Affirm in part; Reverse in part; and Remand; Opinion Filed July 18, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00458-CV

KLZ DIAMOND TOOLS, INC., Appellant
V.
TKG GENERAL AGENCY, INC., FRED CHASE AGENCY, IAT SPECIALTY, AND ACCEPTANCE INDEMNITY INSURANCE COMPANY, Appellees

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-07248

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and Richter[1]
Opinion by Justice Richter

Appellant KLZ Diamond Tools, Inc. (KLZ) challenges the trial court's Order Granting Defendants' Amended No-Evidence Motion for Summary Judgment (the Order). In seven issues, KLZ contends the trial court erred by striking its summary judgment evidence, by granting summary judgment on KLZ's claims for breach of contract, insurance code violations, deceptive trade violations, multiple damages and exemplary damages, and by dismissing its claims against defendant Fred Chase Agency. We affirm the trial court's Order in part, we reverse the Order in part, and we remand certain of KLZ's claims for further proceedings.

[1] The Hon. Martin Richter, Justice, Court of Appeals. Fifth District of Texas at Dallas, Retired, sitting by assignment.

Background

For a number of years, Nir Kamisa managed the operations of his father's business, Kamisa Construction, which sold tools used in the granite and stone industry. In March 2011, Kamisa purchased the assets of his father's business and re-named the company KLZ Diamond Tools, Inc. At that time, Kamisa took a physical inventory of everything in the company's store and warehouse.

Robbers broke into the business on July 9, 2011, and they stole a significant amount of the company's inventory. Kamisa had purchased an Acceptance Indemnity Insurance Company ("Acceptance") policy that was effective April 24, 2011, and protected KLZ from such a loss. Kamisa contacted the police and the insurer immediately. He valued the stolen property at more than $400,000.

Administrator IAT Specialty (IAT) handled the insurer's investigation of KLZ's claim, sending a series of lengthy document requests to KLZ. KLZ produced documents belonging to the company and, after obtaining a confidentiality order, documents belonging to KLZ's predecessor company. At IAT's request, KLZ's accountant met with IAT's accountant, Dennis McBay, so the two could work together to evaluate the loss. In January of 2012, IAT took Kamisa's sworn statement. Approximately a week later, Allen Pennington (counsel for IAT, and later for appellees) sent a letter to Stephen Chapman (counsel for KLZ) seeking seven more categories of documents and information, but stating, "[I]t was a pleasure to work with you and your client in person last week. I believe that last week's statement was extremely helpful, and that your client was cooperative."

Chapman responded to this correspondence on February 1, 2012, stating "it has become obvious that the insurance company will not be satisfied and resolve this claim no matter how much information is provided." The letter outlined KLZ's attempts to cooperate with the

insurer's investigation and decried IAT's "delaying tactics and endless requests for more irrelevant information." Chapman put IAT on notice that KLZ would pursue penalties under the Prompt Payment Act if the claim was not paid within fifteen days, asserting that IAT was already liable for statutory penalties, interest, and attorney's fees under that statute. Pennington responded to Chapman's correspondence on February 21, 2012, proposing an agreement with KLZ:

> Since the company has concluded that the burglary occurred, and that your client, the insured, suffered a substantial loss, the company has decided to offer to pay, at this time, a substantial advance on the claim in the amount of $204,541.11, equal to one-half of the full amount requested by your client.
>
> Acceptance of this check does not limit the amount of the reimbursable claim to which your client is entitled; it is simply an advance on that ultimately determined amount. Likewise, the company reserves the right to recover any portion of this advance, in excess of the proper amount of the total claim determined by the company, in the unlikely event that this tendered amount exceeds the proper reimbursable claim amount.
>
> As consideration for the payment of this advance, your client agrees not to seek any late payment penalties under Section 542.051 of the Texas Insurance Code (as mentioned in your February 1 correspondence), or other applicable provisions, for any period prior to 60 days after the payment of this advance.

KLZ executed the letter agreement proposed by IAT, and IAT delivered a check for $204,541.11 to KLZ. IAT made no further payment toward KLZ's claim.

