COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

1320/1390 DON HASKINS, LTD.,		
Appellant,	§	No. 08-16-00027-CV
	§	Appeal from the
v.	§	County Court at Law No. 5
XEROX COMMERCIAL SOLUTIONS, LLC,	§	of El Paso County, Texas
Appellee.	§	(TC# 2013DCV1044)
	§	

O P I N I O N

Appellant 1320/1390 Don Haskins, Ltd., ("Don Haskins, Ltd." or "Landlord"), is a Texas limited partnership named for two commercial buildings it owns and operates that are located next to each other at 1320 and 1390 Don Haskins Drive in El Paso, Texas. Pursuant to a long-term commercial lease, Don Haskins, Ltd., leased space in one of its buildings to Appellee Xerox Commercial Solutions, LLC ("Xerox" or "Tenant"), as a successor-in-interest of ACS Commercial Solutions, Inc. ("ACS"). In its space, Xerox operated a call center employing hundreds of employees providing customer support and technical services to client businesses. In this appeal, Appellant Don Haskins, Ltd., challenges a partial summary judgment rendered in favor of Appellee Xerox, on the issue of liability only, for Xerox's claim that Don Haskins, Ltd., breached a temporary parking agreement entered in conjunction with the parties' commercial lease. We

affirm.

FACTUAL BACKGROUND

The Lease

In December of 2005, Don Haskins, Ltd., as landlord, and ACS, predecessor-in-interest of Xerox, as tenant, entered a seven-year written lease, titled "Standard Industrial Lease" ("Lease"), renewable for two additional terms of five years each, for a portion of a commercial building located at 1390 Don Haskins Drive in El Paso ("Premises" or "Project"). By terms of the Lease, the Landlord promised to lease premises consisting of approximately 50,263 square feet of a 201,051square foot building, or nearly 25 percent of the available space, to be used by Tenant for all uses related to a call center, in exchange for payment of a rental obligation, due monthly, beginning after completion of improvements.

Relevant to this appeal, the Lease included two sections regarding parking for the premises. First, Section 8.1 obligated the Landlord to create a "common area" on the premises, to include a minimum of 350 parking spaces, pedestrian sidewalks, and other improvements, "for the general use in common of tenants of the Project, and their invitees[.]" This common area remained subject to the exclusive control and management of the Landlord in its reasonable discretion. Landlord could modify or make changes deemed reasonably necessary provided such modifications did not unreasonably interfere with tenant's use of, access to, or parking for the premises. Second, Section 8.2 provided that the Landlord may at any time temporarily close any part of the common area to make repairs or changes, or for any other reasonable purpose, provided Tenant had reasonable access to and parking for its premises. Moreover, Landlord could allocate parking spaces among Tenant and other tenants in the Project if, in the Landlord's opinion, such parking facilities became crowded—provided the allocation and reasonable proximity of Tenant parking was not reduced.

In addition to these sections, the Lease attached and incorporated a Premises/Site Plan referred to as Exhibit A depicting the common areas with parking spaces available for the Project.[1] The lease also included an attachment labeled "Rules and Regulations," which stated in paragraph 10 that: "Tenant will instruct its employees to park in the areas on the land where the Project is located and in spaces reasonably designated, *if any*, by Landlord for employee parking [emphasis added]."

The Amendments and Temporary Parking Agreement

Beginning in May of 2006 through August of 2012, the parties entered into five additional agreements connected with their Lease. Four agreements were labeled in sequence as the First, Second, Third, and Fourth Amendments to the Standard Industrial Lease, and the fifth agreement was titled, "Temporary Parking Agreement." Each amendment expressly acknowledged that the Lease remained in full force and effect except as modified by terms of the amendment. Beginning with the Temporary Parking Agreement, Xerox was recognized as the successor-in-interest of ACS and Tenant of the Lease dated December 2005.

Signed in November 2006, the Second Amendment reflected that early in the leasing relationship disagreements arose over parking issues at the leased premises.[2] The landlord objected that certain employees of Xerox's predecessor were parking on the property of the

[1] As best as we can determine, Exhibit A depicted less than 350 parking spaces but the parties did not clarify or correct the discrepancy. David Jarrett, Xerox's Vice-President of Real Estate, testified the exhibit did not accurately reflect the parking that was initially provided by the Landlord. Arthur Lowenberg, general manager of Xerox's call center, testified the Landlord was providing approximately 360 parking spaces when he first started working at the site in 2012.

[2] The First and Third Amendments to the Lease appear to have no relationship to any of the parking issues that form the basis of the parties' lawsuit. The First Amendment increased the base rent to be paid by Xerox due to the fact that the improvement allowance of two million dollars as agreed upon by the parties in the Lease had been exceeded by over a million dollars. The Third amendment was simply an acknowledgment of a change in the legal description of the leased property.

adjacent building—an area not designated for their use. The Second Amendment referenced the parties' contemporaneous settlement agreement in which the Landlord agreed not to sue, and thereby released Tenant and all its agents and affiliates, for all claims related to Tenant's parking use, or other trespasses, of the adjacent premises occurring on or before the date of the agreement. In return, the Tenant formally waived its right to terminate the Lease at the end of the fourth year, and further agreed it would no longer cause or permit any parking or transportation activity to take place on the adjacent premises.

Despite the settlement, the parties continued to have parking issues which were addressed in the Fourth Amendment, signed in December 2011,[3] and the Temporary Parking Agreement (the "TPA"), signed in August of 2012. Among other things, the Fourth Amendment reduced the base rent effective at the time from $60,147.76 per month, to $50,680.85 per month, from January 2012 through February 2013, then increasing thereafter in accordance with a specified schedule through the end of the lease term, which was therein extended to June 30, 2016. Although not expressed in the Amendment itself, according to the Landlord's pleadings below, the reduction in rent occurred due to Xerox's predecessor having earlier entered into a separate agreement with a nearby church to use part of its property as a parking area for its employees (referred to as the "ancillary

