

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

RICHARD N. BERKSHIRE, TRUSTEE )  
OF THE ROBERT R. ROOT AND )  
LUTHEA ANN ROOT LIVING TRUST, )  
Plaintiff, )  
v. )  
NANCEE ROOT-CUVA, )  
Defendant. )

CASE NO. CI 16 - \_\_\_\_\_

**COMPLAINT**

COMES NOW the Plaintiff, RICHARD N. BERKSHIRE, TRUSTEE OF THE ROBERT R. ROOT AND LUTHEA ANN ROOT LIVING TRUST (hereinafter, "Trustee"), and for his Complaint states as follows:

1. The Robert R. Root and Luthea Ann Root Living Trust (hereinafter, "Trust") was created on June 7, 2006 in Omaha, Douglas County, Nebraska.
2. Richard N. Berkshire became the Successor Trustee of the Trust on April 11, 2012.
3. The Trustee is a resident of Omaha, Douglas County, Nebraska.
4. Defendant Nancee Root-Cuva is a resident of Omaha, Douglas County, Nebraska.
5. That venue is proper in Douglas County, Nebraska.
6. The Trust provides for the ongoing care and maintenance of the current beneficiary of the Trust, Luthea Root.
7. Luthea Root is the mother of Defendant Nancee Root-Cuva.
8. Defendant is one of six (6) remainder beneficiaries of the Trust.

**FIRST CAUSE OF ACTION: FRAUDULENT MISREPRESENTATION**

9. Plaintiff incorporates herein Paragraphs 1 through 8 previously set forth herein and for his first Cause of Action, Plaintiff states as follows:

10. Unbeknownst to Trustee, the Trust owned a 20% interest in Middletown Properties, LLC, a Nebraska limited liability company which owned an apartment building

located at 3560 Howard Street in Omaha, Nebraska (hereinafter, "Property"). This Property was managed by the R.D. Barr Company (hereinafter, "Barr").

11. Defendant represented to Barr that she, Nancee Root-Cuva, was the trustee of the Trust.

12. Defendant's representation to Barr was intentionally false, and the Defendant knew it was false.

13. In December of 2015, Middletown Properties, LLC entered into a transaction to sell the apartment building it owned. Barr, relying upon Defendant's fraudulent misrepresentation, had Nancee Root-Cuva execute the requisite seller documents as trustee of the Trust. Defendant agreed, furthering her fraudulent misrepresentation by endorsing each document as "Nancee Root-Cuva, Trustee" for the "Robert Root and Luthea Ann Root Trust" (e.g. Seller's Settlement Statement, attached as Exhibit "A").

14. Defendant knowingly and intentionally misrepresented herself as trustee with the intent to defraud the Trust.

15. Aware the proceeds of the Property's sale would be distributed in a check to the Trust, which could not be negotiated by the Defendant, Nancee Root-Cuva next directed Barr to write the check out to "Robert Root or Luthea Root" (Email from Nancee Root-Cuva, attached as Exhibit "B").

16. Barr again relied upon Nancee Root-Cuva's fraudulent misrepresentation, and prepared a check for \$333,139.12 from the sale of the Property to "Robert Root or Luthea Root" instead of to the Trust. This check was executed by "Luthea Root by Nancee Root-Cuva POA" (Lincoln Federal check image, attached as Exhibit "C").

17. By directing the Property proceeds be directed to "Robert Root or Luthea Root" the Defendant was knowingly defrauding the Trust of its assets as neither Robert Root nor Luthea Root are proper recipients of funds belonging to the Trust.

18. Moreover, as the Defendant possesses a durable power of attorney for Luthea Root, Nancee Root-Cuva's clear intent was to direct the funds to Luthea Root simply so she could directly access the proceeds of the Property sale for her own personal gain.

19. The Trustee's attempts to recover these funds through Defendant's counsel were unsuccessful, and Nancee Root-Cuva has failed to provide an accounting of the funds she fraudulently misappropriated from the Trust.

