much broader than is reasonable, and would result in an unreasonable restriction on the subject property. The Court would not, therefore, enforce the agreement on subsequent purchasers even if the Court determined that the parties had intended for the restriction to attach to the property regardless of who owned the property.

Plaintiffs also ask that the Court declare that the non-competition agreement does not preclude Plaintiffs from continuing to sell certain items in the hardware store (i.e., pet supplies, cleaning supplies), which items Defendants assert are covered by the non-competition agreement. Plaintiffs sold the products about which Defendants complain in the hardware store before the parties signed an agreement for the sale of the supermarket. In that Defendant Soukariéh visited the property on more than one occasion before he signed the agreement, Defendant Soukariéh had to be aware that Plaintiffs sold the products in the hardware store. Yet, Defendants did not specifically address Plaintiffs’ hardware store sales in the non-competition agreement. Furthermore, it is not unusual for such items to be sold in hardware stores. In short, to interpret the non-competition



agreement to preclude Plaintiffs from selling any products that Defendants sell would be unreasonable. Plaintiffs' sale of the items does not violate the non-competition agreement.

### **B. The Utility Easement**

Plaintiffs argue that Defendants breached the parties' agreement when Defendants stopped the flow of water from well on their property to Plaintiffs' property on which the gas station is located. The undisputed evidence established (1) that Plaintiffs were granted an easement across Defendants' property to allow for the flow of water from the well, and (2) that Defendant Soukarieh stopped the flow of the water. Because Defendants are obligated under the terms of the parties' agreement to provide water to Plaintiffs' property, the issue is whether Defendant Soukarieh's decision to stop the flow of water constitutes a breach of contract.

According to Defendant Soukarieh, he stopped the flow of the water because he does not have the necessary certification from the State of Maine to maintain a well that serves the number of people on Plaintiffs' property. Not insignificantly, Defendant Soukarieh presented no evidence to establish that he in fact is not able to supply the water legally. If Defendant Soukarieh cannot, based on state law or regulation, supply the water, Defendants might be relieved of their obligation under the terms of the agreement. Whether Defendants would be relieved of the obligation to supply water would depend upon the extent of the burden that would be imposed on Defendants. However, on this record, the Court cannot conclude that state law or state regulation prevents Defendants from providing the water, nor can the Court conclude that obtaining the necessary certification is burdensome so as to relieve Defendants of their contractual obligation.

### **C. The Clothing Store**

In Count III of the Pleading By Agreement, Plaintiffs seek enforcement of the parties' agreement regarding the clothing store. Specifically, Plaintiffs ask the Court to conclude that Defendant Soukarieh must pay to Plaintiffs the \$50,000 that the parties agreed could be withheld at the closing pending the completion of the clothing store inventory. Because Plaintiffs assert that they maintain control of \$50,000 worth of inventory, Plaintiffs presumably would transfer the inventory to Defendants in the event the Court concluded that Plaintiffs are entitled to recover the \$50,000. In essence, therefore, Plaintiffs seek to enforce the sale of the clothing store inventory.

The record established that the parties agreed to the transfer of the clothing store, which was to include \$50,000 worth of inventory. Completion of the inventory was the only unsatisfied condition of the agreement at the time the parties' completed the remainder of the transaction in October 2006. The parties agreed to withhold \$50,000 of the purchase price, which sum was to be paid upon completion of the inventory and transfer of the inventory to Defendants. The inventory was not completed, however. Both parties share in the reason for the delay of the inventory. For example, Plaintiffs requested that the inventory be rescheduled in November 2006, and Defendants sought a postponement of the inventory that was scheduled for January 2007. Although the inventory was not conducted, the Court concludes that the parties have a binding agreement for the transfer of the clothing store, including the inventory, and that the value of the inventory to be transferred is \$50,000. Because the parties have a binding agreement and because the inventory can still be performed, the Court will enforce that terms of the agreement.

## II. Defendants' Claims

### A. Misrepresentation

Although in the Pleading By Agreement Defendants allege several instances of misrepresentation, the alleged misrepresentation as to the competition for the supermarket in the area is the sole issue on which Defendants presented evidence that could potentially give rise to liability.<sup>3</sup> If Defendants seek to establish Plaintiffs' liability through fraud, Defendants must prove by clear and convincing evidence that Plaintiffs:

(1) made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing [Defendants] to act or refrain from acting in reliance on it, and (5) [Defendants] justifiably relie[d] on the representation as true and acted upon it to the damage of the [Defendants].

*Rand v. Bath Iron Works Corporation*, 2003 ME 112, ¶ 9, (citing, *Mariello v. Giguere*, 667 A.2d 588, 590 (Me. 1995) (quoting *Guiggey v. Bombardier*, 615 A.2d 1169, 1173 (Me. 1992))).

