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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000129-MR

KHAZAI RUG GALLERY, LLC — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 14-CI-004839

STATE AUTO PROPERTY &
CASUALTY INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Khazai Rug Gallery, LLC appeals an order granting summary judgment to State Auto Property & Casualty Insurance Company. State Auto refused to pay insurance claims Khazai made after Khazai suffered two alleged losses when its employees stole rugs and cash from the company. State Auto claimed the thefts fell under the "missing property" or "mysterious

disappearance" exclusion in the insurance policy that excluded reimbursement for losses that could only be proven by inventory or profit-and-loss computations. The trial court agreed and granted State Auto's motion for summary judgment.

Khazai claims the trial court erred in two ways: first, genuine issues of material fact still existed on the insurance claim; and second, the trial court prematurely granted summary judgment on its misrepresentation and bad faith/unfair claims practices allegations. Having reviewed the record and the applicable law, we hold that the trial court did not err. The insurance contract's computation exclusion is valid and applicable to the instant case because Khazai's evidence does not make a *prima facie* showing that an employee theft loss occurred. Additionally, Khazai was given sufficient time to conduct discovery and has failed to present proof or allegations sufficient to survive a summary judgment motion on its remaining claims.

We begin with a background of the relevant facts.

BACKGROUND

Khazai purchased an insurance policy to cover theft from Khazai's business, and it claims it suffered two losses due to employee theft – 79 rugs and $16,800 in cash were allegedly stolen. Khazai's president purchased the insurance policy through State Auto to cover, among other losses, losses incurred by employee theft. Khazai's president purchased the policy through agent Robert Becker, Vice President of Van Zandt, Emrich and Cary. According to Khazai's

president, he informed Becker that he had as much as $2,000,000 in inventory and large amounts of cash at the business. Becker represented that a policy with State Auto would cover employee theft losses. Based on Becker's representation, Khazai's president believed he was obtaining appropriate insurance coverage to protect Khazai's assets in the event of employee theft losses.

Khazai later allegedly suffered at least two such losses. The first alleged loss involved missing rugs. Two oriental rugs were discovered missing from the storage area, and one employee implicated a second employee as the thief. The president of Khazai confronted the suspected thief, who admitted he had stolen five rugs. He returned the rugs to Khazai. Khazai's president then reported the thefts to the police on December 2, 2013. Khazai performed an inventory over a month later, and 79 rugs were missing. No employee admitted to stealing the 79 rugs, and no video surveillance footage exists to prove the 79 rugs were stolen. The only evidence to prove their loss is an inventory computation.

The second loss occurred in mid-December, 2013. Khazai's president discovered that $800 in cash was missing from a sales desk. Surveillance footage showed that an employee had stolen the money from a drawer. Khazai's president then recalled that he had placed $16,800 in cash in his office, and when he went to check on it, he found it was missing. No surveillance footage was available to prove the cash was stolen from the office. The employee only admitted to stealing

the $800, and he paid the same in restitution to Khazai. No proof of the $16,800 loss exists other than Khazai's president's statement.

When Khazai made an insurance claim on the two losses, State Auto investigated and refused to pay on the claims because the only losses that could be proven were inventory computations. The policies Khazai had for theft specifically excluded losses when the proof of its existence or amount is wholly dependent upon an "inventory computation" or a "profit and loss computation." The policy did permit, however, that "where you establish wholly apart from such computations that you have sustained a loss, then you may offer your inventory records and actual physical count of inventory in support of the amount of loss claimed."

Khazai then filed a Complaint against State Auto on September 18, 2014. Khazai alleged four theories of recovery: misrepresentation; breach of contract; unfair claims practices; and common law bad faith. Under the misrepresentation claim, Khazai alleged that State Auto's agent misrepresented to Khazai that employee theft losses would be covered under the insurance policy. Under the breach of contract claim, Khazai alleged that State Auto failed to make payments pursuant to the terms of the policy. Under the unfair claims practices claim, Khazai alleged that State Auto failed to fulfill its obligations under the Unfair Claims Settlement Practices Act ("UCSPA"). And under the common law

bad faith claim, Khazai alleged that State Auto did not have a reasonable basis for denying Khazai's claim and acted in bad faith in refusing to pay the claim.