20. As a result of Defendant's misrepresentation, Nancee Root-Cuva fraudulently received a total of \$342,600 in distributions from Middletown Properties LLC in 2015 (Middletown Properties LLC K-1 for 2015, attached as Exhibit "D"). Further profit distributions may have been fraudulently received by Defendant in 2014 as well.

21. As a result of Defendant's fraudulent misrepresentations, Plaintiff has been damaged in an amount to be established according to proof at trial.

### **SECOND CAUSE OF ACTION: THEFT BY DECEPTION**

22. Plaintiff incorporates herein Paragraphs 1 through 21 previously set forth herein and for his Second Cause of Action, Plaintiff states as follows:

23. Defendant created and reinforced the false impression with Barr that she was the trustee of the Trust with all of the authority and power inherent in that role.

24. After creating and reinforcing the false impression that Defendant was the trustee of the Trust, Nancee Root-Cuva failed to correct Barr's false impression despite Defendant's knowledge that her statements were false.

25. As a result of the Defendant's deceptive acts Plaintiff has been damaged in an amount to be determined at trial.

### **THIRD CAUSE OF ACTION: CONVERSION**

26. Plaintiff incorporates herein Paragraphs 1 through 25 previously set forth herein and for his Third Cause of Action, Plaintiff states as follows:

27. Defendant Nancee Root-Cuva, without right or privilege, maintained wrongful dominion and control over the property of the Trust.

28. By exercising that control, the Defendant wrongfully deprived the Trust and its beneficiaries the possession and enjoyment of this property.

29. Nancee Root-Cuva's wrongful retention of the Trust property has amounted to conversion.

### **FOURTH CAUSE OF ACTION: UNJUST ENRICHMENT**

30. Plaintiff incorporates herein Paragraphs 1 through 29 previously set forth herein and for his Fourth Cause of Action, Plaintiff states as follows:

31. Defendant Nancee Root-Cuva is in unlawful possession of money that belongs to the Plaintiff.

32. Specifically, Defendant has misappropriated assets belonging to the Trust in an amount to be fully determined at trial, but currently known to be at least \$342,600.00.

33. Defendant's unjust enrichment was to the detriment of the Trust, and the Trust has suffered damages for which the Defendant should be accountable.

WHEREFORE, Plaintiff prays for a judgment against the Defendant in the amount of \$342,600.00 together with interest, costs of this action, and a reasonable attorney's fee.

DATED this 27<sup>th</sup> day of September, 2016.

RICHARD N. BERKSHIRE, TRUSTEE OF  
THE ROBERT R. ROOT AND LUTHEA  
ANN ROOT LIVING TRUST, Plaintiff

By:



David J. Myers, #25639

BERKSHIRE & BURMEISTER

1301 S. 75<sup>th</sup> Street, Suite 100

Omaha, NE 68124

402/827-7000

402/827-7001 fax

[dmyers@berkshire-law.com](mailto:dmyers@berkshire-law.com)

ATTORNEY FOR RICHARD N.

BERKSHIRE, TRUSTEE OF THE

ROBERT R. ROOT AND LUTHEA ANN

ROOT LIVING TRUST

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the above and foregoing Complaint was mailed and emailed this 27<sup>th</sup> day of September, 2016, to Clarence E. Mock, [cmock@johnsonandmock.com](mailto:cmock@johnsonandmock.com), Attorney for Defendant, at Johnson & Mock, PCLLO, 307 N. Oakland Avenue, PO Box 62, Oakland, NE 68045, by depositing same in the United States mail, postage prepaid.

