IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-118

Filed: 1 December 2015

Wake County, No. 11 CVS 18410

CRYSTAL COAST INVESTMENTS, LLC, d/b/a SPARKMAN CONSTRUCTION, Plaintiff,

v.

LAFAYETTE SC, LLC, Defendant.

Appeal by Defendant from judgment entered 11 April 2014 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 August 2015.

Ragsdale Liggett PLLC, by William W. Pollock and Amie C. Sivon, for Plaintiff.

Maginnis Law, PLLC, by Edward H. Maginnis and Asa C. Edwards, for Defendant.

STEPHENS, Judge.

Defendant Lafayette SC, LLC, appeals from the trial court's judgment entered after a jury trial in Wake County Superior Court resulted in a verdict awarding $341,459.97 in damages to Plaintiff Crystal Coast Investments, LLC, doing business as Sparkman Construction, in an action for, *inter alia*, breach of contract. Lafayette argues that the trial court erred in denying its motions to amend its pleadings to add the affirmative defense of modification. Lafayette also argues that the trial court erred in denying its motion *in limine* to exclude certain testimony that Lafayette characterizes as evidence of settlement negotiations. In addition, Lafayette argues

that the trial court erred in denying its requests for jury instructions on waiver, modification, and contract formation. After careful consideration, we hold that the trial court did not err. We consequently affirm its judgment and grant Crystal Coast's motion for attorney fees on appeal.

I. Factual Background and Procedural History

A. Factual Background

On 30 September 2008, Plaintiff Crystal Coast Investments, LLC, doing business as Sparkman Construction ("Crystal Coast"), entered into a contract ("the Contract") with Defendant Lafayette SC, LLC, to provide construction management services during the construction of the Lafayette Village Shopping Center in Raleigh ("the Project").

The Contract's terms provided that Lafayette, as owner of the Project, would remain responsible for all subcontractors and their work, and that in return for "furnish[ing] construction administration and management services," Crystal Coast would receive a construction management fee of $12,000 per month, plus reimbursement of all expenses including on-site personnel salaries and a 10% overhead fee, as well as monthly expense allowances for the use of a truck and a cell phone. Crystal Coast's total monthly compensation under the Contract amounted to approximately $21,500 "due and payable the first day of each month until completion of the construction or termination of [the Contract]." The Contract also provided that

Crystal Coast would be compensated at a rate of $2.00 per square foot for supervising upfits of the Project's tenant spaces performed by other contractors.

The Contract defined its duration as running "from the date of commencement of the Construction Phase until the date of Completion" and further provided that Crystal Coast would receive "Final Payment" for its construction management services after

> (1) the Contract has been fully performed by [Crystal Coast], except for [Crystal Coast's] responsibility to correct nonconforming work . . . ; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by [Crystal Coast] and reviewed by [Lafayette's] accountants; and (3) a final Certificate for Payment has then been issued by the Architect.

The Contract identified the Project's Architect as Ron Cox, and further provided that any amendments to its terms must be in writing and signed by both parties. In addition, the Contract incorporated a separate document which outlined its General Conditions and provided, in pertinent part, that the Project would not be considered to have attained "Substantial Completion" until Crystal Coast had, *inter alia*, "arranged for and obtained all designated or required governmental inspections and certifications necessary for legal use and occupancy of the completed Project, including without limitation, a permanent or temporary certificate of occupancy for the Project."

The parties proceeded according to the Contract's terms until March 2010, when Lafayette's managing member and co-owner Ken Burnham sent a letter to Crystal Coast's owner William Sparkman stating that the Project "has fallen substantially behind schedule," that "[a]ll funds available for contingencies and overruns have been exhausted," and that the construction "must be completed by March 31, 2010." At the time, Sparkman believed the Project's Construction Phase was nearing completion and he subsequently decided to be a "team player" by foregoing his company's April fee, charging a discounted rate of $17,000 per month for May and June, and telling Lafayette that "as long as everything was paid timely, [he] would try to help with the monetary means to keep the [P]roject okay."

On 25 June 2010, Sparkman sent Lafayette an invoice for $34,000 labeled "June Invoice for extended work construction fee and misc superV [sic] final supervision and construction fee for General site building and deck" ("the June 2010 invoice"). Along with this invoice, Sparkman sent a "Partial Release of Lien" affidavit that he executed on 23 June 2010 which stated that the total amount Lafayette had paid to date on the $34,000 it owed for the pay period covering 1 May 2010 through 30 June 2010 was "$0," and that Crystal Coast would "waive, release, and relinquish any and all claims, demands, and right of lien for all work, labor, material, machinery, equipment, fixtures, and services performed an[d] furnished" during that pay period upon receipt of payment. Sparkman later testified that he labeled the June 2010

invoice as his company's "final" monthly invoice because "we were hoping we were close to the end of the [P]roject. We were close to the off-site road being completed. The buildings were close to being completed. . . . so we were hoping that we were within a couple months of being able to ratify the [P]roject." However, due to delays caused by Lafayette's financial difficulties and multiple changes required by the City of Raleigh and the State Department of Transportation, Crystal Coast's work on the Project continued for another year, until June 2011.