Almost a year later, State Auto filed a motion for summary judgment, arguing that because the only evidence of the 79 rugs being stolen is an inventory computation, and because there is no evidence that $16,800 was stolen, Khazai's alleged losses are not covered by the terms of the policy. Khazai opposed the motion substantively, and it also argued that State Auto had not addressed the misrepresentation and bad faith/unfair claims practices allegations. The trial court agreed with State Auto and granted summary judgment on all claims. Khazai timely appealed.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, we must view "[t]he record . . . in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dossett v. New York Mining and Mfg. Co.*, 451 S.W.2d 843 (Ky. 1970)). "Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Soc'y, Inc*., 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted).

Under that review, summary judgment should only be granted "when, as a matter of law, it appears that it would be impossible for the respondent to

produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

Furthermore, "[a]s a general rule, interpretation of an insurance contract is a matter of law for the court." *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 810 (Ky. App. 2000) (citing *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992)). Absent a term having an accepted, technical meaning under the law, the contract's terms are to be interpreted according to what an average person would read and understand them to mean. *Fryman for Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986) (citing *Donohue v. Washington Nat. Ins. Co.*, 259 Ky. 611, 82 S.W.2d 780 (1935)). "While ambiguous terms are to be construed against the drafter and in favor of the insured, we must also give the policy a reasonable interpretation, and there is no requirement that every doubt be resolved against the insurer." *Stone*, *supra* (citing *Kentucky Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164

(Ky. 1992); *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679 (Ky. App. 1996)).

ANALYSIS

Khazai raises two claims on appeal. First, Khazai claims the trial court erred by granting summary judgment when there still existed genuine issues of material fact. Second, Khazai claims the trial court erred by prematurely granting summary judgment on the misrepresentation and bad faith/unfair claims practices allegations. Both appellate issues fail.

I. State Auto properly refused to pay the claims pursuant to the contracts' express terms, thus the trial court correctly granted summary judgment on the breach of contract and bad faith/unfair claims practices allegations.

We first hold that the trial court properly granted summary judgment as it relates to the breach of contract and bad faith/unfair claims practices allegations because the express terms of the contracts preclude recoverable claims, and each of these allegations of recovery depend on an actionable contract claims.

Khazai had two insurance policies, one for each of its buildings. Both contracts contained the same exclusion for employee theft: State Auto would not pay claims when the proof of the loss was solely dependent on an "inventory computation" or "a profit and loss computation[.]" Only "where you establish wholly apart from such computations that you have sustained a loss, then you may

offer your inventory records and actual physical count of inventory in support of the amount of loss claimed."

Similar and identical inventory exclusion clauses have been in use by the insurance industry for more than half a century. *HCA, Inc. v. Am. Prot. Ins. Co.*, 174 S.W.3d 184, 195 (Tenn. App. 2005). They were created to address the problem of insurance claims where employers believed their employees had stolen items from their stores, but the losses could only be explained by bookkeeping that could simply be an accounting error or a product of negligence or wastage or pilferage unconnected to employee theft. Russell G. Donaldson, *Construction and effect of clause in fidelity bond or insurance policy excluding from coverage losses proved by "inventory computation" or "profit and loss computation,"* 45 A.L.R.4th 1049 (1986).

As the computations may be useful in establishing both the fact that there was a loss and to prove the amount of the loss, the key issue with these clauses is determining when, if ever, are inventory or profit-and-loss computations admitted to prove either the fact that there was a loss, or to prove the amount of the loss, or both. It appears that most courts considering the issue interpret the exclusionary clauses in their various iterations as precluding coverage for losses that are solely dependent upon inventory or profit-and-loss computations to prove the fact of the loss. *Id*. On the other hand, when the fact of the loss is proven

entirely by external evidence, then the computations may be used, if necessary at all, as proof of the amount of the loss.