  
David J. Myers



**First American Title Insurance Company  
National Commercial Services**

1125 17th Street, Suite 500 • Denver, CO 80202

Office Phone:(303)876-1112Office Fax:(877)235-9185

**Seller's Settlement Statement**

**Property:** 3580, 3550 and 3564 Howard Street, 504 & 508 South 35th Street, Omaha, NE  
Lot: 8, 1, 2, 6 and 7

**File No:** NCS-750172-CO  
**Officer:** Mej Ellsworth/AH  
**Estimated Settlement Date:** 12/15/2015  
**Disbursement Date:**  
**Print Date:** 12/15/2015, 10:20 AM

**Buyer:** Deuce Retail Investors LLC  
**Address:** 999 S. Logan Street, Suite 300, Denver, CO 80209

**Seller:** Elizabeth Ann Naughton Trust; Devin A. and Catherine C. Dirkschneider Trust; Robert Rool and Lutha Ann Rool Trust; Donald J. Getz Trust dated November 5, 2012; Ray D. Barr Trust  
**Address:**

Charge Description	Seller Charge	Seller Credit
<b>Consideration:</b>		
Total Consideration		2,115,000.00
<b>Adjustments:</b>		
Security Deposits	6,140.00	
<b>Prorations:</b>		
2015 Real Estate Tax 1418740002 12/15/15 to 12/31/15 @\$21699.16/yr		1,005.94
Rents Received 12/15/15 to 12/31/15 @\$18891.00/mo	8,769.26	
<b>Commission:</b>		
Commission Paid at Settlement to The Maga Corp dba CBRE/MEGA	95,175.00	
<b>Payoff Loan(s):</b>		
Lender: Lincoln Federal Savings Bank of Nebraska		
Principal Balance - Lincoln Federal Savings Bank of Nebraska	322,096.74	
Interest on Payoff Loan - Lincoln Federal Savings Bank of Nebraska	503.27	
Filing Fees - Lincoln Federal Savings Bank of Nebraska	10.00	
Fax Fees - Lincoln Federal Savings Bank of Nebraska	10.00	
1 Day Per Diem Interest - Lincoln Federal Savings Bank of Nebraska	33.55	
<b>Title/Escrow Charges to:</b>		
Closing-Escrow Fee to First American Title Insurance Company National Commercial Services	300.00	
Overnight Delivery Service to First American Title Insurance Company National Commercial Services	20.00	
Search and Exam to First American Title Insurance Company National Commercial Services	500.00	
Policy-Extended ALTA 2006 Owner's to First American Title Insurance Company National Commercial Services	1,913.75	
Recording Releases x3 to First American Title Insurance Company National Commercial Services	81.00	
Documentary Transfer Tax-State to First American Title Insurance Company National Commercial Services	4,758.75	
<b>Disbursements Paid:</b>		
Master Lease Escrow to FATCO FBO Midtown Court LLC	10,000.00	
Cash (X To) ( From) Seller	1,665,695.62	
<b>Totals</b>	<b>2,116,005.94</b>	<b>2,116,005.94</b>

**Seller(s):**

Initials: \_\_\_\_\_

Continued From Page 1

**Seller's Settlement Statement**

**Settlement Date:**  
**Print Date:** 12/09/2016

**File No:** NCS-750172-CO  
**Officer:** Mej Ellsworth/AH

Elizabeth Ann Naughton Trust

*Elizabeth Ann Kathol, trustee*  
Elizabeth Ann Kathol, Trustee

Devin A. and Catherine C. Dirkschneider Trust

*Francine K Adams Trustee*  
Francine K. Adams, Trustee

Robert Root and Luthiza Ann Root Trust

*Nancee Ann Root-Cuva*  
Nancee Ann Root-Cuva, Trustee

Donald J. Getz Trust dated November 5, 2012

*Donald J. Getz*  
Donald J. Getz, Co-Trustee  
*Wilma J. Getz*  
Wilma J. Getz, Co-Trustee

Ray D. Barr Trust

*Ray R. Barr Trustee*  
Ray R. Barr, Trustee



From: **NRC** njkkec@yahoo.com  
Subject: **Check**  
Date: Today at 11:33 AM  
To: njkkec@yahoo.com

