Affirmed and Memorandum Opinion filed August 17, 2017.

In the

Fourteenth Court of Appeals

NO. 14-16-00632-CV

JEROME LOVE, Appellant

V.

CHAREE HARRISON AND ETCHED COMMUNICATION, LLC, Appellees

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 2015-69342

M E M O R A N D U M O P I N I O N

After their business relationship soured, appellees Etched Communication, LLC, and Charee Harrison brought contract and fiduciary claims against appellant Jerome Love. Love brought contract, fiduciary, and declaratory-judgment counterclaims against Harrison. The parties negotiated a settlement agreement. When Love repudiated, Etched and Harrison added claims for anticipatory breach of the settlement agreement. Etched and Harrison filed a traditional motion for

summary judgment based on this breach, which the trial court granted.

Love challenges the final summary judgment in essentially two issues.[1] First, Love contends that there was a genuine issue of material fact regarding whether there was a meeting of the minds on essential and material terms of the settlement agreement. Second, if a settlement agreement was reached, then Love argues that there was a genuine issue of material fact regarding the existence of just cause for his repudiation. We affirm.

I. BACKGROUND

During August 2014, in order to provide public-relations and communication services, Harrison and Love entered into the "Company Agreement of Etched Communication, LLC." The sole members of Etched were Harrison with 51% ownership and Love with 49% ownership. Etched sub-leased office space from Texas Black Expo. Love was the president and director of Texas Black Expo.

In September 2015, Etched and Harrison retained legal counsel and sent Love a "cease and desist" letter due to Love's "recent conduct and the need for a termination of the parties' business relationship."

In November 2015, Etched and Harrison filed suit against Love, bringing claims for breach of the Company Agreement and breach of fiduciary duty. In their petition, Etched and Harrison included an application for a temporary restraining order (TRO) and injunctive relief. The trial court signed a TRO that prohibited Love from accessing Etched's funds or accounts and from taking any action to limit Etched's ability to pay company expenses.

[1] Love's overarching first issue presented is whether the trial court erred in granting the summary judgment in favor of Etched and Harrison. In his second and third issues presented, Love argues his specific challenges to the summary judgment.

In December 2015, believing Love to have violated the TRO, Etched and Harrison filed an emergency motion and supplemental emergency motion to show cause. The trial court signed an order finding that Love violated the TRO and ordered Love to pay $6,000 in sanctions and $750 in attorney's fees. Love filed counterclaims against Harrison for breach of the Company Agreement, breach of fiduciary duty, and declaratory judgment.

For several weeks, the parties engaged in settlement discussions whereby Harrison would buy out Love's interest in Etched. On February 1, 2016, through his then-counsel, by email, Love made a settlement offer "to resolve this matter":

> 1. Payment of $25,000 plus the forgiveness of the sanctions award in the amount of $6,750;
> 2. Your clients will continue to pay the sub-lease during its term, until and if, a sub-tenant is located who will assume the sub-lease;
> 3. Non-disparagement clauses for all involved;
> 4. Transfer of the website URL to Etched or Ms. Harrison (whichever she prefers) in exchange for allowing Mr. Love to keep his current desk and the receptionist furniture.
>
> As to Ms. Love's potential wage claim, Ms. Love will accept $3,000 to fully and finally resolve this claim, as well as Mr. Love's providing indemnification to the Company and Ms. Harrison in the event Ms. Love were to attempt to assert a claim at a later date.

By email, through their counsel, Etched and Harrison provided this counteroffer:

> [P]oint 4 will be changed to say the transfer of the URL in exchange for the glass desks and bookshelves as well as the printer, TV Mr. Love has a receipt for and the refrigerator and microwave. We will also include a mutual waiver of the non-compete/non-solicitation agreement, and non-reliance on representations language.
>
> Both sides will nonsuit their claims with prejudice.
>
> On the lease, Mr. Love needs to have the personal guarantee transferred to himself.

As for the FLSA dispute, Mr. Love[] need[s] to provide defense and indemnification.

Please confirm this agreement and I will draft the formal documents.