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<sup>3</sup> Defendants' assertions that Plaintiffs provided financial statements that materially understated the operation of the supermarket or that Plaintiffs' operation of the clothing store after closing in some way constitutes a misrepresentation are unsupported on the record.

Here, Defendants rely upon a statement or statements allegedly made by Plaintiff William Bush that there was no competition in the area for the supermarket. Defendants also maintain that Plaintiffs concealed information regarding the expansion of the Bayside supermarket.

Simply stated, Defendants have failed to convince the Court that Plaintiff William Bush made any false representations regarding the competition for the supermarket. Defendant Soukarieh's assertion that Plaintiff William Bush made certain representations regarding competition is refuted by Plaintiff Bush and is largely uncorroborated. On this record, Defendants have not proven by "clear and convincing" evidence that Plaintiff William Bush made any false statements. Plaintiffs cannot, therefore, prevail on their fraud claim.

In the event that Defendants contend that Plaintiffs are liable under a negligent misrepresentation theory, Defendants' arguments similarly fail. In *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990), the Law Court adopted the §552(1) of the Restatement (Second) of Torts (1977), as the standard for negligent misrepresentation claims in Maine. Section 552(1) describes the circumstances under which a person is liable under a theory of negligent misrepresentation as follows: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." The question is, therefore, whether Plaintiffs' conduct was reasonable under the circumstances.

Preliminarily, as discussed above, the Court is not persuaded that Plaintiff William Bush made the statements upon which Defendants rely to support their misrepresentation claim. Assuming, *arguendo*, that Mr. Bush discussed with Defendant Soukarieh his view of the competition in the area, in the Court's view, the communication would constitute nothing more than Mr. Bush's opinion about the extent of the competition. The Court does not consider Plaintiff William Bush's opinion as to competition, which opinion was purportedly shared in response to Defendant Soukarieh's inquiry, to be false information as contemplated by the Restatement.

Finally, Defendants' negligent misrepresentation claim would be precluded by Defendants' negligence. As mentioned above, the primary focus of Defendants' misrepresentation claim is the

competition generated by the expansion of the Bayside supermarket. The evidence established that information about the possible expansion was in the public domain before the parties signed the purchase and sale agreement. In addition, construction on the expansion was commenced before the closing. If competition for the supermarket was of paramount concern to Defendants as they suggest, Defendants had ample time and opportunity to investigate fully the nature of the competition in the area. If they were unaware of the Bayside expansion as they claim, Defendants failed to use reasonable care in their efforts to determine the nature of the competition in the area. That is, given that the expansion was public knowledge and given that construction began before the sale of the supermarket, with reasonable effort, Defendants would have learned of the expansion. Accordingly, even if Defendants were able to establish the elements necessary to support a negligent misrepresentation claim, Defendants negligence in failing to engage in reasonable due diligence would prevent Defendants from recovering pursuant to 14 M.R.S. § 156 (2008).<sup>4</sup>

## **B. Unpaid Rent**

Defendants claim that Plaintiffs maintained possession of the apartment located on Defendants' property and the clothing store location for more than a month without paying rent. Defendants seek to recover the fair rental value of the property. The parties agreed that Plaintiffs could maintain possession of the property for one month without the need to pay rent. When the parties reached this agreement, they anticipated that Plaintiffs would conduct a liquidation sale for the clothing store during the one-month period, and thereafter the clothing store and its inventory would be transferred to Defendants. In addition, Plaintiffs represented in writing that they would vacate the apartment on November 30, 2006. (Defendant's Exhibit 30). Because the parties could not agree on a date on which to conduct the clothing store inventory, the transfer of the property did not occur and Plaintiffs did not relinquish control of the property. In fact, Plaintiffs continued to conduct business on the property until January 2007.

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<sup>4</sup> In the Pleading By Agreement, Defendants do not specifically allege a claim for negligent misrepresentation. At trial, Defendants argued that because the pleading did not distinguish between fraud and negligent misrepresentation, Plaintiffs were on notice of the negligent misrepresentation claim, and that the evidence had generated the issue. Plaintiffs objected to the Defendants' attempt to prosecute a claim for negligent misrepresentation. Because Defendants did not separately plead a claim for negligent misrepresentation, although the Court considered the claim, the Court also considered Defendants' negligence despite the fact that Plaintiffs did not raise comparative negligence as an affirmative defense. Defendants' comparative negligence was plainly generated by the evidence.

While Plaintiffs acknowledge that they remained on the property beyond the 30-day period on which the parties agreed, Plaintiffs contend that the amount owed should be reduced or eliminated due to sums owed by Defendants. Plaintiffs' argument is unavailing. The parties agreed to a 30-day rent-free period with the understanding that Plaintiffs would vacate the property at which time Defendants would have access to and use of the property. Insofar as Plaintiffs remained in control of the property until April 2, 2007, Plaintiffs are obligated to compensate Defendants for the fair rental value of the property, which the court sets at \$2,000 per month, from November 19, 2006 to April 2, 2007. Because the evidence established that Plaintiffs paid one month's rent, Plaintiffs are responsible for the rental payments from December 19, 2006 through April 2, 2007.