By September 2010, Lafayette had not yet paid Crystal Coast's June 2010 invoice, or its subsequent discounted invoices of $8,000 per month for July and August. As the Project continued to run longer than anticipated and his own company's funds started to run low, Sparkman began discussions regarding Crystal Coast's compensation with Lafayette member Amiel Mokhiber, who had served throughout the Project as a liaison between Sparkman and Lafayette's owners. In an email dated 1 September 2010, Sparkman made clear to Mokhiber that he retained "all rights to charge the full [amount of the construction management services fee of approximately $21,500 per month provided under the Contract] for each month past and future till the [P]roject is completed." That same day, in a separate email to Mokhiber, Sparkman stated that he would be willing to reduce Crystal Coast's monthly fee if Lafayette would agree to pay $10,000 per month for eight consecutive

months. On 11 September 2010, after discussing this proposal with Lafayette's other owners, Mokhiber sent Sparkman an email stating in pertinent part that:

> The following shall confirm Ken [Burnham]'s and my agreement to you with regard to your fees for site work and general construction management of Lafayette Village. This agreement shall not include fees owed Sparkman Construction for Tenant Up[]Fits.
>
> Sparkman Construction will reduce all outstanding and future construction mgt. fees for Lafayette Village (non tenant up[]fit fees) down to eighty thousand ($80,000.00) dollars.
>
> Said balance shall be paid out in eight (8) equal installments of ten thousand ($10,000.00) [dollars] per month for eight (8) consecutive months[.]
>
> . . . .

Although Crystal Coast received one payment of $10,000 under this agreement ("the Mokhiber Agreement") in September 2010, Lafayette made no payments in October or November. On 9 December 2010, Sparkman sent an email stating that, due to Lafayette's lack of timely payments, proceeding under the Mokhiber Agreement would no longer be acceptable. Sparkman's email also included a table displaying unpaid monthly invoices totaling $205,909.85, which represented the total amount that he believed Crystal Coast could charge under the Contract for uncompensated work on the Project dating back to March 2010. Sparkman indicated that he did "not expect the entire amount . . . but the $70,000 (80,000 – 10,000 paid on 9/16/10) will

not suffice any longer." Later that same week, Lafayette sent Crystal Coast two additional $10,000 checks dated 15 and 16 December 2010.

In the months that followed, Crystal Coast's work on the Project continued, and Sparkman continued to send monthly invoices reflecting the cumulative total his company was entitled to charge under the Contract. However, Lafayette made no further payments under the Contract or the Mokhiber Agreement, and the parties continued to discuss alternative ways to compensate Sparkman. At one point, Lafayette offered to pay Sparkman $50,000 plus a 1% ownership interest in the Project ("the Ownership Interest Proposal"). In an email dated 28 March 2011, Sparkman indicated he was willing to accept this proposal as long as his ownership stake would not be subject to cash calls. Lafayette was unwilling to agree to this condition, and no agreement was ever reached. By the time the Project was finally competed in June 2011, Crystal Coast had not received any payment for its work since December 2010.

B. Procedural History

On 2 December 2011, after filing a claim of lien pursuant to Chapter 44A of our General Statutes on 28 September 2011, Crystal Coast filed a verified complaint against Lafayette in Wake County Superior Court for, *inter alia*, breach of contract. Crystal Coast's complaint sought to recover damages totaling $326,786.97 plus interest, costs, and attorney fees based on its allegations that Lafayette had failed to

pay the full construction management fee Crystal Coast was entitled to receive under the Contract for its services since May 2010, and had also failed to pay approximately $50,000 in tenant upfit fees.

On 22 June 2012, Lafayette filed an answer in which it admitted that the parties had entered into the Contract but denied that Crystal Coast had any right to issue invoices for work performed after May 2010, given the fact that "[i]n June of 2010 [Crystal Coast] presented Lafayette with an invoice that [Crystal Coast] itself characterized as the 'final supervision and construction fee for the General site building and deck' . . . . That final invoice generally coincided with the substantial completion of work on the Project[.]" While acknowledging that Crystal Coast continued to work on the Project after June 2010, Lafayette described this work as remedial in nature, and further asserted that although "some conversations and communications" took place between Sparkman and "various people affiliated with the Project" about additional compensation, "no additional agreement was ever reached between [Crystal Coast] and Lafayette's designated representative, Ken Burnham, and Lafayette believed and asserted (consistent with the Contract) that [Crystal Coast] already had the obligation to correct any non-conforming work." Lafayette's answer raised an array of affirmative defenses, including payment, estoppel, waiver, failure to mitigate damages, failure to timely file any lien claim pursuant to the June 2010 invoice, and various purported breaches of the Contract

by Crystal Coast entitling Lafayette to a set-off. In addition, Lafayette's answer raised counterclaims against Crystal Coast for breach of contract, negligent supervision, and slander of title.