On June 29, 2012, KLZ filed suit against IAT, Acceptance, and broker TKG General Agency (TKG).[2] KLZ alleged claims for deceptive trade practices, breach of contract, violations of the Texas Insurance Code, negligent misrepresentation, and common law fraud. Along with actual damages, KLZ sought recovery of multiple damages, exemplary damages, and attorney's fees.

[2] KLZ also sued agent Fred Chase Agency, which did not answer the suit. Fred Chase Agency's role in the summary judgment proceeding is discussed below.

Appellees filed their Amended No-Evidence Motion for Summary Judgment, challenging each of KLZ's claims as well as its recovery of multiple and exemplary damages and attorney's fees. KLZ responded and simultaneously filed its own traditional motion for summary judgment against appellees; appellees filed a response to that traditional motion. The two motions were scheduled to be heard together on Friday, January 31, 2014. The summary judgment hearing was recorded, and that recording constitutes the Reporter's Record in this case.

At the hearing, the trial court considered appellees' objections to Kamisa's affidavit, to which KLZ had attached all of its summary judgment evidence. The judge found the affidavit insufficient to prove up the attached evidence, sustained the objections, and granted the no-evidence motion. Although KLZ timely complied with the trial court's directive to file a supplemental affidavit, the court signed the Order before the new affidavit was filed. KLZ's motion for new trial was overruled by operation of law, and KLZ appealed.

Summary Judgment

All seven of KLZ's issues address the trial court's granting of appellees' no-evidence summary judgment motion.[3]

Standard of Review

A no-evidence summary judgment motion is, in essence, a motion for a pretrial directed verdict. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581 (Tex. 2006). Once a no-evidence motion is filed, the burden shifts to the nonmovant to present evidence raising an issue of material fact as to the elements challenged by the motion. *Id*. at 582. We consider the evidence in the light most favorable to the nonmovant. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009). We credit evidence favorable to the nonmovant if reasonable jurors could, and we

[3] Our opinion is limited to resolution of these seven issues. The trial court did not rule on KLZ's traditional motion for summary judgment, and appellant has not asked us to address it in any fashion.

disregard evidence contrary to the nonmovant unless reasonable jurors could not. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). Within this framework, we review the summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

The Amended No-Evidence Summary Judgment Motion and The Summary Judgment Evidence

Appellees' amended no-evidence motion challenged KLZ's claims for breach of contract, violations of the Texas Insurance Code, violations of the Texas Deceptive Trade Practices Act (the DTPA), multiple damages, exemplary damages, and attorney's fees.[4] Appellees attached the following summary judgment evidence to their original no-evidence motion: the policy, KLZ's Objections and Responses to Requests for Admissions, and excerpts from the Examination Under Oath of Nir Kamisa (Kamisa's EUO). We may consider that evidence if it creates a fact question. *See Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).[5]

KLZ responded to appellees' motion and, in the same document, urged its own traditional summary judgment motion on all of its claims. Both the response and the traditional motion relied upon the same affidavit from Kamisa, which contained more than a dozen attachments, including: KLZ's police report following the burglary, excerpts from the Kamisa EUO and from the McBay deposition, and correspondence between the parties and counsel.

Appellees responded, in turn, to KLZ's motion. They relied upon the same three exhibits submitted with their no-evidence motion and incorporated three additional exhibits: excerpts from the McBay deposition; Pennington's affidavit with attached correspondence between the

[4] Appellees' amended no-evidence motion also challenged KLZ's claims for fraud and negligent misrepresentation, but KLZ has abandoned those claims against these parties. KLZ's brief states:

> Appellant agrees that these claims were properly dismissed as regards to the Appellees, but were more related to the claims against Fred Chase Agency, the defendant that sold the contract to Appellant.

[5] The Texas Supreme Court has made clear that attaching evidence to a no-evidence summary judgment motion does not transform the motion into a traditional one. *Binur*, 135 S.W.3d at 651.

parties and counsel; and the affidavit of Bob Thomas (an insurance adjuster hired by Acceptance to investigate the KLZ burglary) with attached emails sent between Thomas and KLZ.

When both parties move for summary judgment, we consider all the evidence accompanying both motions in determining whether to grant either party's motion. *City of Dallas v. Dallas Morning News, LP*, 281 S.W.3d 708, 712 (Tex. App.—Dallas 2009, no pet.).