Then-counsel for Love responded by email with "Confirmed."

On March 17, 2016, new (current) counsel for Love sent Etched and Harrison a letter, which alleged that Etched and Harrison continued to breach the Company Agreement because they were refusing to involve Love in business decisions and provide access to Etched's books and records. That same day, counsel for Love repudiated the February 1 settlement agreement by phone.

Etched and Harrison filed a first amended petition, which added a claim for breach of the settlement agreement. Etched and Harrison filed a traditional motion for summary judgment on their claim for breach of the rule 11 settlement agreement. To their motion, Etched and Harrison attached:

(1) the trial court's order signed January 12, 2016, granting sanctions against Love;

(2) the settlement agreement—the chain of emails dated February 1, 2016, between then-counsel for Love and counsel for Etched and Harrison;

(3) an affidavit from counsel for Etched and Harrison;

(4) an email dated April 18, 2016, from counsel for Love to counsel for Etched and Harrison seeking $30,000 instead of the agreed $25,000 in payment plus $30,000 (six monthly payments of $5,000) for defense and indemnification on Love's wife's potential wage claim; and

(5) correspondence between counsel that "culminated in the settlement agreement":

- the "cease and desist" letter dated September 22, 2015, from counsel for Etched and Harrison to Love;
- a letter dated December 28, 2015, from then-counsel for Love to counsel for Etched and Harrison seeking "to have [Love's] interest bought out" and "a business divorce";

- an email dated January 5, 2016, from counsel for Etched and Harrison to then-counsel for Love re: Settlement Issues;
- an email chain dated January 7, 2016, between then-counsel for Love and counsel for Etched and Harrison regarding potential independent valuation of Etched;
- a letter dated January 15, 2016, from then-counsel for Love to counsel for Etched and Harrison containing a settlement offer to expire January 19, 2016;
- an email dated January 19, 2016, from counsel for Etched and Harrison to then-counsel for Love containing a counteroffer to expire January 20, 2016; and
- a letter dated January 26, 2016, from then-counsel for Love to counsel for Etched and Harrison containing another settlement offer.

Love filed a response in opposition. To his opposition, Love attached: an email chain dated March 31, 2016, among counsel for Etched and Harrison, Love's counsel, and Love's then-counsel, re: Sanction Amount; a draft settlement agreement and release between Etched and Love's wife; a draft settlement agreement among Etched, Harrison, and Love; the email chain dated February 1, 2016, between then-counsel for Love and counsel for Etched and Harrison; a TRO order signed April 6, 2016, ordering that Love be given "read-only" access to Etched's record and books as and from the time of the November TRO;[2] and the April 18, 2016, email from counsel for Love to counsel for Etched and Harrison containing the $30,000 settlement offer.[3]

[2] On March 31, 2016, Love filed an application for TRO and injunctive relief, requesting access to Etched's records and books, and for Love to be involved in Etched's decisions and meetings.

[3] Also attached to Love's opposition was a cover sheet for an exhibit "for in camera review." Love characterizes this exhibit as an "excerpt of email between Love and his counsel" that would be presented "at and during the motion hearing." However, the record reflects that no

The trial court held a hearing and signed an order granting interlocutory summary judgment in favor of Etched and Harrison. The trial court ordered the parties to specifically perform the terms of the February 1, 2016, settlement agreement, stating:

> To clarify the terms of the agreement that the Court finds and construes as a matter of law (and not to expand or vary its terms), the Court further orders as follows:
>
> (A) The agreement is comprised [sic] of the February 1, 2016 email exchange between [counsel for Etched and Harrison and then-counsel for Love];
>
> (B) The payment and sanctions forgiveness and other consideration is for the purpose of the termination of the LLC and the transfer of Mr. Love's 49% ownership interest therein to Etched;
>
> (C) With respect to the sub-lease, the agreement is clear that Etched will have to continue to pay the sub-lease until it expires. Etched may find a sub-tenant to assume the sub-lease. The express terms of the sub-lease and the master lease held by T[exas] B[lack] E[xpo] will continue to control access to the premises. This settlement agreement does not change that.
>
> (D) The Court agrees with [Love's] counsel that Ms. Love is not a party to the lawsuit, and thus this Court has no authority to adjudicate any agreement she may have made directly or indirectly with Etched. However[,]
>
> (E) the Court will enforce Mr. Love's agreement to provide both a defense and indemnification to Etched and Ms. Harrison in the event Ms. Love were to attempt to asse[r]t a potential wage claim at a later date. Finally,
>
> (F) the remaining terms will be enforced by this Judgment as well, and do not appear to require clarification.