During discovery, Burnham responded on behalf of Lafayette to Crystal Coast's interrogatories and deposition questions. These responses were generally consistent with Lafayette's prior assertion that Crystal Coast's work under the Contract ended in June 2010. In response to an interrogatory that asked him to identify why Crystal Coast was not paid its management fee after April 2010, Burnham replied that "[t]his question is denied. [Crystal Coast] was paid all but $4,000. [Crystal Coast] sent a final bill of $34,000 . . . of this $30,000 was paid." When asked to describe the basis for Lafayette's affirmative defense that Crystal Coast had failed to timely file any lien claims, Burnham replied that the Contract "terminated in mid[-]2010." During his deposition, Burnham testified that he believed the Project "was substantially completed as of the date of [Crystal Coast's] final bill" dated 25 June 2010 and that he did not recall Crystal Coast performing any additional work under the Contract thereafter, apart from tenant upfits and remedial work to correct problems with the construction. Burnham testified further that the Mokhiber Agreement was not his idea, that he never authorized it, and that he believed the three $10,000 checks Lafayette had sent to Crystal Coast in September and December 2010 were intended as payment for the June 2010 invoice. However, Burnham did

acknowledge that "[i]t doesn't make any sense" for Mokhiber to have been negotiating such an arrangement in September 2010 if the Project had, in fact, been completed in June 2010.

On 26 August 2013, after Lafayette repeatedly failed to produce documents in response to discovery requests, Crystal Coast filed a motion to compel. On 4 September 2013, a mediated settlement conference was held pursuant to a court order but Lafayette did not send any officers, employees, or agents to attend and failed to seek leave of court to modify the date of the mediation or the attendance requirements. Instead, Burnham participated by telephone during a portion of the mediation, but made himself unavailable before any agreement could be reached or an impasse could be declared. In an order entered 8 October 2013, the trial court granted Crystal Coast's motion to compel and also awarded sanctions and fees in the amount of $8,355 against Lafayette for its failure to physically attend the mediation settlement conference or make a representative fully available via telephone.

After Lafayette voluntarily dismissed its counterclaims, both parties filed motions for summary judgment. In its motion, Lafayette argued that Crystal Coast's claims "center around the fact that [it] should be paid for work and supervision performed after the Contract was terminated." Here again, Lafayette contended that the Contract had been fully performed by the time it received Crystal Coast's June 2010 invoice and Partial Release of Lien affidavit, which functioned as an application

for "Final Payment" that was approved by both Lafayette and the Project's Architect, who subsequently issued a final certificate of payment. Furthermore, Lafayette claimed that Crystal Coast had already been paid $30,000 toward its June 2010 invoice, with $4,000 withheld as an offset for defective work, and that Crystal Coast "never provided any additional work [after June 2010] other than correcting non-conforming work and deficiencies, which were [Crystal Coast's] original obligations under the Contract."

For its part, Crystal Coast argued in its motion for summary judgment that Sparkman had labeled the June 2010 invoice as "final" because he had expected the Project to be completed soon thereafter, but that this expectation was frustrated by financial delays and requests for changes from Lafayette's owners, the State Department of Transportation, and the City of Raleigh, which necessitated an additional year's worth of work on the Project. In Crystal Coast's view, the Project "was not completed pursuant to the Contract until June 2011," which was when the final certificates of completion for all of the buildings on the site were issued, and thus Crystal Coast remained entitled to collect its monthly construction management fee under the Contract for the work it performed between June 2010 and the Project's completion in June 2011.

The trial court denied both parties' motions for summary judgment by order entered 23 January 2014 and the matter was eventually placed on the trial calendar

for 17 March 2014. After the parties entered into a joint pre-trial order, Crystal Coast filed a motion *in limine* seeking to prohibit Lafayette from (1) introducing any exhibits or witnesses that were not disclosed in its discovery responses, (2) asserting any new defenses or theories that had not been previously outlined in its answer, affirmative defenses, or discovery responses, and (3) introducing any testimony regarding several of Lafayette's previously pled affirmative defenses, including waiver and equitable estoppel, given that these were never developed in Lafayette's discovery responses. After a hearing, the trial court granted Crystal Coast's motion with regard to new exhibits, witnesses, and theories, but denied its request regarding affirmative defenses Lafayette had originally listed in its answer. During the same hearing, Lafayette's trial counsel stated that he had only recently made his first appearance in the matter and made an oral motion to amend Lafayette's pleadings to add the affirmative defense of modification, based on the Mokhiber Agreement. Sparkman opposed this motion, emphasizing the fact that in its prior filings and arguments, Lafayette had exclusively contended that the Contract was terminated in June 2010 and consistently denied that it was ever modified. Consequently, the trial court denied Lafayette's motion, reasoning that it would result in undue delay and undue prejudice.

During the trial that followed, Crystal Coast called eight witnesses to testify about the work it performed on the Project and also introduced over 100 exhibits into

evidence documenting how Lafayette's owners requested and accepted that work both before and after the June 2010 invoice. Notably, Ron Cox, whom the Contract designated as the Project's Architect, testified that he never certified the Project as complete or issued a certificate of Final Payment in response to the June 2010 invoice. When asked to examine a document that Lafayette claimed was a certificate for Final Payment, Cox testified that he had neither signed nor seen it prior to trial. Cox testified further that he had never authorized David Thomas, whose signature appeared on the line for the Project's Architect, to act as an architect on the Project or to sign any certificates of payment, and that in any event, he believed Thomas was a designer, rather than an architect.

