

AFFIRM; and Opinion Filed March 31, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00123-CV

**JEWELL THOMAS, Appellant
V.
VERVEBA TELECOM, LLC, Appellee**

**On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-01451**

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Lang-Miers, and Justice Myers
Opinion by Justice Lang-Miers

Jewell Thomas, representing himself, appeals from a summary judgment granted in favor of Verveba Telecom, LLC and dismissing his claims. We affirm the judgment.

BACKGROUND

Thomas worked for Verveba and was sent to North Carolina for a job. When Verveba was ready to wind down that job, it discovered some of its equipment (a cell phone) was missing and told Thomas that it would not arrange for his travel home to Texas until the phone was found. Thomas claimed he did not have the phone and did not have the money to furnish his own transportation home. After a few days, he drove the company's rental car to Mississippi where he had friends. He asked Verveba for an airplane ticket home and Verveba agreed when Thomas turned in the rental car. Travel was not arranged, however, and Thomas remained in Mississippi for an unknown period of time. Meanwhile, Thomas experienced emotional distress that

exacerbated a mental condition that had been in remission, and he had to begin taking psychiatric medications again. When Thomas eventually returned to Texas, Verveba deducted from his final paycheck the cost of the phone, gasoline, and the rental car.

Thomas sued Verveba in small claims court for breach of contract and intentional infliction of emotional distress. The JP court dismissed the emotional distress claim for want of jurisdiction and submitted the breach of contract claim to a jury. A jury found in favor of Thomas and awarded him \$983.50 plus interest as damages. Thomas appealed to the county court at law, but the record of that proceeding is not in our appellate record. Eventually Thomas and Verveba settled their dispute and filed a Settlement and Release of Judgment in the JP court proceeding stating that they “desire[d] to settle all claims” and that

each party hereby: (i) releases all claims against the other; (ii) waives his/its right to file a motion for new trial, (iii) waives his/its right to appeal the judgment, and (iv) agrees to keep confidential the terms of the settlement and the facts and circumstances of the engagement of Jewell “Jay” Thomas [unreadable] Verveba Telecom, LLC under the Independent Contractor Agreement. . . .

Verveba paid Thomas the settlement amount. After negotiating the check, Thomas filed a new lawsuit in district court asserting claims for intentional and negligent infliction of emotional distress, breach of contract, negligence, gross negligence, and civil conspiracy, all arising out of Verveba’s failure to arrange transportation for him to return home to Texas. He sought damages for severe emotional distress, lost wages, and exemplary damages.

Verveba answered and asserted several affirmative defenses as well as a counterclaim for breach of the settlement agreement. Verveba moved for traditional summary judgment on its affirmative defenses and counterclaim. Thomas did not respond directly to the motion, but filed a motion for sanctions asserting that Verveba’s counterclaim for breach of the settlement agreement was frivolous. The trial court granted summary judgment on Verveba’s counterclaim

and two of its affirmative defenses. The order dismissed Thomas's claims with prejudice. Thomas filed a motion for new trial, which the trial court denied. This appeal followed.

DISCUSSION

Thomas argues that the trial court erred by granting Verveba's motion for summary judgment because (1) the motion was based on an invalid settlement agreement, (2) Verveba's arguments are barred by res judicata and collateral estoppel, and (3) to the extent summary judgment was based on his failure to respond to Verveba's motion, he was not required to respond.

We review a trial court's grant of summary judgment de novo. *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012). Because the trial court granted summary judgment on Verveba's counterclaim and affirmative defenses, Verveba had the burden to show there was no genuine issue of material fact and it was entitled to judgment as a matter of law. See TEX. R. CIV. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). Thomas, as the nonmovant, had no burden to respond to Verveba's motion unless Verveba conclusively established it was entitled to summary judgment. *Willrich*, 28 S.W.3d at 23.

To be entitled to summary judgment on its counterclaim for breach of the settlement agreement, Verveba had to conclusively prove (1) the existence of a contract, (2) Verveba performed or tendered performance, (3) Thomas breached the contract, and (4) damages resulting from the breach. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.). Verveba attached evidence to its motion that it contended established it was entitled to summary judgment on its counterclaim. Thomas's only challenge to Verveba's summary-judgment evidence is that the counterclaim is frivolous because the settlement agreement was invalid. We construe this argument as a challenge to the existence of a contract.