The Trial Court's Decision to Strike KLZ's Evidence

All of KLZ's summary judgment evidence was attached to Kamisa's affidavit. The substance of this original affidavit reads, in its entirety, as follows:

> My name is Nir Kamisa, I am over the age of eighteen years and I am fully capable and competent to make this Affidavit. Every statement contained herein is true and correct and within my personal knowledge.
>
> Attached hereto are true and correct copies of Exhibit[s] 1-16 as shown on the Exhibit List attached. Such records are submitted as evidence in Plaintiff['s] Motion for Summary Judgment and Response to Defendants' No Evidence Motion. Such records are kept in the ordinary course of business. It was the regular course of thereof [sic] to be included in such record, and the record was made at or near the time or reasonably soon thereafter.

Clearly, KLZ was attempting to prove up the exhibits attached to the affidavit as its business records. *See* TEX. R. EVID. 803(6).

Appellees filed objections to the affidavit in its entirety and to a number of its exhibits specifically. Appellees' objections included the affidavit's failure to identify the source of Kamisa's personal knowledge concerning the attached documents, the fact the police report was unsworn and uncertified, and the hearsay status of both the police report and certain correspondence that were clearly not business records of KLZ.

The trial court heard argument on the objections at the summary judgment hearing and sustained them, saying:

> So, I am going to grant the objection[s] to the affidavit which means I have to grant the no-evidence summary judgment on the breach of contract. However, I

> will definitely consider a motion to supplemental rehear [sic] -- because I do think this is a valid breach of contract case –

At the close of the hearing, Chapman confirmed with the court that it would allow him to supplement his summary judgment evidence:

> CHAPMAN: To be clear, Your Honor, until I request my, you know, supplementation or however we want to do it, a motion for leave, that there won't be an order entered regarding summary judgment.
>
> THE COURT: I will give you until next Friday to get that done.
>
> CHAPMAN: I will probably get it done first thing Monday, I would imagine, Your Honor.
>
> THE COURT: Okay, counsel, well, y'all are excused. If you'll get me that, and I will take this off my trial docket and we'll move it about 90 days.

Chapman did file two affidavits the next Monday: one attaching his own correspondence and a revised affidavit for Kamisa proving up its attachments properly. However, after filing the supplemental evidence, Chapman learned the trial court had already signed two orders, one sustaining appellees' objections to the original Kamisa affidavit and one granting the amended no-evidence summary judgment in its entirety. Chapman contacted the trial court by letter reminding the judge of her agreement to consider supplemental evidence on KLZ's behalf. When there was no response, he filed a motion for new trial on KLZ's behalf; the motion was overruled by operation of law.

In its first appellate issue, KLZ argues the trial court erred by striking all of its summary judgment evidence. "We review a trial court's rulings concerning the admission of summary judgment evidence under an abuse of discretion standard." *Wolfe v. C.S.P.H., Inc.*, 24 S.W.3d 641, 646 (Tex. App.—Dallas 2000, no pet.). KLZ concedes its initial affidavit was insufficient to prove up all of its evidence, but it argues it had a right to rely on the trial court's representations concerning filing a corrected affidavit, and it argues the supplemental affidavit did place all of its evidence before the trial court for its consideration.

The summary judgment rule anticipates a party's summary judgment evidence may not initially be presented in accordance with its dictates. Thus, it states that "[t]he court may permit affidavits to be supplemented . . . by further affidavits." TEX. R. CIV. P. 166a(f). In this case, we have a record of the trial court granting that permission. The record also establishes that KLZ filed its supplemental affidavits within the time granted by the court. Regardless, the trial court granted appellees' no-evidence motion without waiting for the supplemental affidavits and without giving an explanation for that ruling. We are unable to discern a reason for the trial judge's decision not to wait for the evidence she encouraged KLZ to file.