Etched and Harrison submitted evidence regarding their attorney's fees

exhibits were offered or admitted at the summary-judgment hearing.

related to enforcement of the settlement agreement. The trial court rendered final summary judgment in favor of Etched and Harrison and awarded $5,500 in attorney's fees. Love timely appealed.

II. Analysis

A. Standard of review

We review a summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review the evidence presented in the light most favorable to the party against whom the summary judgment was rendered, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Id.* To prevail on a traditional motion for summary judgment, a movant must establish "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Tex. R. Civ. P. 166a(c). If the movant establishes its right to judgment as a matter of law, then the burden shifts to the nonmovant to present evidence raising a genuine issue of material fact. *Ballard v. Arch Ins. Co.*, 478 S.W.3d 950, 953 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000)). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

B. Enforceability of the settlement agreement

Etched and Harrison moved for traditional summary judgment on their claims that Love committed an anticipatory breach by repudiating the settlement agreement. We first consider whether the settlement agreement constituted a valid, enforceable

contract. A legally enforceable contract generally consists of: (1) an offer, (2) acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, (5) execution and delivery of the contract with the intent that it be mutual and binding, and (6) consideration. *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Here, Etched and Harrison produced conclusive evidence to establish a valid and enforceable contract. The February 1, 2016, chain of emails conclusively shows that Etched, Harrison, and Love reached a settlement agreement. Love, through his then-counsel, presented his settlement offer; and Etched and Harrison, through their counsel, rejected that offer and presented their counteroffer. Love, through his then-counsel, then accepted that counteroffer with a clear "Confirmed." In relevant part, the terms of the settlement agreement provided that:

- Etched and Harrison would pay Love $25,000 and forgive his $6,750 sanctions award;
- the parties would nonsuit their claims with prejudice;
- Etched and Harrison would continue paying the sub-lease unless another sub-tenant assumed the sub-lease;
- Love would have the guarantee on the lease transferred to himself;
- Love would provide defense and indemnification should his wife assert a wage claim against Etched and Harrison;
- Etched and Harrison would receive the website URL;
- Love would receive the glass desks, bookshelves, printer, TV, refrigerator, and microwave; and
- the parties agreed to non-disparagement and non-reliance on representations, and mutually waived the non-compete/con-solicitation agreement.

In his "first" issue,[4] Love argues that Etched and Harrison did not meet their summary-judgment burden because "the evidence clearly showed that no agreement was perfected because there was never a meeting of the minds on material and essential terms of the agreement." Love contends that there was no agreement on "who would get to use which portions of a leased premises in which they both conducted business, and who would have a key to the premises and be allowed to come and go at which times"; "proper allocation and division of property"; and "a date by which the proposed settlement would be paid to Love." Etched and Harrison assert that these matters were merely "peripheral" to the amount of the buyout and, in any event, most were included in the settlement agreement.

Settlement agreements are a type of agreement "highly favored by the law." *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008). The question of whether a settlement agreement contains all the essential terms for it to be enforceable is a question of law. *See McCalla v. Baker's Campground, Inc.*, 416 S.W.3d 416, 418 (Tex. 2013) (per curiam); *MKM Eng'rs, Inc. v. Guzder*, 476 S.W.3d 770, 778 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Gen. Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737, 744 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Contracts should be examined on a case-by-case basis to determine which terms are material or essential. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *see also MKM Eng'rs*, 476 S.W.3d at 778 ("Essential or material terms of a Rule 11 settlement agreement include payment terms and release of claims." (citing *Padilla v. LaFrance*, 907 S.W.2d 454, 460–61 (Tex.