In between those extremes – where the fact that a loss occurred is premised partially on computations *and* partially on other evidence – courts have diverged regarding whether the computations are admissible as proof of either the fact that there has been a loss, or the amount of the loss, or both. *Id*. *See HCA, Inc., supra* (collecting cases); and *Better Env't, Inc. v. ITT Hatford, Ins. Group*, 96 F.Supp.2d 162, 167-68 (N.D.N.Y. 2000).

Kentucky sides with permitting the computations to be used as evidence of both the fact of a loss and the amount of the loss when *prima facie* substantive evidence has been presented that there was a loss. *Kentuckiana Sales, Inc. v. Sec. Ins. Co. of New Haven*, 394 S.W.2d 744 (Ky. 1965). The facts of that case are illustrative.

There, Kentuckiana Sales suffered two alleged employee thefts while operating a redemption center for trading stamp books – a theft of merchandise and a theft of stamp books. The business operated as follows. Local retail merchants would give stamps to patrons who purchased merchandise, and the patrons could then redeem books of stamps at Kentuckiana Sales for additional merchandise. Records were kept regarding how many books of stamps were redeemed each day and what merchandise was exchanged therefore. The stamp books were then canceled and eventually burned in an incinerator. *Id*. at 746.

The store's manager believed one of his employees was stealing stamp books and merchandise. The manager counted the canceled stamp books awaiting burning and discovered that over a thousand fewer books were awaiting burning than had been redeemed. Some of the books were later recovered when a person presenting them at the store fled when he was questioned about their origin. The manager also secretly placed marks on redeemed books and determined that some books were being redeemed a second time. *Id*.

The manager then arranged for the employee suspected of being the thief to be the only person working at the store on a particular day. A search of the premises after his shift revealed that he had secreted away a blanket and coffee maker from the merchandise stock and over two hundred un-canceled stamp books. The employee later entered a guilty plea to criminal conversion charges. He also signed a statement in which he "substantially confessed to his guilt of misappropriation of the stamp books and the merchandise." *Id.* at 747.

A civil suit followed where Kentuckiana Sales sought recovery from its insurance company for the alleged losses. The results of the criminal proceeding were not admitted in the civil trial, and the employee repudiated his previous confession. *Id*.

Furthermore, due to the insurance contract's exclusion for proving losses solely off of inventory computations, the trial court did not admit Kentuckiana Sales's inventory computation for its alleged merchandise losses.

This computation lacked a "showing of loss as to any particular commodity, but there was an imbalance between the opening and closing inventories[.]" Thus, because there was no evidence aside from the computation to prove the merchandise loss, the trial court directed a verdict in the insurance company's favor on the merchandise loss claim. *Id.*

The trial court also directed a verdict in the insurance company's favor on the stamp book loss claim, albeit for different reasoning. The trial court believed there was sufficient evidence to submit to the jury the fact question of whether the books were stolen, but it did not believe that the books constituted a loss because they had no value. *Id*. at 749.

On appeal, Kentuckiana Sales claimed errors with both directed verdicts. Our Commonwealth's then-highest Court found no error with the merchandise loss claim, but reversed and remanded for a jury determination on the stamp book loss claim.

With the merchandise claim, the Court held that the only factual showing of a loss was from the inventory computation, thus there was not *prima facie* evidence of substance to sustain the cause. All other evidence that merchandise was stolen, including the criminal conviction, a default judgment against the employee, and the prior out-of-court statement, were excluded from evidence. Thus, the only evidence that merchandise was stolen was the inventory

computation, so the insurance contract's exclusion for losses proven only by inventory computations controlled. *Id*. at 748.

In contrast, the Court reversed and remanded for a jury trial on the stamp book loss claim. There was sufficient substantive evidence to make a *prima facie* factual claim for the loss outside of an inventory computation. By placing marks on the stamp books, Kentuckiana Sales had proven that some of the books that had been redeemed once were returned for a second redemption. And by having the employee work as the only clerk on a particular day, it had demonstrated that the employee had hidden two hundred un-canceled stamp books in an unused boiler. This *prima facie* showing of a loss and an attempted theft then permitted Kentuckiana Sales to use an inventory computation to demonstrate both the fact that it suffered loss and the amount of the loss. *Id*. at 746-47, 749.