Nevertheless, any error in the trial court's refusal to consider the supplemental affidavit would only be harmful in this case if KLZ's supplemental summary judgment evidence would have yielded a different ruling on appellees' no-evidence summary judgment. Appellees contend there was no harm in striking KLZ's evidence because most of the stricken evidence appeared elsewhere in the summary judgment record. We agree that a significant amount of summary judgment evidence remained before the trial court after Kamisa's affidavit was stricken, including evidence appellees attached to appellees' no-evidence motion, evidence KLZ attached to its own traditional motion, and evidence appellees produced in response to KLZ's traditional motion. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000) (when both parties move for summary judgment, we consider all evidence accompanying both motions in determining whether to grant either party's motion). However, significant evidence was attached to the supplemental affidavits that was not otherwise part of the summary judgment record, including Kamisa's inventory sheets and certain correspondence from Chapman to Pennington. Instead of considering the summary judgment evidence that had not been stricken, together with the supplemental evidence filed by KLZ, the trial court granted the no-evidence motion without evaluating any of the parties' arguments.

We have evaluated the no-evidence motion considering all the evidence properly in the summary judgment record, and we conclude the trial court erred in granting the motion. Accordingly, we conclude the court's failure to consider all the summary judgment record was harmful error in this case. We sustain KLZ's first issue.

Breach of Contract

In its second issue, KLZ contends the trial court erred by granting summary judgment on its breach of contract claim against Acceptance and IAT.

Appellees' no-evidence motion asserted that KLZ failed to satisfy certain conditions precedent to coverage under the insurance contract.[6] Conditions precedent in this context are acts or events that must occur before there is a right to immediate performance. *See Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 144 (Tex. App.—Dallas 2012, no pet.). Appellees challenged KLZ's evidence that it satisfied the following conditions, each of which is found among the "Loss Conditions" enumerated in the policy:

> 1. To provide a complete inventory of the stolen property in question, including quantities, costs, value and amount of loss claimed;
>
> 2. As often as reasonably required, permit inspection of the property proving the loss or damage and examine Plaintiff's books and records;
>
> 3. Submit a signed, sworn proof of loss containing requested information to investigate the claim; and
>
> 4. Cooperate in the investigation or settlement of the claim.[7]

[6] Appellees did not challenge KLZ's evidence that it had a valid insurance contract with Acceptance, that the contract had been breached, or that KLZ had been injured by that breach.

[7] These four conditions were listed in appellees' original no-evidence motion. When amending that motion, appellees added two more "conditions" of which it alleged KLZ had no evidence:

- To provide a lost inventory claim calculated and based upon actual cash value as defined in the policy; and
- To provide a lost inventory claim calculated and based upon replacement cost value as defined in the policy.

Neither of these statements exists in the Policy. To the extent the Policy required KLZ to produce an inventory that addressed the value of the property in question, the obligation was subsumed by the first listed condition above. We will not address these statements other than as they might be implicated by that first condition.

Although appellees assert that KLZ failed to satisfy these conditions, the summary judgment evidence establishes that, by February 2012, IAT had concluded (1) the burglary occurred, and (2) KLZ "suffered a substantial loss." And based on those conclusions, appellees paid KLZ more than $200,000 as an "advance" on KLZ's full claim. We question whether appellees, if they have partially performed the contract without requiring performance of conditions precedent, can now fairly rely upon those conditions to avoid their own full performance. *See, e.g., Ames v. Great S. Bank*, 672 S.W.2d 447, 449 (Tex. 1984) (performance of a condition precedent can be waived by word or deed). Nevertheless, we conclude that KLZ offered sufficient evidence to raise a material issue of fact as to its compliance with these conditions.

As to the first and third conditions, appellees repeat that KLZ has failed to give them sufficient documentation to allow evaluation of the claim. Appellees concede that KLZ produced a spreadsheet showing the inventory purchased in the transfer of the business to Kamisa. Likewise, appellees concede KLZ produced a subsequent iteration of this spreadsheet that showed portions of the earlier inventory were no longer present. Kamisa testified that the items missing from the original inventory were stolen in the burglary. Appellees demand further proof, saying "whether these items were stolen, a result of prior shrinkage, or even present [when the assets were transferred to Kamisa] is entirely undocumented and unknown." Kamisa's testimony, as the owner of the business and longtime manager of its inventory, is sufficient to raise a material question of fact as to the legitimacy of KLZ's identification of the stolen inventory. Similarly, appellees complain that KLZ's system of bookkeeping was insufficient to establish the amounts KLZ paid to replace stolen inventory. We conclude Kamisa's testimony was sufficient to raise a fact issue concerning KLZ's replacement of certain inventory so the cost of such replacement would be compensable under the policy.