[3] According to Farschman's affidavit, in January of 2007, she received notice that Xerox's predecessor had hired more employees who were then parking in unauthorized areas adjacent to the leased premises. She therefore sent Xerox's predecessor a "Default/Trespass Notice," dated January 11, 2007, notifying them of the issue, and directing them to not do so. The notice indicated that Xerox's predecessor was in default under the terms of the Lease by failing to keep its employees from trespassing and parking on the adjacent parking lot. The notice included a map of designated parking areas in which the tenant could park; the map indicated that the adjacent parking lot was deemed as a no parking area. In addition, in April of 2010, Farschman sent Xerox's predecessor a "Parking/Storage Violation Notice," which among other things made a "request" that Xerox's predecessor instruct its employees and/or invitees to "cease any and all illegal parking in accordance with Paragraph 10 of the Rules and Regulations attached to your Lease." She also sent Xerox's predecessor another parking violation notice in August of 2010, which alleged that Xerox's predecessor's employees or invitees were "removing and vandalizing the towing signs posted by El Paso Towing" in that lot.

parking lot"), along with a shuttle service used to transport employees to and from the call center, in exchange for monthly payments paid to the church.[4]

In August 2012, the parties again addressed parking issues for the call center by signing the Temporary Parking Agreement. By terms of the TPA, the Landlord agreed it would provide no less than three hundred and fifty-eight (358) parking spaces, referred to as "alternate temporary parking spaces," in temporary parking areas depicted in an exhibit attached and incorporated to the agreement. The exhibit showed an aerial view of both buildings, located at 1320 and 1390 Don Haskins Drive, with parking areas including 358 parking spaces marked and overlapping on both properties. The Landlord further agreed to install signage in the parking lot, to ensure the parking lot was "lit substantially similar to Tenant's existing parking spaces," and to erect a chain link fence in the rear of the building.[5] By its terms, the TPA restricted Xerox to parking only in the temporary parking areas depicted on the exhibit. Fourteen days after the effective date of the TPA, vehicles that were parked outside of the temporary parking areas were subject to being towed.

The Termination of the Temporary Parking Agreement

Months after signing the TPA, the Landlord terminated the agreement, at will, after Cardinal Health, the tenant of the building at 1320 Don Haskins Drive, decided to expand operations. On December 19, 2012, the Landlord sent notice to Xerox that it was terminating the TPA effective ten days later. The notice letter prohibited Xerox from any further use of 200

[4] We note that the evidence at trial demonstrated that Xerox and its predecessor, respectively, entered into the arrangement with the church to use its property as a parking area in March 2008, and again in April 2014.

[5] Exhibit A to the TPA was labeled as "Depiction of Temporary Parking," and included a depiction of the proposed temporary parking area, a reference to where the future fence was to be placed, and an area designated as "no parking." Exhibit A further indicated that there would be approximately "358 car parking spaces" in the temporary parking area.

parking spaces behind the Cardinal Health building. Xerox was provided up to 120 total spaces located directly in front of and behind the leased premises, as reflected on a Site Plan attached as Exhibit "A."

In response, Xerox sent a letter dated December 20, 2012, notifying the Landlord that reduction of the parking spaces below the "350 space minimum provided in the lease, or the 358 spaces provided in the temporary parking license [was] not acceptable," and would be viewed as a "material landlord breach of the lease." On January 2, 2013, Xerox additionally sent the Landlord a "Notice of Landlord Default," which reiterated Xerox's position that the Landlord materially breached both the Lease and the TPA by "unilaterally" reducing the allotted parking by more than 200 spaces, and demanded a cure of the default.

On February 8, 2013, Xerox sent a second "Notice of Landlord Default," which listed all of the parties' prior agreements, including the Lease, the four amendments, and the TPA, referring to them collectively as the "Contract." In the February Notice, Xerox stated that it was giving the Landlord notice that it was in default under "the Contract," but focused solely on the TPA, complaining that the Landlord had agreed to provide Xerox with 358 parking spaces in the TPA, but had improperly reduced the available spaces by over 200, leaving Xerox with only 120 parking spaces for its operations. In the February Notice, Xerox demanded that the default be cured within 30 days or it would seek appropriate legal action.

PROCEDURAL BACKGROUND

On March 1, 2013, the Landlord filed suit against Xerox seeking a declaratory judgment that it had not breached either the Lease or the TPA. Among other things, the Landlord alleged the Lease merely provided a minimum of 350 spaces for the common use of all tenants. Additionally, the Landlord claimed it retained the exclusive right to allocate parking spaces in its

"reasonable discretion." The Landlord further asserted that the parties had previously resolved their parking disputes when they signed the Second and Fourth Amendments to the Lease, and that despite being aware of parking issues at the premises, Xerox's predecessor-in-interest agreed to a lease extension to June 30, 2016.

In response, Xerox filed an answer denying all allegations, together with a counterclaim for breach of contract. For its claim, Xerox referred to the Lease, each amendment thereto, the Settlement Agreement, and the TPA, or collectively the parties' "Contract." Xerox alleged that "[t]he Landlord breached the Contract by reducing the 358 parking spaces the Landlord [was] required to provide for Xerox's use by over 200, leaving Xerox with less than 120 parking spaces available for its use." As a result of the breach, Xerox alleged it suffered damages including having to spend significant sums each month to provide alternative parking arrangements for its employees.

Thereafter, the Landlord filed a verified answer to the counterclaim denying all of Xerox's allegations and alleged, among other things, that the TPA was unenforceable due to its lack of mutuality of obligation and consideration, and/or on the basis it was terminable at will.

Xerox's Motions for Partial Summary Judgment

Pursuant to Texas Rule of Civil Procedure 166a(c), Xerox filed a traditional motion for partial summary judgment on the issue of liability on its counterclaim for breach of contract. TEX.R.CIV.P. 166a(c). In support of its argument, Xerox attached as evidence the Lease, the four amendments, the TPA, and an affidavit from David Jarrett, Vice-President of Real Estate for Xerox, who authenticated the evidence and described the Landlord's unilateral termination of the parking agreement.

In response, the Landlord objected that Xerox's motion was "defective," arguing it failed

to specify the grounds upon which it was made, pointing out that the motion referred to eight separate documents as being the "Contract" that the Landlord allegedly violated. In addition, the Landlord asserted the TPA was not a valid, enforceable agreement as it lacked mutuality of obligation; and, even if it was enforceable, it was temporary and indefinite in duration. Moreover, the Landlord claimed the TPA lacked any provision preventing it from terminating the temporary parking rights at will and without notice. Finally, the Landlord claimed the only enforceable, valid contract in evidence was the Lease, as modified by amendments, which provided in Section 8.1: "All parking areas … shall at all times be subject to the exclusive control and management of Landlord in its reasonable discretion."