Sparkman himself testified during the trial that Crystal Coast continued to perform work under the Contract until the final permits and certificates of occupancy were approved by the City of Raleigh in June 2011, and that up until that point, Lafayette's owners "asked multiple times for more work, more things, more items," and never once indicated that they believed that his company's work had been completed or the Contract had terminated as a result of the June 2010 invoice. When asked to describe his discussions with Mokhiber in September 2010, Sparkman testified that while negotiating the Mokhiber Agreement, he had made clear that "[t]he $80,000 was just a helpful hand to try to make the [P]roject again move forward and to get some finances in my account." Sparkman testified further that Lafayette

had been aware that "if I was not paid that $10,000 every month of that $80,000 then they were to understand that I would charge my full rights, what I would charge per the [C]ontract." For his part, Mokhiber later testified that Sparkman insisted that their arrangement be made contingent on Crystal Coast being paid every month and confirmed that Sparkman "clearly stated that if he didn't get paid on time and he had to . . . chase the money, he reserved the right to go back to what's allowed him in the [C]ontract."

Crystal Coast also sought to introduce into evidence emails and testimony related to the Ownership Interest Proposal. Lafayette filed a motion *in limine* to exclude this evidence pursuant to Rule 408 of the North Carolina Rules of Evidence as evidence of settlement negotiations. The trial court denied this motion, reasoning, "[g]iven the fact that [Lafayette's] defense is waiver I'm going to find that this evidence comes in for a purpose other than settlement negotiations, and that is, to show Mr. Sparkman's intent or lack thereof and [Lafayette's] intent or lack thereof concerning [waiver]." Sparkman subsequently testified that Lafayette had suggested the Ownership Interest Proposal as an alternative means of compensation for Crystal Coast's continuing work on the Project, noting that Lafayette's owners told him that "the one percent would at that point of the meeting would equate to around $100,000 and two years from that April 2011 it would equate to around $270,000" which meant that "within two years I would be paid back my full requested amount." However,

Sparkman testified further that the Proposal was never finalized because Lafayette would not agree to exempt his ownership interest from future cash calls.

Burnham was the only witness to testify on behalf of Lafayette at trial. Consistent with his discovery responses, Burnham testified that Crystal Coast was not entitled to any further compensation under the Contract and that he considered the June 2010 invoice and Partial Release of Lien affidavit to represent an application for Final Payment, which both Lafayette and the Project's Architect had approved, and of which all but $4,000 had already been paid. However, Burnham acknowledged that Sparkman had sent similar lien affidavits with every prior monthly invoice for Crystal Coast's work on the Project, and that his conclusion that the June 2010 invoice was an application for Final Payment was largely based on the fact that it was the last invoice he personally received from Sparkman and "[i]t says 'final' on it." Burnham also testified that although Ron Cox was the Project's Architect, at some point Burnham decided to "switch[] to a different inspecting architect. I'm not exactly sure when, but this guy, David Thomas, you know, basically offered to do it for less money," and so it was Thomas who carried out the inspection to determine whether the Project was complete for purposes of Crystal Coast's Final Payment application, even though Thomas is not licensed as an architect in North Carolina. Although he acknowledged that Crystal Coast continued to work on the Project until the site received final approvals from the City of Raleigh in June 2011, Burnham contended

that because several of the buildings on-site had already been issued certificates of occupancy and temporary permits before he received the June 2010 invoice, he did not believe such approvals were necessary in order to consider the Project "fully complete" and that roughly 90% of that work was remedial in nature to correct non-conforming work. Burnham conceded that much of this non-conforming work was originally performed by subcontractors Lafayette had hired itself based on plans Lafayette had changed, against the recommendations of both Sparkman and the Project's Architect, Cox. Nevertheless, Burnham blamed Sparkman for failing to properly supervise the subcontractors.

Burnham testified further that although he was not aware of any writing signed by both parties to amend the Contract, and despite his discovery responses denying any amendment ever occurred, he now believed the Contract had been amended as a result of the Mokhiber Agreement. Alternatively, Burnham characterized the Mokhiber Agreement as an entirely new and separate agreement between Lafayette and Crystal Coast that he initially opposed but then agreed to in order to secure Sparkman's cooperation in getting the subcontractors to fix their non-conforming work. Burnham testified that Lafayette relied on Sparkman's willingness to reduce his company's fee, and that when combined with the $30,000 Lafayette paid Crystal Coast in September and December 2010, the subsequent Ownership Interest Proposal would have satisfied its obligations under the Mokhiber Agreement had

Sparkman not rejected it. When pressed by Crystal Coast's counsel as to why Lafayette would propose granting Sparkman an ownership interest—which by Burnham's own reckoning was worth a minimum of $40,000—instead of only paying the $50,000 Lafayette actually owed under the Mokhiber Agreement, Burnham explained that Lafayette's co-owners

> were championing [Sparkman's] cause and they said, you know, let's just make [Sparkman] happy and, you know, blah, blah, blah, so, you know, we met [to negotiate]. I told Mr. Sparkman I wasn't real happy with his performance at the last phase of the [P]roject getting the subcontractors back to fix their work and, you know, we discussed settling the whole issue and this is what we came up with, you know, was this settlement negotiation.

At the close of all the evidence, Lafayette made a motion to amend its pleadings to add the affirmative defense of modification pursuant to Rule 15(b) in order to conform to the evidence based on the express or implied consent of the parties because "[t]his case was tried regarding all sorts of amendments to the [Contract], whether in writing or otherwise" to which Crystal Coast never specifically objected during the trial. The trial court denied this motion, as well as Lafayette's motion for a directed verdict, and its requests for jury instructions on modification, waiver, and contract formation.