As to appellees' specific complaint that KLZ's statement of loss was not sworn, we note again that Kamisa gave sworn testimony in support of his claim. Under the facts of this case, we conclude that testimony satisfies the condition of a sworn statement of the loss KLZ incurred. *See also Tex. Farm Bureau Underwriters v. Hasting*, 449 S.W.2d 283, 285 (Tex. Civ. App.—El Paso 1969, no writ) (requirement of sworn signature can be waived if not pointed out with opportunity to cure).

The summary judgment record indicates KLZ produced its own documents and those belonging to its predecessor company. It is up to a fact finder to determine whether those documents were sufficient to require appellees to pay KLZ's claim in full. But KLZ produced ample evidence to merit putting its claim before a fact finder.

And as to the second and fourth conditions challenged by appellees, the summary judgment record indicates KLZ did allow appellees to review its books and did cooperate with appellees' investigation. There is summary judgment evidence of KLZ directing its accountant to meet with McBay to review records together and evidence of a number of document productions. Indeed, there is correspondence from appellees' counsel remarking on Kamisa's cooperation during the taking of the sworn statement. We conclude KLZ has raised a material issue of fact on these conditions as well.

We sustain KLZ's second issue.

Insurance Code Violations

In its third issue, KLZ argues the trial court erred by granting summary judgment on its claims for bad faith and Prompt Payment Act violations against Acceptance and IAT. KLZ's

petition and brief speak to two claims under this heading, both couched as violations of the Texas Insurance Code.[8]

KLZ contends appellees "have violated the Texas Unfair Claim Settlement Practices Acts (Insurance Code 542.001–542.302)" in the following four ways:

> Knowingly misrepresenting pertinent facts or policy provisions relating to the policyholder's claim, i.e. misrepresenting the claim valuation as being actual cash value.
>
> Failing to adopt and implement reasonable standards for prompt investigation of claims arising under its policies as a reservation of rights letter was issued before any investigation was accomplished.
>
> Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear.
>
> Compelling plaintiff to take legal action to recover the total amount of benefits due to them under the insurance policy under its policies by offering substantially less than the amount ultimately recovered in a lawsuit.

KLZ's citation to sections 542.001 through 542.302 encompasses all of chapter 542, which "may be cited as the Unfair Claim Settlement Practices Act." TEX. INS. CODE ANN. § 542.001 (West 2009). KLZ's four specific allegations are found in section 542.003 of the code, which lists acts that constitute unfair claim settlement practices. *See id.* § 542.003(b)(1), (3), (4), (5).

Appellees' no-evidence motion asserted that KLZ had no evidence appellees had violated any of these four subsections, but we need not undertake that analysis. Chapter 542 does not provide a private cause of action for violations of its terms. *First Am. Title Ins. Co. v. Patriot Bank*, No. 01-14-00170-CV, 2015 WL 2228549, at *7 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.) (holding trial court did not err in granting summary judgment in defendant's favor on plaintiff's claims that defendant violated section 542.003, because there is no private cause of action for such violations); *see also Terry v. Safeco Ins. Co. of Am.*, 930 F. Supp. 2d 702, 714

[8] KLZ did not plead a claim for common law bad faith.

(S.D. Tex. 2013) (granting summary judgment on claims for violation of Unfair Settlement Practices Act because there is no private right of action for violations of section 542.003). Accordingly, we affirm the trial court's summary judgment on KLZ's claims under section 542.003.

KLZ's second claim under the Insurance Code is for violation of the Prompt Payment Act (PPA), which was incorporated in the Texas Insurance Code at subchapter B of chapter 542. We are to construe the PPA liberally to promote the prompt payment of insurance claims. TEX. INS. CODE ANN. § 542.054. The PPA sets deadlines for the insurer to acknowledge receipt of a claim, commence investigation of the claim, and request necessary information from the claimant. *Id.* § 542.055(a). The statute provides that once an insurer has received all the information it has reasonably requested, it must pay the claim within sixty days or pay "damages and other items as provided by Section 542.060." *Id.* § 542.058(a) (West Supp. 2015). As to those "other items," the statute provides:

> If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

Id. § 542.060(a) (West 2009). "[W]hether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is [ordinarily] a question for the fact-finder." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997).