In support of its response, the Landlord included two affidavits, one from Trudi Farschman, a paralegal working for its property management company, and the other from Randy Lee, its attorney of record. Farschman's affidavit attached twenty-seven documents that included correspondence and emails between the parties pertaining to issues addressed in the Second, Third, and Fourth Amendment, and the TPA. Lee's affidavit attached excerpts from the deposition of David Jarrett, Xerox's property manager.[6]

In reply, Xerox asserted its motion was not defective as lacking adequate notice of the breach of contract claim as the Landlord responded substantively. Thereafter, the trial court granted Xerox's motion for partial summary judgment on its counterclaim expressly finding that the Landlord had breached the TPA. The court also ruled that the determination of the amount of damages owed by the Landlord, if any, would be determined at trial. Thereafter, Xerox filed a second motion for partial summary judgment seeking to dismiss the Landlord's petition for

[6] Jarrett signed the Lease on the Landlord's behalf, in his capacity as Vice-President of Real Estate of Xerox's predecessor, as well as all four amendments to the lease, the Settlement Offer, and the TPA.

declaratory judgment and to realign the parties for purposes of trial. The trial court granted Xerox's motion.

The Final Judgment

At trial, Xerox presented witnesses to testify about the cost of alternative arrangements it made to continue operating its call center after termination of the TPA through the end of the lease term. For a second time, after the Landlord terminated the TPA, Xerox contracted with a nearby church to provide parking spaces and a shuttle service to transport employees back and forth from the call center to the parking lot. Because employees worked staggered shifts beginning every hour from 6 a.m. to 4 p.m., with the last shift ending at 1 a.m., shuttle services were needed for extensive hours throughout the work day. Along with expert testimony, Xerox presented invoices and other evidence in support of the damages it claimed.

At the end of trial, the court instructed the jury that it had already found the Landlord had breached the TPA, and the only issue for its consideration was the amount of damages owed by the Landlord, if any, and the award of attorney's fees, if any. The question to the jury asked for an award of damages that would reasonably compensate Xerox for damages sustained in the past and in reasonable probability would be sustained in the future, up to June 30, 2016, if any, resulting from the Landlord's failure to comply with the TPA. The jury awarded past damages to Xerox in the amount of $110,320, for its shuttle and parking expenses beginning on January 1, 2013, through the date of trial, and future damages for these same expenses in the amount of $89,737, through June 30, 2016. The jury also awarded attorney's fees. On November 16, 2015, the trial court signed a final judgment rendering the verdict in favor of Xerox for breach of the TPA, and damages as assessed by the jury. The trial court denied the Landlord's motion for new trial and to set aside

the judgment. Thereafter, the Landlord filed this timely appeal.[7]

DISCUSSION

The appeal challenges no issues pertaining to the jury's verdict, or with the partial summary judgment dismissing the Landlord's declaratory judgment action. Rather, in four issues, the Landlord argues the trial court erred by granting partial summary judgment in favor of Xerox on the issue of liability for breach of the TPA. First, the Landlord argues that Xerox failed to establish that the TPA amended the Lease as a matter of law. Second, that Xerox did not conclusively establish that the TPA was an enforceable contract supported by consideration. Third, that even if the TPA was supported by consideration, it was terminable at will as it lacked a definite term. And fourth, even if the term of the TPA was for a reasonable period, the question of what constituted a "reasonable period" remained a question of fact for a jury to resolve.

Standard of Review

We review a trial court's grant of a summary judgment motion *de novo*. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Chance v. Elliot & Lillian, LLC*, 462 S.W.3d 276, 283 (Tex. App.—El Paso 2015, no pet.). A plaintiff moving for traditional summary judgment bears the burden of showing that there is no genuine issue of material fact on any element of his claim, and that he is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c). When a movant meets that burden of establishing each element of the claim or defense on which it seeks summary judgment, the burden then shifts to the nonmovant to disprove or raise an issue of fact as to at least one of those elements. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014); *Chance*, 462 S.W.3d at 283.

[7] In its notice of appeal, the Landlord stated that it was appealing from the trial court's final judgment, and the two pretrial orders granting partial summary judgment.

However, if the movant does not satisfy its initial burden, the burden does not shift and the nonmovant need not respond or present any evidence. *Amedisys, Inc.*, 437 S.W.3d at 511; *State v. Ninety Thousand Two Hundred Thirty–Five Dollars and No Cents in U.S. Currency ($90,235)*, 390 S.W.3d 289, 292 (Tex. 2013).

If the burden does shift, we must then determine whether the nonmovant raised an issue of fact, and in doing so, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *Fielding*, 289 S.W.3d at 848; *Chance*, 462 S.W.3d at 283; *Terex Utilities Inc. v. Republic Intelligent Transp. Svc. Inc.*, 392 S.W.3d 340, 342 (Tex. App.—El Paso 2013, no pet.). If the nonmovant does not raise a fact issue on any elements of a claim or defense, summary judgment is appropriate. *See Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508-509 (Tex. 2010).

Contract Interpretation

We review a trial court's construction of unambiguous contracts, including lease agreements, *de novo*. *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 393 (Tex. 2017) ("Construing an unambiguous lease is a question of law for the Court."); *MCI Telecomm. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650–51 (Tex. 1999). Our primary concern in construing a written contract is to ascertain the parties' true intent as expressed by the plain language they used in their written agreement. *See Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017); *see also BP Am. Prod. Co.*, 526 S.W.3d at 393-94 (a court's "primary duty is to ascertain the parties' intent as expressed within the lease's four corners"). It is a fundamental principle that "we may neither rewrite the parties' contract nor add to its language." *Fischer v. CTMI, LLC*, 479 S.W.3d 231, 239 (Tex. 2016) (citing *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162

(Tex. 2003)). We must construe a contract in its entirety to determine the purposes the parties had in mind at the time it was signed. *Id*. Contract terms will be given their plain, ordinary, and generally accepted meanings, unless the contract indicates a technical or different sense. *See Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 662 (Tex. 2005).