On 21 March 2014, the trial court submitted the case to the jury on the issues of whether Lafayette had breached the Contract and, alternatively, whether Crystal Coast should be entitled to recovery in *quantum meruit*. That same day, the jury

returned a verdict in Crystal Coast's favor in the amount of $341,459.97. On 11 April 2014, the trial court entered a judgment reflecting the jury's verdict. On 17 April 2014, Crystal Coast filed a motion for costs pursuant to section 7A-305 of our General Statutes, as well as a motion to enforce its lien and for attorney fees pursuant to section 44A-35. On 7 May 2014, Lafayette gave notice of appeal to this Court. On 19 May 2014, the trial court held a hearing on Crystal Coast's post-trial motions. On 24 October 2014, the trial court entered an order granting Crystal Coast's motion for costs in the amount of $2,732.74. In that same order, the court found as facts that Crystal Coast was the prevailing party as defined by section 44A-35, that Lafayette "unreasonably refused to fully resolve the matter which constituted the basis of this suit by such acts as failing to attend mediation in person and offering only $4,000.00 to settle the matter," and that Crystal Coast had incurred $104,624.00 in attorney fees, which were reasonable "based upon the time and labor expended, the skill required, the customary fee for like work, [and] the experience and abilities of the attorneys" as reflected in the affidavits Crystal Coast submitted in support of its motion. As a result, the court granted Crystal Coast's motion to enforce its lien and for attorney fees. On 30 July 2015, Crystal Coast filed a motion with this Court to amend the record on appeal to reflect the trial court's order granting its costs and attorney fees, as well as a motion for attorney fees on appeal, both of which were referred to this panel.

II. Analysis

A. Lafayette's Rule 15 motions to amend the pleadings

Lafayette argues that the trial court abused its discretion in denying its motions to amend the pleadings prior to trial and at the close of the evidence to add the new affirmative defense of modification. We disagree.

(1) Lafayette's Rule 15(a) motion

"Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend." *Martin v. Hare*, 78 N.C. App. 358, 360, 337 S.E.2d 632, 634 (1985) (citation omitted). "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.* at 361, 337 S.E.2d at 634 (citations omitted). A motion to amend a pleading under Rule 15(a) "is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion." *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 16 (citations omitted), *affirmed per curiam*, 361 N.C. 522, 271 S.E.2d 909 (1980).

In the present case, the trial court denied Lafayette's Rule 15(a) motion to add the defense of modification based on its conclusion that allowing such an amendment to the pleadings on the day the trial was scheduled to begin would result in undue

prejudice to Crystal Coast given Lafayette's undue delay in bringing the motion. Lafayette contends this was an abuse of discretion for two reasons. On the one hand, Lafayette emphasizes certain superficial similarities between the present case and our prior decision in *Watson v. Watson*, 49 N.C. App. 58, 270 S.E.2d 542 (1980), wherein we found no abuse of discretion in the trial court's decision to grant the defendant's motion to amend the pleadings on the first day of trial. On the other hand, Lafayette argues that there was no risk of any undue prejudice here because Crystal Coast already possessed the evidence Lafayette contends proves that the parties modified their Contract—namely, the Mokhiber Agreement and various emails, invoices, and checks that were produced or received by Crystal Coast during its work on the Project. Thus, in Lafayette's view, the fact that it never previously asserted its modification defense in its answer or in its responses to discovery requests should be immaterial because Crystal Coast's counsel had ample access to relevant evidence and ample opportunity to shape its inquiries accordingly, but failed to do so.

We are not persuaded. In *Watson*, we stated that part of our rationale for upholding the trial court's decision to grant the defendant's motion to amend nearly two and a half years after the plaintiff initiated her lawsuit was that the defendant's counsel "had been removed from the case upon [the] plaintiff's motion and the motion for amendment was the first appearance by [the] defendant's new counsel." *Id.* at 61, 270 S.E.2d at 544. Here, Lafayette highlights the fact that, as in *Watson*, its trial

counsel first entered an appearance in this case shortly before moving to amend the pleadings on the first day of trial. However, there is no indication that Crystal Coast played any part whatsoever in causing the removal of Lafayette's original counsel, and while we agree with Lafayette that *Watson* demonstrates that a trial court does not necessarily abuse its discretion by granting a Rule 15(a) motion to amend on the first day of trial after years of discovery, it does not logically follow that a trial court's decision to *deny* such a motion under similar circumstances automatically amounts to an abuse of discretion. Indeed, in opposing Lafayette's motion during the pretrial hearing, Crystal Coast cited our decision in *Kinnard*. In *Kinnard*, we held the trial court did not abuse its discretion in denying the plaintiff's motion to amend the pleadings in his suit for breach of contract to add an entirely new cause of action two days prior to trial because the new allegations "would not only greatly change the nature of the defense to what was a breach of contract action but also would subject [the] defendant to potential treble damages which greatly increased the stakes of the lawsuit" and because if the motion had been allowed "further discovery and time for preparation would likely have been sought, thus further delaying the trial." 46 N.C. App. at 727, 266 S.E.2d at 16. Here, Lafayette argues that the trial court should have allowed its motion to amend because this case is more like *Watson* than *Kinnard*, but in our view, our holdings in both those cases demonstrate that we will not disturb a

trial court's exercise of its broad discretion to grant or deny a Rule 15(a) motion unless its decision could not have been the product of a reasoned decision.