Appellees contended in their no-evidence motion that KLZ had no evidence Acceptance and IAT had violated the PPA. To prevail on this claim under the act, KLZ would have to establish (1) it had a claim under an insurance policy, (2) its insurer is liable for the claim, and (3) the insurer has failed to follow one or more requirements of the PPA with respect to the claim. *See GuideOne Lloyds Ins. Co. v. First Baptist Church of Bedford*, 268 S.W.3d 822, 830–

31 (Tex. App.—Fort Worth 2008, no pet.) (discussing pre-codification version of statute). To survive appellees' no-evidence motion, KLZ was required to raise an issue of material fact on each of these three elements.

Appellees have acknowledged that KLZ had a claim under its Acceptance policy for its "significant loss" in the July 2011 burglary. Appellees have likewise acknowledged liability for KLZ's insurance claim, although not for the total amount KLZ has sought to recover. The parties continue to dispute the final amount of KLZ's loss and how that loss is to be measured under the policy. But we have concluded that KLZ raised a material issue of fact on all challenges to its breach of contract claim. Thus, KLZ has defeated the no-evidence summary judgment on the first two elements of this claim.

What remains then is whether KLZ raised a material question of fact as to appellees' failure to comply with one or more of the PPA's timelines. Several pieces of correspondence between the parties are helpful in addressing one of those deadlines:

- Chapman's February 1, 2012 letter to Pennington reports that "it has become obvious that the insurance company will not be satisfied and resolve this claim no matter how much information is provided." Chapman accuses IAT of "delaying tactics and endless requests for more irrelevant information [that] are beyond reason and have only one purpose, to delay paying a valid claim for over five months." Chapman puts IAT on notice that KLZ will file a claim under the PPA if the $409,082.21 claim is not paid within fifteen days.
- Pennington's letter of March 16, 2012 makes a number of points in response. Pennington expresses IAT's "disappointment" at KLZ's failure to provide documentation, without identifying any specific documentation at issue. He acknowledges receipt of "several missing invoices" from KLZ on March 15, 2012. He acknowledges that IAT has

concluded that the burglary occurred and that KLZ "suffered a substantial loss." IAT then offers to pay an "advance" on the claim of $204,541.11 if KLZ agrees not to seek PPA penalties for any period prior to April 16, 2012. And IAT agrees to present its calculation of KLZ's loss by April 9, 2012.

- Chapman's March 21, 2012 letter includes KLZ's acceptance of the advance. But as to production of more documents, Chapman states that he considers the additional request for documents to be "part of a delaying tactic in this case," and asserts that IAT "has been provided all the information it needs to determine the value of the stolen equipment."

This correspondence establishes that KLZ produced documents to appellees on March 15, 2012; we find no evidence of any later production. On March 21, 2012, KLZ took the position that appellees had been provided all the information they needed to determine the value of the stolen equipment and that any additional document requests amounted to delaying tactics. Pennington stated that IAT would provide its calculation of KLZ's loss by April 9, 2012, but the summary judgment record includes no such calculation. And finally, IAT offered an advance—which KLZ accepted—with the understanding that KLZ would not seek PPA penalties for any amount before April 16, 2012. We conclude that (1) the documentation produced by KLZ, (2) IAT's agreement to provide its loss calculation, and (3) IAT's offer of an advance on payment of the claim combine to create a fact issue as to whether appellees had received all the information they had reasonably requested. *See* TEX. INS. CODE ANN. § 542.058(a) (West Supp. 2015). If we calculate sixty days from April 16, 2012—the latest of these key dates and IAT's proposed cut-off for earlier PPA claims—then appellees would have been required to pay KLZ's claim by June 15, 2012, or to incur the PPA's penalties. *See id.* Because appellees have never paid more than the advance on KLZ's claim, we conclude that KLZ raised a material issue of fact

concerning whether IAT and Acceptance impermissibly delayed paying KLZ's claim after they received all the information reasonably requested to assess KLZ's claim.