I need the check to be written out as Robert Root or Luthea Root. Thank you in advance Nancee Root-Cuva acting trustee. Nancee Root-Cuva

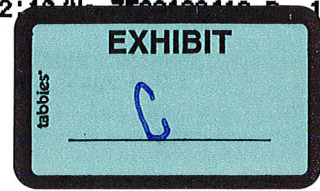
Sent from my iPad

*Nancee Root-Cuva*

FROM Lincoln Federal Omaha

(WED) JUL 13 2016 12:11/ST. 12:10 JUL 13 2016

Check View Plus

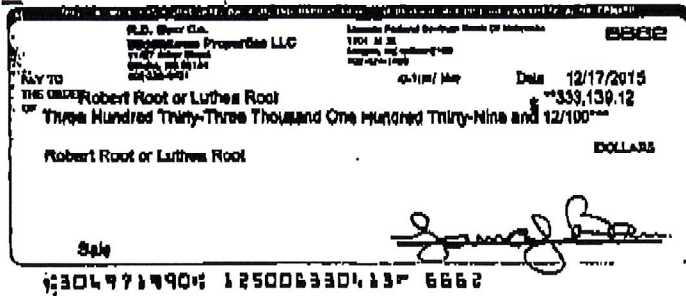


REPOSITORY NAME: 304971990-Payor-Items

DELIVERY OPTIONS: Select Delivery

Submit Select All Reset Index List

Select	Routing and Transit Number	Process Date	Amount	Account Number	Check Number	Process Control	Aux On Us	Seq Num
<input type="checkbox"/>	304971990	02/18/2016	00333139.12	0000000125006330413	000000000006662	006662	00000000000000	0000000



Vertical text on the left side of the check image, including 'PAY TO THE ORDER' and 'THREE HUNDRED THIRTY-THREE THOUSAND ONE HUNDRED THIRTY-NINE AND 12/100'.

Vertical text in the center of the check image: '007000024 02/18/16 12:11 PM 01 07/13/16'

Vertical text on the right side of the check image: 'Luther Root by [Signature]'

Electronic Endorsements	Type	R/T	Date	ISN	Truncated
	Subsequent	061000146	20160218	97187273	N
	Subsequent	091000022	20160217	008656246153	N
	BOFD	091000022	20160217	4577210464	Y





651113

OMB No. 1545-0123

PARTNER# 5 Schedule K-1 (Form 1065)

2015

Department of the Treasury Internal Revenue Service

For calendar year 2015, or tax year beginning ending

Final K-1 Amended K-1

Partner's Share of Income, Deductions, Credits, etc. See back of form and separate instructions.

Part I Information About the Partnership

A Partnership's employer identification number 47-0651187
B Partnership's name, address, city, state, and ZIP code MIDDLETOWN PROPERTIES, LLC 11427 ARBOR STREET OMAHA NE 68144-3048
C IRS Center where partnership filed return E-FILE
D Check if this is a publicly traded partnership (PTP)

Part II Information About the Partner

E Partner's identifying number 508-24-1686
F Partner's name, address, city, state, and ZIP code ROBERT ROOT, TRUST NANCEE ROOT-CUVA, TRUSTEE 441 SUNNY SLOPE AVENUE OMAHA NE 68137

G General partner or LLC member-manager Limited partner or other LLC member
H Domestic partner Foreign partner

I What type of entity is this partner? DISREGARDED ENTITY
J If this partner is a retirement plan (IRA/SEP/Keogh/etc.), check here

J Partner's share of profit, loss, and capital (see instructions): Table with columns Beginning and Ending, rows Profit, Loss, Capital.

K Partner's share of liabilities at year end: Nonrecourse, Qualified nonrecourse financing, Recourse.

L Partner's capital account analysis: Table with rows Beginning capital account, Capital contributed during the year, Current year increase (decrease), Withdrawals & distributions, Ending capital account.