Thomas contends that the settlement agreement was invalid to release the claims he asserted in this lawsuit because it did not specifically “mention” each claim it was releasing. He contends that Texas law requires a release to “mention,” that is, identify each claim by name, to be effective. For support, he cites *Keck, Mahin & Cate v. National Union Fire Insurance Co.*, 20 S.W.3d 692 (Tex. 2000), *McCullough v. Scarbrough, Medlin & Associates, Inc.*, 435 S.W.3d 871 (Tex. App.—Dallas 2014, pet. denied), and *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.). He also argues that the settlement agreement released only his breach of contract claim because that was the only claim heard in the JP court. We disagree.

The cases upon which Thomas relies generally hold that for a release to be effective, it must “mention” the claim or cause of action released or the claim must clearly fall within the release’s subject matter when viewed in light of the facts and circumstances surrounding the execution of the release. *Keck, Mahin & Cate*, 20 S.W.3d at 698; *McCullough*, 435 S.W.3d at 885–86, 889; *Vela*, 723 S.W.2d at 204; *see also Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991) (examining whether claim was “mentioned or clearly [fell] within the subject matter of the” release). None of these cases held that the release must identify each claim or cause of action by name to be effective and, in fact, none of the releases in these cases identified the claims being released specifically by name. *See, e.g., Keck, Mahin & Cate*, 20 S.W.3d at 697 (releasing “all demands, claims or causes of action of any kind whatsoever, statutory, at common law or otherwise, now existing or that might arise hereafter, directly or indirectly attributable to the rendition [of] professional legal services” during a certain time period); *McCullough*, 435 S.W.3d at 886 (releasing “any claims, demands, causes of action and liabilities, known or unknown, either [party] has against the other based on any facts, events, transactions and occurrences . . ., excepting the obligations or outstanding issues or claims

provided herein”); *Vela*, 723 S.W.2d at 204 (releasing “all damages, claims or causes of action claimed or asserted against Pennzoil”).

The claims Thomas now asserts relate to Verveba’s failure to arrange his transportation back to Texas and the emotional distress he claimed to have suffered as a result. This was the basis for his claim for intentional infliction of emotional distress in the JP court proceeding, the same proceeding in which the parties reached the settlement agreement. And it does not matter that the current claims were never heard in the JP court, because a release may be effective for future unknown claims. *See Keck, Mahin & Cate*, 20 S.W.3d at 698 (release may cover unknown claims); *McCullough*, 435 S.W.3d at 885–86 (same). Even though the settlement agreement did not specifically name all the claims Thomas asserts in this lawsuit, it is undisputed that they all arose out of the subject matter of the release, and the language of the release is broad enough to encompass those claims (“each party hereby . . . releases all claims against the other”). *See Keck, Mahin & Cate*, 20 S.W.3d at 698; *McCullough*, 435 S.W.3d at 885.

Thomas also argues that summary judgment was based erroneously on his failure to respond to Verveba’s motion for summary judgment and that his motion for sanctions should have been treated as a response. We disagree with Thomas’s interpretation of the court’s basis for summary judgment. However, even if we treat his motion for sanctions as his response, the result is the same. The motion for sanctions made the same arguments we previously decided against Thomas. We conclude that Thomas’s motion for sanctions did not raise a genuine issue of material fact concerning the existence of a contract.

Thomas also argues that Verveba’s arguments were barred by res judicata and collateral estoppel because Verveba previously filed a plea to the jurisdiction that the trial court denied. But the denial of a plea to the jurisdiction is not a final judgment, as Thomas contends. It is a preliminary ruling that allowed Thomas’s claims to proceed. *See generally Tex. Dep’t of Parks &*

Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004). Consequently, those doctrines are not a basis to reverse the summary judgment.

We resolve Thomas's issues against him.

CONCLUSION

We affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

JEWELL THOMAS, Appellant

No. 05-16-00123-CV V.

VERVEBA TELECOM, LLC, Appellee

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Opinion delivered by Justice Lang-Miers.

Chief Justice Wright and Justice Myers
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Verveba Telecom, LLC recover its costs of this appeal from appellant Jewell Thomas.

Judgment entered this 31st day of March, 2017.