### **C. Conversion of Television Set**

Defendants contend that Plaintiff Jane Bush improperly removed a television set from the supermarket after Defendants assumed ownership of the supermarket. In support of this argument, Defendants note that because the television was located in the supermarket at the time of the sale, and because they were to acquire all of the contents of the supermarket at the time of the sale, they are entitled to the television set.

Under Maine law, "[t]he necessary elements to make out a claim for conversion are: (1) a showing that the person claiming that his property was converted has a property interest in the property; (2) that he had the right to possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for its return that was denied by the holder." *Withers v. Hackett*, 1998 ME 164, ¶ 7, 174 A.2d 798, 799 (citing, *Leighton v. Fleet Bank of Me.*, 634 A.2d 453, 457 (Me. 1993)).

Pursuant to the parties' agreement, the sale of the supermarket included "all personal property used in the business and business inventory which shall not be less than \$200,000 at time of closing." (Addendum to Contract, p. 1). By its own terms, the sale included personal property used in the business. The evidence established that although the television was used in Plaintiffs' other businesses, the television was "used in the [supermarket] business." Given that the television was located in the supermarket at the time of sale, Defendants could have reasonably expected the television to be included in the sale. Defendants are, therefore, entitled to the television set. Because the undisputed evidence proved that Plaintiff Jane Bush removed the television set from the

supermarket, and that Defendants have failed to return the television, Defendants have established the necessary elements to prevail on their conversion claim.

### Conclusion

Based on the foregoing analysis, the Court orders as follows:

1. The parties' non-competition agreement does not apply to any subsequent purchasers of Plaintiffs' remaining shopping center property. Plaintiffs' sale in the hardware store of pet supplies, cleaning supplies and cigarettes does not violate the non-competition agreement.<sup>5</sup>

2. Defendants shall restore the flow of water to the gas station property as soon as practicable. In the event that Defendants believe that state law or regulation constitutes an unanticipated, undue financial burden on Defendants, within 14 days of this Decision and Judgment, Defendants shall provide Plaintiffs with a written estimate of the cost of compliance. If after presentation of the written estimate of the cost, the parties disagree as to whether the cost represents an undue burden on Defendants' obligation to supply the water, the parties shall submit the issue to this Court for resolution. The Court would then decide which party shall be responsible for the cost of compliance.

3. Within 30 days of the date of this Decision and Judgment, the parties shall arrange for a valuation of the clothing store inventory currently maintained by Plaintiffs. Upon completion of the inventory, Defendants shall pay to Plaintiffs the value of the inventory, provided that Defendants shall not be obligated to pay in excess of \$50,000 for the inventory, and Plaintiffs shall transfer the inventory to Defendants. If the value of the inventory exceeds \$50,000, the excess inventory shall be turned over to Plaintiffs. If within 14 days of the date of this Decision and Judgment the parties cannot agree on the identity of a person by whom the inventory will be conducted, the parties shall notify the Court, and the Court will designate a person to conduct the inventory.<sup>6</sup>

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<sup>5</sup> Although the Pleading By Agreement does not include a specific claim by Defendants for breach of the non-competition agreement based on Plaintiffs sale of items that were allegedly within the scope of the non-competition agreement, the issue was raised as part of Plaintiffs' request for declaratory judgment. To the extent that Defendants asserted a claim for breach of the agreement, because the Court has concluded that the sale of subject items is not within the scope of the non-competition agreement, the Court finds in favor of the Plaintiffs on the claim.

<sup>6</sup> Citing the terms of the Contract for the Sale of Commercial Real Estate that the parties signed in July 2006, Plaintiffs requested reimbursement of their attorneys' fees, particularly those fees incurred in connection with

4. Judgment is entered in favor of Plaintiffs and against Defendants on Defendants' misrepresentation claim.

5. Judgment is entered in favor of Defendants and against Plaintiffs in the amount of \$6,800.04 on Defendants' claim for unpaid rent.<sup>7</sup>

6. Within 14 days of the date of this Decision and Judgment, Plaintiffs shall transfer to Defendants the television set that was removed from the supermarket.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Judgment into the docket by reference.

Date: 2/3/09

  
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their efforts to enforce the sale of the clothing store inventory. Because, as discussed above, both parties contributed to the delay in the inventory and thus the delay in the completion of the sale, the parties shall be responsible for their own attorneys' fees.

<sup>7</sup> The Court determines that Plaintiffs owe Defendants for 3 months and 14 days (December 19, 2006 through April 2, 2007).

Mailed  
2/6/09  
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2/10/09

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