Although we are not entitled to rewrite a parties' contract, we keep in mind the principle that contracts should be construed in favor of enforceability and against forfeiture. *Fischer*, 479 S.W.3d at 239 ("Forfeitures are not favored in Texas, and contracts are construed to avoid them."). Thus, a court may imply terms that are reasonably implied. *Id.* ("Expressions that at first appear incomplete or uncertain are often readily made clear and plain by the aid of common usage and reasonable implications of fact.") (citing *Bendalin v. Delgado,* 406 S.W.2d 897, 900 (Tex. 1966) (quoting RESTATEMENT OF THE LAW OF CONTRACTS § 370 & cmt. c.)). Terms that appear to be indefinite may be given meaning by usage of trade or by course of dealing between the parties. *Id*. (citing RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a.). A court may consider the facts and circumstances surrounding a contract including the setting in which it was negotiated and other objectively determinable factors that give context to the parties' transaction. *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 450 (Tex. 2015).

WHETHER THE TPA AMENDED THE LEASE

In Issue One, the Landlord asserts that Xerox did not prove that the TPA amended the Lease as a matter of law. Within this broad argument, four sub-arguments are included: (1) that the TPA did not purport to amend the Lease or otherwise alter the discretionary rights of the Landlord pursuant to Section 8.1 and 8.2; (2) that no language in the TPA supports a term coterminous with the Lease; (3) that the parties' prior conduct shows they plainly identified amendments by use of the term "Amendment;" and (4) in each of the parties' prior amendments,

the parties plainly described the consideration supporting each agreement.

A motion for summary judgment must provide the nonmovant with fair notice of the grounds upon which the movant is basing its motion, and a trial court may only grant a summary judgment motion on those grounds specifically addressed in the motion. *See Wright v. Sydow*, 173 S.W.3d 534, 554 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (citing *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993)); *see also Stephens v. LNV Corp.*, 488 S.W.3d 366, 374 (Tex. App.—El Paso 2015, no pet.). We note Xerox's motion seeking partial judgment on the issue of liability alleged that the Landlord had breached the contract and attached the Lease, amendments, and the TPA, and collectively referred to the documents attached as the "Contract." Xerox specifically alleged that the Landlord had violated its obligation under the TPA to provide at least 358 parking spaces for Xerox's use. Despite Xerox's specific allegation, the Landlord objected that Xerox failed to specify which agreements were breached and argued that the TPA did not qualify as an amendment of the parties' Lease. Replying to the Landlord's objection, Xerox argued alternative theories: (1) that the TPA amended the Lease by its terms; or alternatively, (2) even if it did not operate as an amendment, the TPA was enforceable as an agreement supported by consideration, and with a duration of a reasonable time based on the subject of the agreement.

On appeal, Xerox explained in its brief that it did not know if the Landlord considered the TPA an amendment to the Lease, or a separate contract, but either way it believed it was entitled to partial judgment on the issue of a breach of the parking provision. Although it argued the distinction made no difference, Xerox eventually abandoned its alternative theory that the TPA operated as an amendment. Xerox explained, "[o]nce the Landlord took the position that the Parking Agreement did not amend the Lease, Xerox did not oppose but instead agreed with that

position." Xerox asserted it sought and the trial court granted partial judgment that the TPA—as a separate contract and not an amendment to the Lease—was breached by the Landlord. By terms of the TPA, the Landlord agreed it would provide alternate temporary parking spaces in parking areas depicted in an exhibit attached and incorporated to the agreement. No longer following the common area allocation, the TPA restricted Xerox to parking only in the temporary parking areas depicted on the exhibit. The TPA does not contradict terms of the Lease, as Section 8.1 provides "Landlord may, at its sole option, modify the Common Areas or make such changes thereto … provided such does not unreasonably interfere with Tenant's use of, access to, or parking for the Premises."

In bringing forth its first issue for review, the Landlord asserts that Xerox did not prove the TPA amended the Lease as a matter of law. The trial court, however, issued no such ruling. On review of the record, we agree that Xerox sought and the trial court granted partial judgment on the narrow basis of the TPA as a separate contract. *See City of San Antonio v. Hardee*, 70 S.W.3d 207, 212 (Tex. App.—San Antonio 2001, no pet.) (recognizing that an appellate court may accept admissions made in the briefs as true). Because the trial court was not asked to do so, the trial court made no ruling on the alternative theory—whether the TPA amended the lease as a matter of law.

Given the circumstances, we conclude we are not authorized to review Issue One's broad argument, and three of its four sub-arguments, as these arguments assert Xerox failed to prove an alternative theory abandoned and not ruled on below. TEX.R.APP.P. 33.1(a)(1) and (2) (as a prerequisite of appellate review, the record must show the trial court made a ruling). An appellate court is not authorized to reverse a trial court's judgment in the absence of properly assigned error. *Prudential Ins. Co. of Am. v. J.R. Franclen, Inc.*, 710 S.W.2d 568, 569 (Tex. 1986). However, to

the extent that at least one sub-argument—whether the TPA supports a term coterminous with the Lease—overlaps and duplicates other assigned issues that follow, we will address it accordingly. Issue One is overruled.

THE TPA DID NOT LACK CONSIDERATION

In Issue Two, the Landlord asserts that Xerox did not conclusively establish that the TPA was an enforceable contract supported by consideration.

It is well recognized that a contract that lacks mutual consideration is unenforceable. *See, e.g., Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006) (recognizing that all contracts "must be supported by consideration"); *see also Flex Enterprises LP v. Cisneros,* 442 S.W.3d 725, 728 (Tex. App.—El Paso 2014, pet. denied); *Mendivil v. Zanios Foods, Inc.,* 357 S.W.3d 827, 830–31 (Tex. App.—El Paso 2012, no pet.). Consideration is a bargained-for present exchange in return for a promise. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991); *Cherokee Comm'ns, Inc. v. Skinny's, Inc.*, 893 S.W.2d 313, 316 (Tex. App.—Eastland 1994, writ denied). It may consist of a benefit that accrues to one party or a detriment incurred by the other party; the detriment must induce the making of the promise and the promise must induce the incurring of the detriment.[8] *Roark*, 813 S.W.2d at 496.