[4] Love does not contend that the settlement agreement did not otherwise conform to rule 11. *See* Tex. R. Civ. P. 11 (enforceable agreement touching suit pending must be in writing, signed, and filed with the papers as part of record); *Padilla v. LaFrance*, 907 S.W.2d 454, 460–61 (Tex. 1995) (series of letters filed with motion trial court after party revoked its consent constituted rule 11 settlement agreement); *Green v. Midland Mortg. Co.*, 342 S.W.3d 686, 690–92 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (same as to series of emails).

1995))); *Gen. Metal*, 438 S.W.3d at 745 (settlement agreement included essential terms of return of company shares, payment, and dismissal of lawsuit with prejudice); *Green v. Midland Mortg. Co.*, 342 S.W.3d 686, 691 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (material terms were "an agreement to pay a specified sum of money in exchange for the settlement of all claims"); *cf.* Black's Law Dictionary 1698–99 (10th ed. 2014) (defining "material terms" as "contractual provision[s] dealing with a significant issue such as subject matter, price, payment, quantity, quality, duration, or the work to be done").

For an agreement to be enforceable, there must be a meeting of the minds—mutual understanding of and assent to the agreement regarding its subject matter and essential terms. *Ludlow v. DeBerry*, 959 S.W.2d 265, 272 (Tex. App.—Houston [14th Dist.] 1997, no writ). The determination of a meeting of the minds is based on the objective standard of what the parties said and did, not on their subjective states of mind. *See Angelou*, 33 S.W.3d at 278. "The parties must agree to the same thing, in the same sense, at the same time." *Id.* at 279.

First, Love argues that Etched and Harrison did not meet their summary-judgment burden because there was no meeting of the minds regarding the essential term of access to the leased premises. The parties do not dispute, and the trial court's summary-judgment order so referenced, that a master lease existed and was held by Texas Black Expo, which sub-leased space to Etched. *See Rus-Ann Dev., Inc. v. ECGC, Inc.*, 222 S.W.3d 921, 926 (Tex. App.—Tyler 2007, no pet.) ("The rights and duties of the lessor and lessee are determined by the lease and are contractual."). However, the crux of the settlement agreement concerned the buyout "amount" for Love's interest in Etched. *See City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 721 (Tex. App.—Fort Worth 2008, pet. dism'd) (no fact issue on meeting of the minds where transportation of wastewater was "secondary issue" at

time of contract's execution while purchase of treatment capacity was "major victory"). Accordingly, while the settlement agreement did not set forth any details regarding the "peripheral issue" of access, the settlement agreement included financial details related to which parties (Etched and Harrison) would be responsible for payment of the remainder of Etched's sub-lease and which party (Love) would take on the guarantee for the lease. The evidence objectively demonstrates that the parties mutually understood and agreed to these terms.

Even construed in the light most favorable to Love, the existence of a redline draft settlement agreement and further discussion by email about access to particular leased space does not raise a fact issue on the enforceability of the settlement agreement. *See MKM Eng'rs*, 476 S.W.3d at 779 ("[T]he Rule 11 Agreement is not unenforceable merely because the parties contemplated taking additional actions and executing a final settlement agreement at a later date."), 782 ("While these terms may have been important to one party or the other, the parties' failure to resolve their differences concerning other non-essential or collateral matters left for future negotiation do not render the Rule 11 Agreement unenforceable as a matter of law."); *Gen. Metal*, 438 S.W.3d at 748–51 (binding settlement shown despite parties' failure to execute contemplated additional formal document).

Next, we disagree with Love that there was an absence of a meeting of the minds on proper allocation and division of property among the parties. Love does not further explain what "essential" property allegedly was missing from the settlement agreement. The settlement agreement expressly stated that Love would receive specific office furniture items, as well as that Etched and Harrison would receive Etched's website address. The evidence objectively shows that the parties mutually understood and agreed to this property division. Love cites no evidence to the contrary and therefore does not raise a fact issue on the enforceability of the

settlement agreement.