In the present case, our review of the record makes clear that up until the day this case was calendared for trial, Lafayette consistently and repeatedly contended that the Contract terminated in June 2010. For nearly two years, beginning with its answer and continuing throughout Burnham's discovery responses, as well as in its motion for summary judgment, Lafayette denied the Contract was ever amended and never once specifically raised the Mokhiber Agreement as a potential defense against Crystal Coast's allegations. Thus, despite Lafayette's claims to the contrary, the fact that Crystal Coast already possessed the evidence Lafayette sought to rely on to support its new modification defense does not alleviate the undue prejudice that would have resulted from allowing Lafayette to change its theory of what that evidence purportedly proved, and indeed, its entire theory of the case, at the eleventh hour. We therefore hold that the trial court did not abuse its discretion in denying Lafayette's Rule 15(a) motion to amend its pleadings.

(2) Lafayette's Rule 15(b) motion

Lafayette also argues that the trial court abused its discretion in denying the Rule 15(b) motion it made to add the defense of modification at the close of all the evidence in order to conform the pleadings to the evidence.

Rule 15(b) provides, in pertinent part, that "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b) (2013). As our Supreme Court has explained,

> the implication of Rule 15(b) . . . is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.

Eudy v. Eudy, 288 N.C. 71, 77, 215 S.E.2d 782, 786-87 (1975) (citations omitted), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). Moreover, "[w]here the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, no objection to such evidence is necessary and the failure to object does not amount to implied consent to try the unpleaded issue." *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 630, 347 S.E.2d 473, 476 (1986) (citation omitted). "The trial court's ruling on a motion to amend pursuant to [Rule 15(b)] is not reviewable on appeal absent a showing of abuse of discretion." *Id.* (citation omitted).

In the present case, Lafayette contends that although its Rule 15(a) motion to add this same affirmative defense was denied, the evidence and testimony Crystal Coast introduced at trial supports an inference of modification, which in Lafayette's

view means the issue was tried by implied consent of the parties. However, as the trial court explained in denying Lafayette's motion, Crystal Coast made no secret of its opposition to trying the issue of modification, and all the evidence Lafayette cites in support of its argument that the issue was tried by implied consent also supports an array of issues that were properly raised in the pleadings, such as Lafayette's waiver theory and Crystal Coast's burden of proving the Contract and its terms. Therefore, because the evidence which supports modification "also tends to support an issue properly raised by the pleadings," *Tyson*, 82 N.C. App. at 630, 347 S.E.2d at 476, we hold that the trial court did not abuse its discretion in denying Lafayette's Rule 15(b) motion to amend its pleadings.

B. Lafayette's motion in limine to exclude evidence of settlement negotiations

Lafayette argues that the trial court erred in denying its motion *in limine* to exclude evidence of the Ownership Interest Proposal as evidence of settlement negotiations under Rule 408 of the North Carolina Rules of Evidence. We disagree.

Although Rule 408 prohibits the introduction of evidence of conduct or statements made in settlement negotiations "to prove liability for or invalidity of the claim or its amount," we have long held that "[t]his [R]ule does not, however, require the exclusion of evidence that is otherwise discoverable or offered for another purpose, merely because it is presented in the course of compromise negotiations." *Renner v.*

Hawk, 125 N.C. App. 483, 492-93, 481 S.E.2d 370, 375-76 (citations omitted), *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

In the present case, Lafayette raised waiver as an affirmative defense in its answer. Because waiver is "an intentional relinquishment of a known right," *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949) (citations omitted), we believe that evidence tending to show whether Crystal Coast intended to waive its rights under the Contract, or conversely, whether Lafayette's owners actually believed such a waiver had occurred, was both relevant and admissible. In our view, the evidence Lafayette characterizes as settlement negotiations, such as emails between Sparkman and Lafayette's owners and related testimony, clearly demonstrates that Sparkman believed his company was still entitled to compensation under the Contract, which tends to show a lack of intent to waive. Moreover, this evidence also tends to show that Lafayette's owners agreed that Crystal Coast should be paid for its continuing work on the Project, which likewise reflects a belief that no waiver had occurred insofar as it tends to contradict Lafayette's argument that Crystal Coast was not entitled to any further compensation because the only additional work it performed after the Contract terminated as a result of the June 2010 invoice was to correct non-conforming work and deficiencies. We therefore agree with the trial court that evidence of the Ownership Interest Proposal was relevant to and admissible for the purpose of showing the parties' intent or lack thereof regarding

Lafayette's affirmative defense of waiver. Consequently, because this evidence was offered for a purpose other than to prove the validity or amount of Crystal Coast's claim, we hold the trial court did not err in denying Lafayette's motion *in limine*.

C. Lafayette's requests to instruct the jury on waiver, modification, and formation

Lafayette argues that the trial court erred in denying its requests to instruct the jury on waiver, modification, and formation. We disagree.

"When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim." *Ellison v. Gambill Oil Co.*, 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) (citation omitted), *affirmed per curiam in part and disc. review improvidently allowed in part*, 363 N.C. 364, 677 S.E.2d 452 (2009). "If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error." *Id.* (citation omitted).