The Landlord contends the TPA obligates the Landlord to do a variety of things but does

[8] We note that amendments and modifications to contracts must also be supported by consideration in order to be valid. *See generally Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986); *see also Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 113 (Tex. App.—El Paso 1997, pet. denied) (recognizing that a contract modification must satisfy the elements of a contract, and therefore, there must be a meeting of the minds supported by consideration). The consideration given for an amendment, however, may not be predicated on the consideration already given in the contract, or in other words, a promise to fulfill a pre-existing obligation cannot serve as consideration for an amendment to a contract. *See, e.g., Dupree v. Boniuk Interests, Ltd*., 472 S.W.3d 355, 367-68 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *FCLT Loans, L.P. v. United Commerce Ctr. Inc*., 76 S.W.3d 58, 60 (Tex. App.—Eastland 2002, no pet.). In the present case, even if we were to conclude that the TPA was an amendment, we would find sufficient consideration, as the TPA imposed new obligations on the Landlord to make improvements to the alternate parking area, and required Xerox to give up its right to park in the parking area designated in the Lease.

not impose an obligation on Xerox to do anything. On this basis, the Landlord asserts the TPA lacked consideration. We disagree.

The Lease provided Xerox with a non-exclusive right to parking in any common area of the premises. Xerox then agreed to give up, in part, its right to park in a common area directly behind the premises, in exchange for the Landlord providing alternate parking spaces. A large part of the common area that Xerox formerly shared with other tenants was then fenced in for exclusive use by DHL trucks. By terms of the TPA, the Landlord shifted parking spaces for Xerox's use farther away to an area behind the adjacent building, at 1320 Don Haskins Drive, which was then occupied by Cardinal Health.

We agree with Xerox that its agreement to give up its rights under the Lease constituted sufficient consideration on its part, as a bargained-for exchange, to support the TPA. In general, when a party gives up a pre-existing legal right, this provides valid consideration to support a contract. *See N. Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998); *see also Garza v. Villarreal*, 345 S.W.3d 473, 483 (Tex. App.—San Antonio 2011, pet. denied) (party's agreement to waive various legal claims it had against opposing party provided sufficient consideration to support settlement agreement); *Lampkin v. Lampkin*, 480 S.W.2d 35, 37 (Tex. Civ. App.—El Paso 1972, no writ) (wife's agreement to give up legal right to have court apportion or divide parties' property in a divorce proceeding provided consideration for property settlement agreement); *cf. Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 791 (Tex. 2008) (recognizing that giving up a legal right can constitute consideration for a contract, but finding that the appellant had not given up any legal rights in the parties' agreement); *see generally Mendivil v. Zanios Foods, Inc.*, 357 S.W.3d at 831 (citing *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 309 (Tex. App.—El Paso 2009, no pet.) (in determining whether a contract was supported by valid consideration,

mutual, reciprocal promises that bind both parties, as expressed in a contract, may constitute valid mutual consideration for the contract)). Accordingly, we conclude that Xerox's agreement to park in an alternate parking area, rather than in the common area designated in the Lease, was sufficient to constitute consideration for the TPA.[9] Issue Two is overruled.

WHETHER XEROX MET ITS BURDEN OF PROOF ON BREACH OF CONTRACT

In Issues Three and Four, the Landlord argues that Xerox did not meet its burden of establishing all elements of its breach of contract claim against the Landlord in its motion for partial summary judgment. The four elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance, or tendered performance, by the plaintiff; (3) a material breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *Restrepo v. All. Riggers & Constructors, Ltd.*, 538 S.W.3d 724, 740 (Tex. App.—El Paso 2017, no pet.) (citing *Velvet Snout, LLC v. Sharp*, 441 S.W.3d 448, 451 (Tex. App.—El Paso 2014, no pet.)). In these two related issues, the Landlord argues that Xerox failed to meet its burden of establishing the third element of its claim—a material breach of the TPA by the Landlord.

In Issue Three, the Landlord argues that because the TPA lacked a definite term of duration, or an event that would cause it to end, it was an agreement terminable at will. As such, the

[9] The Landlord also argues that Xerox failed to provide any "evidence" to support its claim that the TPA was supported by valid consideration, in response to the Landlord's verified denial claiming that there was no valid consideration. We note, however, that the goal of contract interpretation is to ascertain the parties' true intent as expressed by the plain language they used in their written agreement. *See Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017) (citing *Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010) (explaining that "we look at the language of the policy because we presume parties intend what the words of their contract say"); *see also Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam) ("The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument."). Thus, a contract's plain language controls, not "what one side or the other alleges they intended to say but did not." *Primo*, 512 S.W.3d at 893 (citing *Gilbert*, 327 S.W.3d at 127); *see also Eurecat US, Inc. v. Marklund*, 527 S.W.3d 367, 387 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Hall*, 292 S.W.3d at 28) (determining whether valid consideration exists in a contract is a question of law for a court to decide). Having found that the terms of the TPA itself provided sufficient mutual consideration, we conclude that Xerox was not required to come forward with any additional "evidence" on this issue.

Landlord asserts its notice of termination excused any future obligation to continue to provide up to 358 parking spaces as required by the terms of the TPA. Alternatively, in Issue Four, the Landlord asserts that if the TPA was not terminable at will, then it would only last a reasonable time, and determining what constitutes a reasonable time is an issue for the jury. We disagree with both arguments.

1. Whether the TPA was Terminable at Will Generally

In Issue Three, the Landlord argues that the TPA was not among the types of contracts for which a reasonable duration could be implied, and that, instead, the contract was, as a matter of law, terminable at will. We disagree.

If a contract is considered terminable at will, "the act of terminating the contract is not itself a breach of contract by [the promisor] because it was merely exercising its right to terminate the contract with or without cause." *See, e.g., Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc.*, 356 S.W.3d 54, 66 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also Clifford v. McCall-Gruesen*, No. 02-13-00105-CV, 2014 WL 5409085, at *3 (Tex. App.—Fort Worth Oct. 23, 2014, no pet.) (mem. op. on reh'g) (not designated for publication) (if a lease creates a tenancy at will, landlord had the right to terminate the lease at will, and therefore did not breach the parties' contract in doing so).