We sustain KLZ's third issue in part: the trial court erred by granting the no-evidence motion in favor of IAT and Acceptance for violation of the PPA.[9]

DTPA and Multiple Damages

In its fourth issue, KLZ argues the trial court erred by granting summary judgment on its DTPA claims. KLZ pleaded first that appellees had engaged in an unconscionable action or course of action in violation of the DTPA. The statute defines an unconscionable action or course of action as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." TEX. BUS. & COM. CODE ANN. § 17.45(5) (West 2011). Unconscionability requires proof that the defendant took advantage of the plaintiff's lack of knowledge, resulting in unfairness that is "glaringly noticeable, flagrant, complete and unmitigated." *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985). Neither KLZ's petition nor its brief in this Court identifies any action that results in this kind of unfairness. And we do not find evidence of gross unfairness in the summary judgment record. Evidence of an unconscionable action or course of action must involve more than mere breach of contract. *See Mays v. Pierce*, 203 S.W.3d 564, 572 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Likewise, "[a]n allegation of a mere breach of contract, without more, does not constitute a 'false, misleading, or deceptive act' in violation of the DTPA." *Ashford Dev., Inc. v. USLife*

[9] Our conclusion is in accord with cases that have remanded claims under the PPA when viable breach of contract claims have been remanded for trial. *See, e.g., Columbia Lloyds Ins. Co. v. Mao*, No. 02-10-00063-CV, 2011 WL 1103814, at *9 (Tex. App. —Fort Worth Mar. 24, 2011, pet. denied) ("Because, as set forth above, we must remand the Maos' breach of contract claim to the trial court, we also reverse the trial court's grant of summary judgment to Columbia Lloyds on the Maos' PPCA claim and remand that claim to the trial court.").

Real Estate Servs. Corp., 661 S.W.2d 933, 935 (Tex. 1983). KLZ pleaded that appellees had committed the following "laundry list" violations:

> (a) represented that goods or services have sponsorship, approval, characteristics that it does not have;
>
> (b) represented that goods or services are of a particular standard, quality, or grade if they are another;
>
> (c) represented that an agreement confers or involves rights, remedies, or obligations that it does not have or involve or are prohibited by law;
>
> (d) failed to disclose information concerning goods or services which was known at the time of the transaction with the intention to induce the customer into a transaction which the consumer would not have entered had the information been disclosed.

See TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (7), (12), (24) (West Supp. 2015). However, when KLZ attempts to explain the "misrepresentations" underlying these allegedly deceptive actions, it refers to the same conduct it charges as breach of the insurance contract: a refusal to apply a replacement-cost measure of loss and a refusal to pay the entire loss based on a purported lack of information from KLZ. Indeed, KLZ identifies appellees' original representations as the promises made in the insurance policy and endorsements. We conclude KLZ's DTPA claims of misrepresentation are rooted in its contractual relationship with appellees. To the extent the summary judgment record contains evidence of IAT or Acceptance acting contrary to the representations, KLZ's claim is governed by contract law, not the DTPA. *See Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14–15 (Tex. 1996) (when representations are nothing more than promises defendant will fulfill contractual duty, breach of that duty sounds only in contract). We conclude the trial court did not err in granting the no-evidence summary judgment on KLZ's DTPA claims.

In its fifth issue, KLZ contends the trial court erred by granting summary judgment on its claim for multiple damages. KLZ pleaded that appellees' violations of the DTPA were committed knowingly and intentionally, thus making KLZ entitled to recover multiple damages

under that statute. *See* TEX. BUS. & COMM. CODE ANN. § 17.50(b)(1) (West 2011). Because we have concluded that the trial court properly granted summary judgment on KLZ's DTPA claims, there is no legal basis for KLZ to recover multiple damages.

We overrule KLZ's fourth and fifth issues.