Before examining whether evidence existed to support each of Lafayette's requested instructions, we turn first to Crystal Coast's argument that Lafayette has failed to properly present this issue for our review due to multiple violations of our Rules of Appellate Procedure. Rule 9(a)(1)(f) requires an appellant objecting to the omission of a jury instruction to "set[] out the requested instruction or its substance in the record on appeal immediately following the [transcript of the entire charge]

given," N.C.R. App. P. 9(a)(1)(f), while Rule 7(a) requires that an appellant who contends that the trial court's findings or conclusions were contrary to the evidence must "cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion." N.C.R. App. P. 7(a). The record on appeal Lafayette submitted to this Court failed to fully comply with both these rules, and Crystal Coast urges us to deny review of the trial court's jury instructions based on these procedural defects. However, Lafayette has filed a Motion to Amend the Record on Appeal to correct these defects, which we now grant in order to review its claims.

(1) Waiver

Lafayette first contends that the trial court erred in denying its request to instruct the jury on waiver. As noted *supra*, waiver is "an intentional relinquishment of a known right." *Clement*, 230 N.C. at 639, 55 S.E.2d at 461 (citations omitted). A waiver can be express or implied "by [a party's] conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Guerry v. Am. Trust Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951). "No rule of universal application can be devised to determine whether a waiver does or does not need a consideration to support it. It is plain, then, that in the nature and occasion of the particular waiver must lie the answer as to whether or not it requires such consideration." *Clement*, 230 N.C. at 640, 55 S.E.2d at 461 (emphasis omitted).

"However, an agreement to waive a substantial right or privilege, thus altering the terms of the original contract, must be supported by additional consideration, or an estoppel must be shown." *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 426, 293 S.E.2d 749, 755 (citations and emphasis omitted), *rehearing denied*, 306 N.C. 753, 302 S.E.2d 884 (1982).

In the present case, Lafayette argues there was sufficient evidence to support a jury instruction on waiver and specifically highlights three distinct categories of evidence to support its claim.

First, Lafayette contends that Crystal Coast expressly waived its rights under the Contract by agreeing to forego its monthly fee in April 2010 and then submitting discounted invoices in May, June, July, and August 2010, which led Lafayette to naturally and justly believe that Crystal Coast had dispensed with its right to charge the full amount under the Contract. However, our review of the record does not support Lafayette's argument. On the one hand, it is clear that Sparkman's decision to forego his company's monthly rate in April and discount its invoices for the months that followed was made in direct response to Burnham's email detailing Lafayette's financial difficulties, and Lafayette makes no argument that Crystal Coast received any consideration for this purported waiver of its substantial right to compensation under the Contract. On the other hand, Sparkman testified that although he wanted "to try to help," he also made clear that the discounted rates were conditioned on

"everything [being] paid timely," and that when Lafayette failed to timely pay the discounted invoices, he explicitly informed Mokhiber that he reserved the right to charge the full amount under the Contract. We find this evidence of Sparkman's attempts to be a "team player" insufficient to support a jury instruction on waiver.

Next, Lafayette argues that Crystal Coast waived its rights under the Contract as a result of submitting its June 2010 invoice and lien waiver. The gravamen of Lafayette's argument on this point is that because the June 2010 invoice included the word "final" in its title, Lafayette naturally and justly considered it as an application for Final Payment under the Contract which, in combination with Sparkman's Partial Release of Lien affidavit, dispensed with Crystal Coast's right to charge any amount above $34,000 for work performed under the Contract prior to 23 June 2010, as well as any right to compensation under the Contract for any work performed thereafter. Here again, our review of the record does not support Lafayette's argument. There is no dispute that Crystal Coast's work on the Project continued for a full year after it submitted the June 2010 invoice, during which time Sparkman consistently and repeatedly made clear to Lafayette that he believed his company was still entitled to compensation under the Contract. Thus, in our view, rather than constituting the intentional relinquishment of a known right, the inclusion of the word "final" in the June 2010 invoice merely reflected the fact that, at the time, both parties expected that the Project would soon be completed. As for the Partial Release of Lien affidavit

Sparkman sent along with the June 2010 invoice, given the fact that its scope was expressly limited to the pay period between 1 May 2010 and 30 June 2010, and Burnham's testimony that Sparkman sent similar waivers with each monthly invoice he submitted during Crystal Coast's performance under the Contract, we find it difficult to discern how this document could constitute a full and final waiver of Crystal Coast's right to compensation under the Contract for all past and future work on the Project. Further, even if we agreed with Lafayette that the June 2010 invoice constituted an application for Final Payment, there is no evidence in the record that such an application was ever approved by the Project's Architect, Ron Cox, who testified that he neither signed nor authorized David Thomas to sign the certificate for Final Payment. We therefore find the evidence of Crystal Coast's June 2010 invoice and Sparkman's 23 June 2010 affidavit insufficient to support a jury instruction on waiver.