Thus, in our Commonwealth, a business with an employee theft insurance contract containing the computation exclusion must present substantive evidence demonstrating a *prima facie* loss and employee theft before it may utilize its inventory or profit-and-loss computations as additional evidence of the fact that there was a loss, or as proof of the loss's value.

Applying this *prima facie* standard to the instant case reveals that the trial court properly granted summary judgment on the breach of contract and bad faith/unfair claims practices allegations. Regarding the breach of contract claims, Khazai has not put forward evidence to survive summary judgment. Khazai's

evidence that rugs had been stolen only proves that five rugs were stolen and then returned. Khazai discovered that two rugs were missing, and upon investigation, the employee who had stolen the rugs was identified and confronted. The employee admitted to stealing five rugs, and he returned all five rugs. The employee denied taking any additional rugs, and he signed a confession admitting he took only five rugs. He later entered a guilty plea to the theft. Khazai performed an inventory almost two months later and discovered that 79 rugs were missing.

Regarding the allegedly stolen cash, Khazai's evidence is similar. Khazai's office manager discovered that $800 was missing, and after reviewing surveillance footage, discovered that an employee had taken the money from a drawer. The employee later pled guilty to stealing the $800 and paid restitution to Khazai. Khazai's president then recalled he had allegedly placed $16,800 in his office desk drawer, and when he went to check on it, found it was missing. No surveillance footage was available to show it had been stolen. No employee admitted to stealing the money. And, assuming the cash was stolen, someone other than an employee could have taken it.

Thus, aside from the inventory, the evidence only establishes that five rugs were stolen and returned. And similarly, aside from Khazai's president's statement that $16,800 cash was stolen from his desk, the evidence only establishes that $800 was stolen and later paid back through restitution. These facts, even

viewed in a light most favorable to Khazai, are insufficient to make a *prima facie* employee theft case.

Khazai's facts are similar to *Teviro Casuals, Inc. v. American Home Assur. Co.*, 81 A.D.2d 814, 439 N.Y.S.2d 145 (1981). There, a clothing company suspected that one of its employees was stealing dresses. The employee was observed one day placing four dresses in a carton that he then placed into an outdoor garbage bin. The employee was caught by the police later that evening attempting to retrieve the carton from the garbage bin. The dresses were worth $20 total. The company then performed an inventory and discovered shrinkage of 2,695 garments worth $15,209 total. The company sought recompense from its insurer under an employee theft clause similar to the instant case. Following a jury trial, the company was awarded $15,209. *Id*. at 814-15.

The insurer appealed, and the New York Supreme Court reversed the judgment. Following a *prima facie* rule similar to Kentucky's, the court rejected that the company had produced sufficient evidence to overcome the contract's inventory computation exclusion:

> Even under the line of cases permitting inventory computations to prove the full amount of the loss where there is evidence of a loss due to employee dishonesty, which is apparently the majority view, we doubt that such limited evidence of employee dishonesty is legally sufficient under the exclusion clause to permit the use of an inventory computation to establish (1) that there was a loss of thousands of garments and (2) that the loss was attributable to employee dishonesty.

Id. at 816.

Khazai's allegations of employee theft are equally infirm. Both the stolen rugs and the stolen cash were singular, proven incidents where Khazai was made whole and suffered no loss. Unlike *Kentuckiana Sales*, Khazai did not perform additional investigative measures to discover a pattern of loss, nor did it establish any independent evidence that more than five rugs and $800 in cash were stolen. Where there was independent evidence aside from the inventory computations in *Kentuckiana Sales* that a fact-finder could rely upon to find that additional thefts had occurred, Khazai's sole proof that 79 rugs and $16,800 were stolen was its inventory computation. As was the case in *Teviro Casuals*, an isolated theft cannot form the *prima facie* evidence of other thefts absent some evidentiary basis other than an inventory computation.

Thus, the trial court properly granted summary judgment on the breach of contract claims. And because the bad faith/unfair claims settlement practices allegations are dependent on a valid obligation to pay an insurance contract, the trial court also properly granted summary judgment on those claims.