Exemplary Damages

KLZ alleged in its petition that appellees committed acts and omissions "knowingly, willfully, intentionally, with actual awareness, and with the specific and predetermined intention of enriching said Defendants at the expense of [KLZ]" and that those acts and omissions "r[o]se to the level of fraud and/or malice." KLZ sought exemplary damages on that basis, pursuant to section 41.003 of the civil practice and remedies code. KLZ did not allege any specific act or omission; it stated only that "the acts and omissions of Defendants complained of herein" entitle it to exemplary damages. Appellees' no-evidence motion alleged that KLZ had no evidence to support these allegations of knowing conduct that amounted to fraud or malice. To overcome the motion, appellant was required to come forward with "clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice, or gross negligence." TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 2015). And KLZ's burden of proof for such damages could not be satisfied by evidence of ordinary negligence, bad faith, or a deceptive practice. *Id.* § 41.003(b).

We need not determine whether KLZ came forward with evidence sufficient to raise a genuine issue of fact on this issue, because KLZ has not successfully maintained a cause of action against appellees that would support an award of exemplary damages. As we have noted, KLZ has abandoned its claim for fraud against appellees. We are remanding KLZ's claims for breach of contract and violations of the Prompt Payment Act, but neither of those claims would allow recovery of exemplary damages. *See Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617,

618 (Tex. 1986) ("breach of contract cannot support recovery of exemplary damages"); *see also Paramount Nat. Life Ins. Co. v. Williams*, 772 S.W.2d 255, 270 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (exemplary damages allowed along with statutory penalties for delay based on independent tort finding of breach of duty of good faith and fair dealing).

We overrule KLZ's sixth issue.

Summary Judgment for the Non-Moving Defendant

In its seventh issue, KLZ argues the trial court erred by dismissing KLZ's claims against defendant Fred Chase Agency. KLZ points out that Fred Chase Agency did not file an answer to KLZ's petition in this suit and never appeared below. The Amended Motion recites that it was filed by defendants Acceptance, IAT, and TKG. Indeed, the record of the summary judgment hearing in this case establishes that counsel informed the trial court that Fred Chase Agency had not appeared and was not a summary judgment movant.

The trial court's Order does not mention Fred Chase Agency specifically, but it directs that KLZ "take nothing on all claims against Defendants." Moreover, it asserts that "[h]aving disposed of all parties and all claims in this cause, this is a final judgment of the court." Thus, the trial court granted summary judgment not only as to the three movants, but also as to Fred Chase Agency. An order that grants summary judgment to a party that did not move for summary judgment is erroneous and must be reversed. *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 844 (Tex. App.—Dallas 2003, no pet.).

We resolve KLZ's seventh issue in its favor.

Conclusion

We affirm the trial court's Order granting summary judgment in favor of IAT, Acceptance, and TKG on KLZ's claims for negligent misrepresentation, common law fraud, violations of the DTPA, multiple damages, and exemplary damages. We reverse the trial court's

Order granting summary judgment in favor of IAT and Acceptance on KLZ's claims for breach of contract, violations of the Prompt Payment Act, and attorney's fees, and we remand those claims for further proceedings.

We also reverse the trial court's Order granting summary judgment in favor of Fred Chase Agency and remand KLZ's claims against Fred Chase Agency for further proceedings.

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/Martin Richter/
MARTIN RICHTER
JUSTICE, ASSIGNED

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KLZ DIAMOND TOOLS, INC., Appellant

No. 05-14-00458-CV V.

TKG GENERAL AGENCY, INC., FRED CHASE AGENCY, IAT SPECIALTY, and ACCEPTANCE INDEMNITY INSURANCE COMPANY, Appellees

On Appeal from the 191st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-12-07248.
Opinion delivered by Justice Richter, Justices Fillmore and Stoddart participating.

In accordance with this Court's opinion of this date, the order of the trial court granting defendants' amended no-evidence motion for summary judgment is **AFFIRMED** in part and **REVERSED** in part.

We **REVERSE** the trial court's order insofar as it grants summary judgment in favor of IAT Specialty and Acceptance Indemnity Insurance Company on KLZ Diamond Tools, Inc.'s claims for breach of contract, violations of the Prompt Payment Act, and attorney's fees. We also **REVERSE** the trial court's order insofar as it grants summary judgment in favor of Fred Chase Agency on all of KLZ Diamond Tools, Inc.'s claims against it.

In all other respects, the trial court's judgment is **AFFIRMED**.

We **REMAND** this cause to the trial court for further proceedings consistent with our opinion of this date.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 18th day of July, 2016.