The case on which the Landlord relies, *Clear Lake City Water Auth. v. Clear Lake Utilities Co.*, is a case in which the Texas Supreme Court examined a contract between a water authority and a private utility company to provide water and sewage treatment to landowners within a certain 100-acre tract of land. *Clear Lake City Water Auth. v. Clear Lake Utilities Co.* 549 S.W.2d 385 (Tex. 1977). In *Clear Lake*, the water authority sought declaratory judgment arguing the contract it entered with the utility company granting exclusive right to provide water and sewer services to

residents of the tract was void from the beginning or had been lawfully terminated at will. *Id*. at 387. The utility also sought a declaratory judgment but argued instead that the contract remained binding for a reasonable period of time despite the fact the contract had been silent on its duration. *Id*.

In its decision, the Texas Supreme Court recognized a long-standing rule that contracts which contemplate continuing performance (or successive performances) and are indefinite in duration can be considered terminable at will. *Id.* at 390–91 (citing *Kennedy v. McMullen*, 39 S.W.2d 168, 174 (Tex. Civ. App. 1931, writ ref'd); *Tanenbaum Textile Co. v. Sidran*, 423 S.W.2d 635, 637 (Tex. Civ. App. 1967, writ ref'd n. r. e.); *Sturgeon v. City of Paris*, 58 Tex. Civ. App. 102, 122 S.W. 967, 970 (1909, writ ref'd); *Byrd v. Crazy Water Co*., 140 S.W.2d 334, 336 (Tex. Civ. App. 1940, no writ); TEX.BUS. & COMM.CODE ANN. § 2.309 (1968); 1 Williston On Contracts § 38 at 115-116 (3d ed. 1957)). The Court in *Clear Lake*, however, did not base its decision on the contract involving either continuing or successive performances.

More narrowly, the Court decided the contract was terminable at will because it involved a governmental agency performing a governmental function. *Id*. at 391. As *Clear Lake* explained, the water authority, by contract, could not lawfully abdicate its governmental functions, even for a "reasonable time," nor "bind itself in such a way as to restrict its free exercise of [its] governmental powers[.]" *Id*. Implying a reasonable term into the parties' contract would unnecessarily curtail the authority's ability to act "in the best interests of all of its customers and the public in general[.]" *Id*. at 392. Thus, the contract between the water authority and utility remained terminable at will as a matter of law. *Id*. As applied to this case, we agree with Xerox that *Clear Lake* is factually distinguishable and not controlling. First, the Landlord does not argue, nor does the evidence suggest, it qualifies as a governmental unit; and second, the Landlord does

not argue the TPA is a contract that contemplates continuing or successive performances.

On public policy grounds, various courts have uniformly held that employment contracts are terminable at will in the absence of any set duration. *See, e.g., Tanenbaum Textile Co. v. Sidran*, 423 S.W.2d 635, 637 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.) (employment agreement in which manufacturing company agreed to pay a salesman a commission on all sales produced by him for an unspecified period of time was terminable at will by either party); *Brown v. Sabre, Inc.* 173 S.W.3d 581, 585 (Tex. App.—Fort Worth 2005, no pet.) (recognizing the general principle that when the terms of service in an employment contract are left to the discretion of either party, or the term left indefinite, either party may put an end to it at will, and may do so without cause) (citing *East Line and Red River Railroad Company v. Scott*, 72 Tex. 70, 10 S.W. 99, 102 (1888); *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993)). Given the TPA does not concern employment, however, these cases are also distinguishable.

Lease agreements without any specific length of duration or end date are also considered to be tenancies at will, or terminable at will by either party. *See, e.g., Providence Land Services, LLC v. Jones,* 353 S.W.3d 538, 542 (Tex. App.—Eastland 2011, no pet.) (citing *Holcombe v. Lorino*, 124 Tex. 446, 79 S.W.2d 307, 310 (1935)); *see also Effel v. Rosberg*, 360 S.W.3d 626, 630 (Tex. App.—Dallas 2012, no pet.) ("It is the long-standing rule in Texas that a lease must be for a certain period of time or it will be considered a tenancy at will."); *Urban v. Crawley,* 206 S.W.2d 158, 160 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.) ("A lease for an indefinite and uncertain length of time is an estate at will."); *see also Fandey v. Lee*, 880 S.W.2d 164, 169 (Tex. App.—El Paso 1994, writ denied) (a tenant at will is one who holds possession of a premises by permission of an owner, but without a fixed term). Because a tenant at will has no certain or sure estate, the landlord "may put him out at any time." *See ICM Mortg. Corp. v. Jacob*, 902 S.W.2d

527, 530 (Tex. App.—El Paso 1994, writ denied); *see also Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 915 (Tex. 2013) (recognizing that tenants at will are lawfully in possession of property with their landlords' consent, but for no fixed term, and therefore, the landlords can put them out of possession at any time). If a lease does not specify a certain time for its duration, the tenant is "merely a tenant at will," and the tenancy may be terminated at the will of either party.

2. Whether the TPA created a Tenancy at Will

Because the TPA provides no at will term, the Landlord attempts to implicate the at will provision as a matter of law. Because we recognize that some lease agreements lacking term dates or periods of duration are treated as terminable at will, we turn next to examine whether the TPA qualifies as an at will lease agreement.

As a matter of law, a lease is defined as a grant of an estate in land for a limited term, with conditions attached.[10] *See Holcombe v. Lorino*, 124 Tex. 446, 454–55, 79 S.W.2d 307, 310 (1935); *see also Virani v. Syal*, 836 S.W.2d 749, 751 (Tex. App.—Houston [1st Dist.] 1992, writ denied). In determining whether an agreement constitutes a lease, the Supreme Court has held that the lease must contain a "granting clause," or terms which reflect an intention on the part of the landowner to transfer an interest in and possession of the property described. *See, e.g.*, *Vallejo v. Pioneer Oil Co.*, 744 S.W.2d 12, 14-15 (Tex. 1988) (per curiam). "To create the relationship of landlord and tenant, no particular words are necessary, but it is indispensable that it should appear to have been

[10] Chapter 92, of the Property Code, which is applicable to residential tenancies, defines a "lease" as "any written or oral agreement between a landlord and tenant that establishes or modifies the terms, conditions, rules, or other provisions regarding the use and occupancy of a dwelling." TEX. PROP. CODE ANN. § 92.001(3) (West 2014). However, Chapter 93, which is applicable to commercial tenancies, does not provide a definition of the term "lease." We therefore defer to the common-law definition of a lease in the context of commercial leases. *See generally City of El Paso v. Viel*, 523 S.W.3d 876, 892 (Tex. App.—El Paso 2017, no pet.) (recognizing that in construing a statute with an undefined term, a court may consider the definition of the term at common law).

the intention of one party to dispossess himself of the premises and of the other to occupy them." *Id*. at 15 (citing *Brown v. Johnson*, 118 Tex. 143, 12 S.W.2d 543, 545 (1929)).