M Did the partner contribute property with a built-in gain or loss? Tax basis GAAP Section 704(b) book Other (explain) Yes No

Part III Partner's Share of Current Year Income, Deductions, Credits, and Other Items

Table with 4 columns: Line number, Description, Amount, and Code. Rows include Ordinary business income, Net rental real estate income, Other net rental income, Guaranteed payments, Interest income, Ordinary dividends, Qualified dividends, Royalties, Net short-term capital gain, Net long-term capital gain, Alternative minimum tax (AMT) items, Collectibles (28%) gain, Unrecaptured section 1250 gain, Net section 1231 gain, Tax-exempt income and nondeductible expenses, Other income, Section 179 deduction, Other deductions, Distributions, Other information, Self-employment earnings.

\*See attached statement for additional information.

For IRS Use Only section containing a barcode.

47-0651187

**Federal Statements**  
**Robert Root, Trust**  
**508-24-1686**

**Schedule K-1, Line 2 - Net Rental Real Estate Income (Loss)**

<u>Description</u>	<u>Type</u>	<u>Amount</u>	<u>Disposed</u>
MIDDLETOWN APARTMENTS	MULTI-FAM RESIDENCE	\$ 9,578	

**Schedule K-1, Line 9c - Unrecaptured Section 1250 Gain**

<u>Description</u>	<u>Amount</u>
UNRECAP SEC 1250 GAIN	\$ 161,500

PARTNER# 5

<b>Schedule K-1</b>	<b>Analysis of Partner's K-1, Current Year Increase (Decrease) Worksheet</b>	<b>2015</b>
For calendar year 2015, or tax year beginning _____, and ending _____		

Partnership Name MIDDLETOWN PROPERTIES, LLC	Employer Identification Number 47-0651187
Partner's Name ROBERT ROOT, TRUST	Taxpayer Identification Number 508-24-1686

Items Included in Current Year Increase (Decrease):

SCHEDULE K ADDITIONS:

NET RENTAL REAL ESTATE INCOME/LOSS	9,578
INTEREST INCOME	2
NET SECTION 1231 GAIN/LOSS	394,129

SUBTOTAL	403,709
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TOTAL PER SCHEDULE K-1, CURRENT YEAR INCREASE (DECREASE)	403,709
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PARTNER# 5

Partner's Basis Worksheet, Page 1

2015

Schedule **K-1**

For calendar year 2015, or tax year beginning , and ending

Partnership Name <b>MIDDLETOWN PROPERTIES, LLC</b>	Employer Identification Number 47-0651187
Partner's Name <b>ROBERT ROOT, TRUST</b>	Taxpayer Identification Number 508-24-1686

Beginning of year .....				8,027
<b>Increases:</b>				
Capital contributions:	Cash		Property (adjusted basis)	
"Excess" depletion				
Income Items:	Ordinary Income			
	Net income from rental real estate activities			9,578
	Net income from other rental activities			
	Interest			2
	Dividends			
	Royalties			
	Net short-term capital gain			
	Net long-term capital gain			
	Other portfolio income			
	Net gain under section 1231			394,129
	Other income			
	Tax-exempt interest and other income			403,709
Other increases:	Transfer of capital			
	Gain on disposition of section 179 assets			
	Other increases			
Distributions:	Cash	342,260	Property (adjusted basis)	342,260
Increase (decrease) in share of partnership liabilities	P/Y		69,476	C/Y
				-69,476
<b>Subtotal</b> .....				0
Distribution in excess of partner basis .....				

<b>Decreases:</b>				
Noncap Items:	Nondeductible expenses			
	Charitable contributions			
	Foreign taxes			
Loss Items:	Ordinary loss			
	Net loss from rental real estate activities			
	Net loss from other rental activities			
	Royalties			
	Net short-term capital loss			
	Net long-term capital loss			
	Other portfolio loss			
	Net loss under section 1231			
	Other losses			
	Section 179 expense			
	Deductions related to portfolio income			
	Other deductions			
	Interest expense on investment debts			
	Section 59(a)(2) expenditures			
	Loss on disposition of section 179 assets			
Depletion				
Other decreases				
<b>End of year</b> .....				0

Note to partner: This worksheet was prepared based on partnership records. Please consult with your tax advisor for adjustments.