Lafayette argues further that Crystal Coast waived its rights under the Contract when Sparkman entered into the Mokhiber Agreement on 11 September 2010. Specifically, Lafayette contends that by agreeing to invoice at a rate of only $10,000 per month, Sparkman relinquished his right to charge the full amount provided under the Contract. Our review of the record does not support Lafayette's argument. At trial, Mokhiber testified that his Agreement with Sparkman was contingent on Crystal Coast actually being paid $10,000 per month for eight

consecutive months beginning in September 2010, that Sparkman "clearly stated that if he didn't get paid on time and he had to . . . chase the money, he reserved the right to go back to what's allowed him in the [C]ontract," and that this reservation of rights "was brought up at the original negotiation." However, the evidence introduced at trial demonstrates that Lafayette only made one timely payment under the Mokhiber Agreement in September 2010, followed by two payments in December 2010, and then made no further payments thereafter. Thus, even assuming *arguendo* that the $10,000 monthly fee Crystal Coast was entitled to receive under the Mokhiber Agreement could have sufficed as consideration for a negotiated waiver of its rights under the Contract, because Lafayette failed to perform its obligations under the Mokhiber Agreement we have no trouble in concluding that this evidence was insufficient to support a jury instruction on waiver. Accordingly, we hold that the trial court did not err in denying Lafayette's request for such an instruction.

(2) Modification

Lafayette also argues that the Mokhiber Agreement constituted evidence of modification, and that the trial court therefore erred in denying Lafayette's request for a jury instruction on modification. However, in light of our holding that the trial court did not err in denying Lafayette's Rule 15 motions to amend its pleadings to add the defense of modification, we hold that the trial court did not err in declining to provide such an instruction to the jury.

(3) Formation

Finally, Lafayette argues that the trial court erred in denying its request for a jury instruction on contract formation. Although the parties stipulated to the Contract's existence, in its appellate brief Lafayette argues that in light of the Contract's express requirement that any amendments be in writing and signed by both parties, and Crystal Coast's arguments at trial that there was never any signed amendment to the Contract, the trial court's failure to instruct the jury that "contracts can be formed through written agreement, oral expressions, or by conduct of the parties; and that contracts with clauses requiring amendments to be signed and in writing can nonetheless be amended by an oral or implied agreement between the parties" created a false impression for the jury that the Contract's terms "could not have been modified by the documentary and testimonial evidence of the [Mokhiber] Agreement." This argument fails, given that by Lafayette's own logic, the primary function of such an instruction would be to re-open the proverbial "back door" on the issue of modification. We have already held that the trial court did not err in denying Lafayette's motions to amend its pleadings to add modification as an affirmative defense and, consequently, that the trial court did not err in denying Lafayette's request for a jury instruction on modification.

Lafayette also argues that the trial court's failure to instruct the jury on formation prevented the jurors from being able to decide whether Crystal Coast

breached the implied covenant of good faith and fair dealing that arises in every contract. *See, e.g.*, *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985). In its appellate brief, Lafayette contends that Crystal Coast breached this duty by "working on tenant upfit jobs for Crystal Coast's financial benefit with the result that the general site completion was prolonged at Lafayette's expense." When Lafayette asked for this instruction at trial, the court replied "[t]here's not any evidence of that," and our review of the record confirms the trial court's conclusion. On the one hand, the Contract expressly authorizes Crystal Coast to receive a fee for working on tenant upfits. On the other hand, apart from Burnham's testimony blaming Crystal Coast and Sparkman for virtually everything that went wrong on the Project, the evidence introduced at trial overwhelmingly indicates that the Project's completion was prolonged by an array of factors including Lafayette's financial difficulties, non-conforming work by sub-contractors whose work the Contract expressly made Lafayette itself responsible for, and issues obtaining final permits and approval of the site from the City of Raleigh and the State Department of Transportation which were due at least in part to changes Lafayette made to the plans for the Project against the recommendations of both Sparkman and the Project's architect. The only evidence that Lafayette cites to the contrary in support of its argument are two pages from the transcript of Sparkman's trial testimony in which Lafayette's counsel cross-examined him about the terms of the Contract and

suggested that its provision for tenant upfits created a financial incentive for Crystal Coast to drag its feet in completing the Project, which Sparkman denied. Because we find this evidence insufficient to support a jury instruction on formation, we hold that the trial court did not err in denying Lafayette's request.

D. Crystal Coast's motion for attorney fees on appeal

On 30 July 2015, pursuant to Rules 35 and 37 of the North Carolina Rules of Appellate Procedure, Crystal Coast filed motions with this Court to amend the record on appeal to reflect the trial court's 24 October 2014 order and for the imposition of attorney fees on appeal. Rule 35(a) allows costs to be taxed against the appellant if a judgment is affirmed, "unless otherwise ordered by the court." N.C.R. App. P. 35(a). "Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal." N.C.R. App. P. 35(c). Assessable costs include "counsel fees, as provided by law." N.C. Gen. Stat. § 7A–305(d)(3) (2013), *amended by* 2015 N.C. Sess. Law 241; *see also R & L Constr. of Mt. Airy, LLC v. Diaz*, __ N.C. App. __, __, 770 S.E.2d 698, 701 (2015).

As noted *supra*, pursuant to N.C. Gen. Stat. § 44A-35, the trial court granted Crystal Coast's motion for attorney fees incurred during trial by order entered 24 October 2014 based on its findings that Crystal Coast was the prevailing party and Lafayette's refusal to resolve the matter was unreasonable. Lafayette did not appeal

this order, and has filed no response to Crystal Coast's motion for attorney fees on appeal. In light of the trial court's unchallenged finding that Lafayette unreasonably refused to resolve this matter, we grant Crystal Coast's motion for attorney fees on appeal and remand the matter to the trial court to take evidence and make appropriate findings concerning the amount of fees to be awarded which were incurred on appeal.

NO ERROR in part; REMANDED in part.

Judges BRYANT and DIETZ concur.