In *Vallejo*, the owner of a convenience store sought a declaratory judgment of rights and obligations under a written agreement that had earlier been entered between his predecessor-in-interest and an oil company. *Id*. at 13. The agreement titled, "Lease and Operating Agreement," obligated the predecessor-store-owner to exclusively sell the gasoline products of the oil company. *Id*. Wanting to sell a different brand, the successor-store-owner argued the agreement with the oil company was not a lease that ran with the land, but merely a personal contract not binding on himself but solely on his predecessor. *Id.* Examining the nature of the agreement, the Supreme Court concluded it did not qualify as a lease—despite the express title of the agreement—as no terms conferred on the oil company the right to possess the premises. *Id*. at 15; *see also Mr. W Fireworks, Inc. v. Alamo Fireworks, Inc.*, No. 04-04-00934-CV, 2005 WL 2216501, at *2 (Tex. App.—San Antonio Sept. 14, 2005, no pet.) ("It is well-settled that a lease is valid only if it confers upon the lessee the right to exclusive possession or occupancy of the premises described in the granting clause."); *Mount Calvary Missionary Baptist Church v. Morse St. Baptist Church*, No. 2-04-147-CV, 2005 WL 1654752, at *7 (Tex. App.—Fort Worth July 14, 2005, no pet.) (mem. op. on reh'g) (not designated for publication) (recognizing that although no particular words are necessary, it is "indispensable that it should appear to have been the intention of one party to dispossess himself or herself of the premises and of the other to occupy them" in order to create a valid lease agreement). The *Vallejo* Court observed, "conspicuously absent from this agreement is a granting clause." 744 S.W.2d at 14.

Here, like the agreement in *Vallejo*, we note the TPA also lacks a granting clause. With regard to the parking area that is a subject of the TPA, there is no transfer of an interest in and

possession of the property to Xerox, nor obligation on the Landlord to dispossess itself of the parking spaces. At most, the TPA imposes two obligations on the Landlord: (1) to provide Xerox "alternate temporary parking spaces;" and (2) to restrict adjacent tenants from routing truck traffic through the parking area. We therefore conclude that the TPA lacks an essential element of a lease, and thus, cannot be construed as creating a tenancy at will over the premises. *See Vallejo*, 744 S.W.2d at 14-15.

In sum, the cases upon which the Landlord relies for the proposition that the TPA should be considered terminable at will are inapplicable as those cases involve governmental units, or contracts calling for successive services, employment contracts, or lease agreements. *See, e.g.*, *Clear Lake City Water Auth. v. Clear Lake Co.* 549 S.W.2d 385, 387 (Tex. 1977) (water and sewer authority); *Aztec Services, Inc. v. Quintana-Howell Joint Venture*, 632 S.W.2d 160, 162 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (agreement calling for successive engineering services); *Tanenbaum Textile Co. v. Sidran*, 423 S.W.2d 635, 637 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.) (employment contract); *Ingram Freezers v. Atchison, T. & S. F. R. Co.*, 464 S.W.2d 915, 921 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (lease agreement); *L. A. Durrett & Co. v. Iley*, 434 S.W.2d 367, 371 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (lease agreement).

Finally, on the evidence submitted, there is a final reason to reject the implication of a terminable at will term as duration of the TPA. Examining our record, we note the Landlord itself produced evidence guiding our interpretation of the parties' intentions. Among the twenty-seven exhibits attached to the Farschman affidavit, the Landlord included an email dated August 29, 2012, which attaches a copy of the proposed TPA containing an at will provision. The unsigned proposal expressly stated the TPA would continue only "until Landlord provides [Xerox] with ten

(10) days prior written notice revoking this Agreement." In our review of the record, however, we note the signed TPA, dated August 31, 2012, plainly omits the Landlord's proposed unilateral revocation after giving notice. When interpreting parties' intentions, their prior negotiations may bear on the court's interpretation. *See Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469-70 (Tex. 2011) (negotiations of the parties may have some relevance in ascertaining the purpose and intent embodied in the contract being interpreted as a whole); *see also Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*, 516 S.W.3d 89, 96 (Tex. App.—Tyler 2017, pet. filed). Given evidence of a contrary intention, we conclude the parties themselves did not intend for the TPA to operate as terminable at will as this contractual term was stricken from their signed agreement. Issue Three is overruled.

3. The Trial Court Properly Implied a Reasonable Term for the Duration of the TPA

In Issue Four, the Landlord argues that even if the TPA was not terminable at will, it was error for the trial court to imply a reasonable term for the TPA's duration as opposed to deciding it remained a genuine issue of material fact for a jury.

When construing an agreement, courts may imply terms that can reasonably be implied. *Fischer*, 479 S.W.3d at 239. Ordinarily, the question of what is a "reasonable" term for the duration of a contract without a specified term is to be "determined by the circumstances of the parties and the subject matter of the contract." *See, e.g., Anderson Energy Corp. v. Dominion Okla. Tex. Expl. & Prod.*, 469 S.W.3d 280, 294 (Tex. App.—San Antonio 2015, no pet.) (citing *Hall v. Hall*, 158 Tex. 95, 308 S.W.2d 12, 16 (1957); *see also Metromarketing Servs., Inc. v. HTT Headware, Ltd.*, 15 S.W.3d 190, 196 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (what constitutes a "reasonable time" to complete performance under a contract of an indefinite term depends on the facts of the case); *Heritage Res., Inc. v. Anschutz Corp.*, 689 S.W.2d 952, 955 (Tex.