Khazai alleged State Auto acted in bad faith and violated the Unfair Claims Settlement Practices Act ("UCSPA"). The UCSPA applies to a "claim, [which,] as used in the statute, means an assertion of a right to remuneration under an insurance policy once liability has reasonably been established." *Knotts v.*

Zurich Ins. Co., 197 S.W.3d 512, 516 (Ky. 2006) (internal quotation marks omitted). Accordingly, assertions of bad faith that arise under the UCSPA require first and foremost that "the insurer must be obligated to pay the claim under the terms of the policy[.]" *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452 (Ky. 1997) (quoting *Federal Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844, 846-47 (Ky. 1986) (Leibson, J., dissenting)).

As shown above, there is no genuine issue of material fact regarding whether State Auto had an obligation to pay the claim under the policy's terms. Accordingly, the bad faith/UCSPA claims fail as a matter of law. The trial court thus properly granted summary judgment on these claims.

II. The trial court did not prematurely or *sua sponte* grant summary judgment on the misrepresentation or bad faith/UCSPA claims, nor did it err by granting summary judgment on the misrepresentation claim.

Khazai next argues that the trial court erred by prematurely and/or *sua sponte* granting summary judgment on the misrepresentation claim and the bad faith/UCSPA claim. Concerning the bad faith/UCSPA claim, we have reviewed the summary judgment motion filed below and find that the claim was fairly presented to the trial court and adequately addressed by both parties. Moreover, as shown above, the claim is dependent upon an obligation to pay pursuant to a contract's terms. As the alleged losses were not covered by the contract, there was

no basis for the bad faith/UCSPA claim. Thus, the trial court properly granted summary judgment on that claim.

Regarding the misrepresentation claim, we likewise find the claim was fairly presented in the summary judgment motion, as State Auto requested the action be dismissed *in toto* and argued against Khazai's allegation in its Complaint regarding misrepresentation. Khazai's response to the motion included both an argument that material issues of fact remained for the misrepresentation claim, and it also included an affidavit by Khazai's president that laid out his misrepresentation allegation. Accordingly, Khazai's argument that the trial court granted summary judgment *sua sponte* is unavailing. *See, e.g., Storer Commc'ns of Jefferson Cty., Inc. v. Oldham Cty. Bd. of Educ.*, 850 S.W.2d 340 (Ky. App. 1993).

Its argument that the ruling was premature is likewise infirm, as Khazai had over a year to conduct discovery, it was able to produce an affidavit from Khazai's president laying out his misrepresentation allegations, and it could have deposed State Auto's agent, or any other person, to further improve its claim. *See Blankenship v. Collier*, 302 S.W.3d 665, 668-69 (Ky. 2010). Thus, the trial court properly had the issue before it and was permitted to issue a substantive ruling.

Concerning the substantive legal issue, we review *de novo* whether the trial court properly granted summary judgment if, after viewing the evidence in

a light most favorable to Khazai, it would be impossible for Khazai to produce evidence at trial warranting judgment in its favor. *Steelvest*, 807 S.W.2d at 483. Review of the substantive claim requires a brief history.

Khazai's Complaint alleged that State Auto's agent represented to Khazai that the insurance covered losses due to employee theft, but that the terms of the insurance contract rendered the coverage "illusory." State Auto then, in its motion for summary judgment, addressed the "illusory" claim, noting that the insurance did cover employee theft provided there is some evidence other than an inventory computation. In response, Khazai reiterated the allegations made in its Complaint and further argued that State Auto's agent committed "fraud in the inducement" by representing that the insurance would cover losses due to employee thefts in spite of the fact that "exceptions would swallow the rule, essentially leaving the Rug Gallery bare when victimized by employee theft."

The trial court's order granting summary judgment addressed this argument that the coverage was "illusory," noting that the case law holds that when a business demonstrates through some extrinsic evidence that a loss has occurred due to employee theft, then the business may use its inventory or profit-and-loss computations to prove the extent of the loss, thus rendering the insurance not illusory.

On appeal, Khazai again argues its illusory claim – "State Auto, through its agent, made representations that it would cover losses resulting from

employee theft in order to induce Khazai to purchase a policy. However, State Auto never told Khazai that the exceptions would swallow the rule . . . ." Khazai further argues a seemingly novel claim – that State Auto's agent fraudulently concealed the inventory computation exclusion, and in so doing it induced Khazai to purchase the insurance contract.