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DOUGLAS COUNTY, NEBRASKA

RICHARD N. BERKSHIRE, TRUSTEE )  
OF THE ROBERT R. ROOT AND )  
LUTHEA ANN ROOT LIVING TRUST, )

Plaintiff, )

VS. )

NANCEE ROOT-CUVA, )

Defendant. )

Case No. CI16-8295

044 FILED  
IN DISTRICT COURT  
DOUGLAS COUNTY NEBRASKA  
NOV 16 2017  
JOHN M. FRIEND  
CLERK DISTRICT COURT

ORDER

THIS MATTER came on for hearing on the 8<sup>th</sup> day of August, 2017 upon the Plaintiff's Motion for Summary Judgment against the Defendant. Both parties appeared through their respective counsel. Hearing was held on this matter. Exhibits 1-11 were offered by the Plaintiff and received by the Court. No evidence was offered by the Defendant. Arguments were presented by both counsel. The Plaintiff submitted a brief in support of their Motion for Summary Judgment. Defendant chose not to submit a brief or written response to said Motion. Upon conclusion of the hearing, the matter was taken under advisement. The Court now being fully advised in the premises sets forth its findings below.

Neb. Rev. Stat. §25-1332 (Reissue 2016) states that Summary Judgment "shall be rendered forthwith if the pleadings and evidence admitted at the hearing show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It is further stated within the Plaintiff's brief, "Summary Judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Day v. Heller*, 653 N.W.2d 475, 478 (Neb. 2002). "A movant for summary judgment makes a prima facie case by

producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence is uncontroverted at trial." *Durkan v. Vaughn*, 609 N.W.2d 358, 361 (Neb. 2000). "The burden of producing evidence then shifts to the party opposing the motion." *Id.*

Plaintiff argues that his evidence supports his allegations contained within his complaint. Summarily stated, the Defendant represented herself as a trustee of the trust, took the trust assets and then used the assets for her own benefit. At the hearing on this matter, the Defendant presented no evidence to challenge the Plaintiff's prima facie case of which has been received by the Court via the Plaintiff's evidence offered at this hearing. Upon review of the Plaintiff's evidence received at this hearing, it is clear to this Court that there exists no genuine issue of material fact. It is further clear by the pleadings and the evidence received by this Court that the Defendant cannot offer any evidence purporting otherwise. The Court finds that the evidence presented by the Plaintiff at its Summary Judgment hearing clearly supports its allegations contained within its Complaint as the same pertain to conversion. It being clear that the Defendant did wrongfully convert assets of the trust for her own benefit. Thus this Court finds that it is proper that Plaintiff's Motion for Summary Judgment shall be granted as a matter of law. The Court now finding that the Plaintiff's claims are uncontroverted and that the Plaintiff should be awarded a Summary Judgment as a matter of law against the Defendant.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the Court sustains Plaintiff's Motion for Summary Judgment and awards judgment in favor of the Plaintiff and against the Defendant Nancee Root-Cuva in the amount of TWO HUNDRED NINETY THREE THOUSAND FIVE HUNDRED EIGHT SIX DOLLARS AND FIVE CENTS (\$293,586.05) together with costs expended herein.

DATED this <sup>16<sup>th</sup></sup> ~~20<sup>th</sup>~~ day of November, 2017.

BY THE COURT:



Duane C. Dougherty  
District Court Judge

C: David J. Myers  
Clarence E. Mock, III

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on November 16, 2017 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Clarence E Mock III  
cmock@johnsonandmock.com

David J Myers  
dmyers@berkshire-law.com

Date: November 16, 2017

BY THE COURT:

*John M. Friend*  
CLERK