Finally, Love takes issue with the lack of "a date by which the proposed settlement amount would be paid to Love." However, Texas courts hold that time of performance such as the time of payment of a settlement amount is not an essential term because time ordinarily is not of the essence in a contract. *See, e.g.*, *RayMax Mgmt., L.P. v. New Cingular Wireless PCS, LLC*, No. 02–15–00053–CV, 2016 WL 7241475, at *5 (Tex. App.—Fort Worth Dec. 15, 2016, pet. denied) (mem. op.); *Consumer Portfolio Servs., Inc. v. Obregon*, No. 13–09–00548–CV, 2010 WL 4361765, at *6–7 (Tex. App.—Corpus Christi Nov. 4, 2010, no pet.) (mem. op.); *Atl. Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 211–12 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (op. on reh'g); *Shaw v. Kennedy, Ltd.*, 879 S.W.2d 240, 246–47 (Tex. App.—Amarillo 1994, no writ). Nor does Love provide, and we have not located, any authority to support his proposition that "when a party will be paid[] a settlement amount is a material and essential component of any agreement." Love points to the redline draft of the settlement agreement negotiating the potential date of payment. But, again, the parties' failure to formalize this collateral matter does not raise a fact issue on the enforceability of the settlement agreement. *See MKM Eng'rs*, 476 S.W.3d at 779, 782; *Gen. Metal*, 438 S.W.3d at 748–51.

We conclude that the summary-judgment record establishes the existence of a valid, enforceable settlement agreement as a matter of law. Therefore, we overrule this issue.[5]

[5] Within this issue, Love also generally argues that the "self-serving" summary-judgment affidavit submitted by counsel for Etched and Harrison "did not render the issues undisputed." Even if Love had presented any specific challenge to the affidavit, we already have concluded that the February 1, 2016, chain of emails contained all the essential and material terms of the parties' settlement agreement and was an enforceable contract. Moreover, because the settlement agreement is unambiguous, the affidavit is of limited relevance and cannot be used to show the parties' motives or intentions apart from the settlement agreement. *See Anglo–Dutch Petroleum*

C. No fact issue regarding just cause

In his "second" issue, Love argues that if the settlement agreement was enforceable, then the trial court should not have granted summary judgment because a genuine issue of material fact existed as to whether he had just cause to repudiate the agreement.

Repudiation or anticipatory breach[6] consists of words or actions by a contracting party that indicate he is not going to perform the contract in the future. *See Builders Sand, Inc. v. Tuttle*, 678 S.W.2d 115, 120 (Tex. App.—Houston [14th Dist.] 1984, no writ). A party claiming anticipatory breach of a contract must establish the following elements: (1) a party to a contract has absolutely repudiated the obligation; (2) without just excuse; and (3) the other party is damaged as a result. *Hernandez v. La Bella*, No. 14–08–00327–CV, 2010 WL 431253, at *4 (Tex. App.—Houston [14th Dist.] Feb. 9, 2010, no pet.) (mem. op.); *see Owens v. Owens*, No. 14-01-01164-CV, 2003 WL 1986947, at *2 (Tex. App.—Houston [14th Dist.] May 1, 2003, pet. dism'd) (mem. op.); *Van Polen v. Wisch*, 23 S.W.3d 510, 516 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *see also* Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges: Contracts PJC 101.23 & cmt. (2014) (may be submitted as defensive measure or as cause of action).[7] Just cause or excuse has been defined as a "reasonable basis" for the repudiation "under

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Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 452 (Tex. 2011).

[6] Courts have used the terms "repudiation" and "anticipatory breach" interchangeably. *See Grp. Life and Health Ins. Co. v. Turner*, 620 S.W.2d 670, 673 (Tex. Civ. App.—Dallas 1981, no writ).