Under either of Khazai's theories, even viewing the evidence in a light most favorable to Khazai, its pled facts cannot survive summary judgment. At best, Khazai's arguments equate to a claim that State Auto's agent did not inform Khazai about the inventory computation exclusion in the employee theft provision. Even if we assume the agent did omit to tell Khazai about the inventory computation exclusion, this claim fails as a matter of law.

Insurance contracts typically contain numerous, valid exclusions. Indeed, in Kentucky, "[r]easonable conditions, restrictions, and limitations on insurance coverage are not deemed *per se* to be contrary to public policy." *Snow v. W. Am. Ins. Co.*, 161 S.W.3d 338, 341 (Ky. App. 2004) (citing *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 802 (Ky. 1991)). These contracts with their exclusions and restrictions may be sold to customers by an insurance agent who is simply conducting a "commercial transaction for the sale of insurance." *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 63 (Ky. 2010). While so doing, insurance agents owe a standard duty of reasonable care to their clients. *Id.* This duty of reasonable care does not include a duty to advise the client unless: (1)

the agent undertakes to advise the client; or (2) the agent impliedly undertakes to advise the client. *Mullins v. Commonwealth Life Ins. Co*., 839 S.W.2d 245, 248 (Ky. 1992) (citing *Trotter v. State Farm Mut. Auto Ins. Co*., 297 S.C. 465, 377 S.E.2d 343, 347 (1988)). The implied assumption of duty arises in three circumstances: (1) the insured pays the insurance agent consideration beyond a mere payment of premium; (2) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on; or (3) the insured clearly makes a request for advice. *Mullins*, *supra* (citation omitted). It is the insured's burden to prove the insurer assumed such a duty. *Id*.

In the instant case, Khazai's president's affidavit demonstrates that the insurance agent at worst failed to advise Khazai about the inventory computation exclusion while not assuming a duty to advise Khazai about the inventory computation exclusion:

> 21. State Auto, through its agent, represented that losses occasioned by theft, including employee theft, would be covered under its policy of insurance, and represented that it would completely perform its obligations in return for payment of the stated premiums. Khazai Rug Gallery has paid all of its premiums.
>
> 22. If, at the time State Auto made said representations, I had been told of the conditions of coverage, I would not have purchased the policy in question. Instead, State Auto's representations were intended to, and did, induce me to purchase a policy of insurance for the Khazai Rug Gallery.

Based on this affidavit and the other record evidence, it is clear that the agent neither undertook to advise Khazai about the exclusion, nor did it impliedly undertake to advise Khazai about the exclusion. Accordingly, there was no duty to advise Khazai about the policy exclusion, and State Auto cannot be liable for its agent's failure to advise Khazai.

As Khazai's misrepresentation and omission claims are premised upon a failure to advise Khazai about an exclusion, those claims must fail as a matter of law. A misrepresentation claim requires "affirmative misrepresentations" and "not simply the failure to advise a potential insured" about exclusions. *Pan-Am. Life Ins. Co. v. Roethke*, 30 S.W.3d 128, 133 (Ky. 2000). Similarly, fraud by omission requires that one fail to disclose a fact for which the person had a duty to disclose. *See Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011) (comparing fraud by misrepresentation and omission claims).

As shown, it is not alleged that the agent affirmatively misrepresented that the policy did not have an inventory computation exclusion, nor is it alleged that the agent had a duty to disclose the exclusion. Thus, neither a misrepresentation claim nor an omission claim is sustainable based on the facts and allegations in the record. The trial court properly granted summary judgment on this claim.

CONCLUSION

Khazai's allegations, viewed in a light most favorable to Khazai, fail to make a *prima facie* showing that they suffered a loss due to employee theft, thus the use of inventory calculations is not permitted. Accordingly, their breach of contract, bad faith/UCSPA, and misrepresentation claims fail as a matter of law. The trial court properly granted State Auto's motion for summary judgment. It is affirmed.

ALL CONCUR.

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