App.—El Paso 1985, writ ref'd n.r.e.) ("What is a reasonable time depends upon the facts and circumstances as they existed at the date of the contract."); *see generally O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237, 245 (Tex. App.—San Antonio 1998, pet. denied) (op. on reh'g) (evidence presented at bench trial supported trial court's decision to imply reasonable term for duration of parties' domestic contract). If a reasonable time is implied, the determination of what is a reasonable time is generally a question of fact unless the evidence is uncontroverted. *See WesternGeco, LLC v. Input/Output, Inc.*, 246 S.W.3d 776, 785 n.6 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

With its summary judgment motion, Xerox came forward with both the Lease and the TPA among other documents relevant to the parties' leasing relationship. Although the TPA is titled "Temporary Parking Agreement," the term "temporary" is left undefined. To start, both parties agreed, they did not intend for the agreement to last forever. The trial court implied the end of the Lease, or June 30, 2016, as a "reasonable period" for the TPA's duration, and instructed the jury that it was authorized to assess damages against the Landlord only through the end of that date, if it found any were proven. Xerox asserts the Lease and the TPA are related agreements as both concern the same subject matter. We agree.

Without controverting evidence, the Lease and its amendments provided the only reasonable term from which the trial court could infer a reasonable period of duration. *Fischer*, 479 S.W.3d at 239-40 (quoting *Tanenbaum Textile Co. v. Sidran*, 423 S.W.2d 635, 637 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.) ("Where a contract is silent as to the time it is to run, or provides that it is to run for an indefinite term, … the law will imply that a reasonable time is meant."). Keeping in mind the need for parking arose solely from the operation of the call center, the lease term itself provided a reasonable term by implication as there is no purpose otherwise for

the alternate parking arrangement. *See Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996) (courts should construe a contract from a utilitarian standpoint bearing in mind the business activity sought to be served).

We note the TPA provided for "no less than three hundred and fifty-eight (358) [parking] spaces[.]" The exhibit attached to the TPA shows parking spaces overlapping both the leased premises and the Landlord's adjacent building. The TPA uses the term "alternate temporary parking spaces." The term "alternate" has no meaning separate and apart from the Lease and becomes meaningless if construed independently. The use of the parking spaces themselves has no independent purpose other than for use by employees and invitees of Xerox's call center. Thus, it is reasonable to conclude that the TPA provides alternate parking spaces for use by Xerox employees and invitees of the leased facility, not for any alternate purpose or objective.

By demonstrating that the Landlord terminated the TPA prior to the end of the Lease, Xerox met its initial burden of establishing all elements of its claim for breach of contract. Xerox argues and we agree that the TPA altered the location where its employees and invitees could park pursuant to the terms of the Lease. Together, the Lease and the TPA represent a course of dealing between the parties from which the trial court could implicate a reasonable period of duration to avoid forfeiture. *Fischer*, 479 S.W.3d at 239. By implication, the TPA remained effective through the end of the Lease as the TPA clearly served the purpose of supporting the call center. *Id*. Whether the TPA amended the Lease is a distinction without a difference.

Although the party moving for summary judgment bears the initial burden of establishing the elements of its claim, once it does so, the burden then shifts to the nonmoving party to disprove or raise an issue of fact as to at least one of those elements. *Amedisys, Inc.*, 437 S.W.3d at 511. The Landlord could have disputed the implication of the end of the lease term as being a reasonable

period of duration by coming forward with its own controverting evidence. The Landlord presented the affidavit of Trudi Farschman and deposition excerpts from David Jarrett, Xerox's property manager. Farschman primarily detailed the history of the parties' leasing relationship and their frequent discussions of parking spaces. Jarrett merely testified that he himself had no communications regarding the intended duration of the TPA but one of Xerox's attorneys had communicated with the Landlord about the intent of the TPA. We conclude the evidence presented fails to controvert the lease term as a reasonable period of duration, and thus, the duration of the TPA was conclusively established as a matter of law.

As a final matter to address, the Landlord argues that Xerox did not make it clear in its motion for summary judgment that it relied on the term of the Lease as the duration of the TPA, and only did so in its reply to the Landlord's response. The Landlord relies on the general rule that a trial court may not consider any new ground for summary judgment that was not in the moving party's summary judgment motion and was instead only included in the reply without the nonmoving party's consent. *See All Metals Fabricating, Inc. v. Foster Gen. Contr., Inc.*, 338 S.W.3d 615, 622 (Tex. App.—Dallas 2011, no pet.) (citing *Sanders v. Capitol Area Council*, 930 S.W.2d 905, 911 (Tex. App.—Austin 1996, no writ) (in absence of nonmovant's consent, movant may not raise a new ground for summary judgment in a reply to nonmovant's response)). We disagree with the Landlord's argument.

In its motion for summary judgment, Xerox broadly argued the Landlord had breached the Contract to provide parking for Xerox's use in operating the call center. From the beginning, Xerox relied on the collection of documents including the Lease, amendments, and the TPA, as evidence of the parties' parking agreement. When the Landlord responded narrowly by contending the TPA was terminable at will, Xerox replied with its argument against the Landlord's position,

not with a new or independent ground for summary judgment. In either case, the trial court was asked to interpret the TPA and implicate a term of duration. *Fischer*, 479 S.W.3d at 239. Thus, we conclude that Xerox did not raise a "new" ground in its reply when it argued the TPA term could be implicated from the Lease agreement.

We therefore conclude that Xerox met its burden of establishing all elements of its claim for breach of contract as the Landlord failed to controvert the evidence or otherwise raise a genuine issue of material fact. We conclude the trial court did not err in granting summary judgment in Xerox's favor on the issue of liability. Issue Four is overruled.

CONCLUSION

We affirm the trial court's two underlying orders granting partial summary judgment finding that the Landlord was liable for breaching the TPA. Further, as the Landlord has not challenged the jury's verdict awarding damages to Xerox for breach of contract, we affirm the trial court's final judgment in all respects.

GINA M. PALAFOX, Justice

May 9, 2018

Before McClure, C.J., Rodriguez, and Palafox, JJ.