[7] Although the parties mistakenly characterize just cause as an affirmative defense to repudiation, we apply the traditional summary-judgment standard requiring Etched and Harrison to demonstrate the lack of just cause as part of their repudiation claim. Only if we conclude that Etched and Harrison have met their burden will we review whether Love has raised a fact issue on the existence of just cause to preclude summary judgment.

the facts and circumstances then existing." *See Cont'l Cas. Co. v. Vaughn*, 407 S.W.2d 818, 820 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); *see also* Black's Legal Dictionary 266 (10th ed. 2014) ("good cause" or "just cause" means "a legally sufficient reason").

Here, the summary-judgment evidence conclusively demonstrates that on March 17, 2016, in a phone call counsel for Love informed counsel for Etched and Harrison that Love would not be honoring any February 1, 2016, settlement agreement. The summary-judgment evidence further demonstrates that Love did not have any reasonable basis for his repudiation as of March 17, 2016. On February 1, 2016, then-counsel for Love responded with "Confirmed," which constituted an acceptance of the counteroffer presented by counsel for Etched and Harrison on February 1, 2016. Love's counsel did not provide an explanation for Love's repudiation of the settlement agreement in the letter sent to counsel for Etched and Harrison, dated March 17, 2017. In addition, the evidence shows that the parties engaged in lengthy back-and-forth discussions prior to entering the settlement agreement. In particular, there is evidence that the parties freely negotiated valuation of Love's interest in Etched prior to agreeing to the buyout amount of $25,000 plus forgiveness of the $6,750 sanctions award. Finally, the evidence shows that Etched and Harrison incurred attorney's fees resulting from Love's repudiation. We conclude that Etched and Harrison demonstrated Love's anticipatory breach.

Love's evidence does not raise any fact issue on the existence of just cause. Love first points to the entirety of Etched and Harrison's summary-judgment filing and argues that just cause existed because "the parties agreed that a proper valuation of the company would occur." The parties discussed the potential availability and expense of an outside valuation during their negotiations, but this is not evidence that they "agreed" such valuation would occur, much less that it would form the

basis for the settlement amount. Rather, the parties proposed competing valuations prior to agreeing on the amount of $25,000 plus forgiveness of the $6,750 sanctions award in the settlement agreement.

Next, Love contends that Harrison "withheld accurate information" about the status of Etched, relying on the April 6, 2016, TRO in which the trial court ordered Harrison to provide Love with reasonable "read-only" access to company records. Love did not apply for a TRO until after he had repudiated the settlement agreement. Moreover, this TRO concerned Love's counterclaim for Harrison's alleged breach of the Company Agreement, which Love already agreed he would nonsuit with prejudice in the settlement agreement. Love next points to evidence that on April 18, 2016, he requested access to Etched's records "to be satisfied [with] the company's state of affairs." In the same email, counsel for Love states that Love "alternatively" would be willing to settle on virtually the same terms as in the settlement agreement (except $30,000 instead of $25,000) "without going any further." Even viewed in the light most favorable to Love, such evidence does not bear on whether Love had just cause as of March 17, 2016, to refuse to honor the settlement agreement.

Finally, Love argues that he had just cause based on the allegedly "obstructive and unresponsive" conduct of Etched and Harrison. However, Love did not present evidence of this alleged excuse for repudiation. *See* n.3.

Because Etched and Harrison met their summary-judgment burden on anticipatory breach and Love then failed to raise a fact issue on the element of just cause, we overrule this issue.[8] Having overruled what Love listed as his second and

[8] Within this issue, Love also asserts that "the jury should have decided whether the facts support a finding that a . . . failure of consideration occurred." *See City of The Colony*, 272 S.W.3d at 733 (failure of consideration occurs when, due to supervening cause after agreement is reached, promised performance fails). Love asserted the affirmative defense of failure of consideration in

third issues, we also overrule his overarching first issue. *See* n.1.

III. CONCLUSION

Accordingly, we affirm the trial court's final summary judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Jamison, and Brown.

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his answer to Etched's and Harrison's first amended petition. However, Love points to no evidence and therefore did not meet his burden to avoid summary judgment by raising a fact issue on the elements of failure of consideration. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *MKM Eng'rs*, 476 S.W.3d at 776.