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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-430

No. COA20-531

Filed 17 August 2021

Cumberland County, No. 17 CVS 3532

CONTAMINANT CONTROL, INC., Plaintiff

v.

ALLISON HOLDINGS, LLC, Defendant

Appeal by Defendant from Judgment entered 28 August 2019 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 25 May 2021.

Patterson Harkavy, LLP, by Narendra K. Ghosh, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles E. Coble, Walter L. Tippett, Jr., William A. Robertson, and James Bobbitt, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Allison Holdings, LLC (Defendant) appeals from a Judgment entered after a jury returned a verdict in favor of Contaminant Control, Inc. (Plaintiff) on Plaintiff's Breach of Contract Claim and against Defendant on its Breach of Contract

Counterclaim. The Record, including evidence adduced at trial, tends to show the following:

¶ 2 In early October 2016, Hurricane Matthew threatened Florida and other states along the southeastern coastline. Upon hearing about the impending hurricane, Robert Harrison (Harrison) a project manager for Pennsylvania-based Unlimited Restoration, Inc. (URI) planned to travel to Florida to obtain work providing commercial and industrial drying services in the aftermath of the storm. Before reaching Florida, Harrison learned of flooding in southeastern North Carolina and traveled to Lumberton to see if URI could "provide services, equipment, people to help [the City] get back up and running." Although he was unsuccessful in obtaining work in Lumberton, Harrison learned of flooding in Fayetteville. Harrison contacted Mark Vestal (Vestal), owner and operator of Plaintiff. Plaintiff is a North Carolina-based environmental contracting company. Vestal assisted Harrison in identifying work opportunities for URI in Fayetteville. Eventually, Vestal obtained Keith Allison's (Allison) phone number; Allison is part owner of Defendant.

¶ 3 Defendant owned and operated the Systel Building (Building) in downtown Fayetteville. On 8 October 2016, Hurricane Matthew caused flooding and property damage to the downtown Fayetteville area, including the Building. Stanley Futrell (Futrell), the Building's facility manager, arrived the next morning and inspected the damage. The Building had lost power and Futrell observed the basement was under

water, and the first floor had sustained significant water damage. Futrell contacted a local construction company to begin removing water from the basement and restoring the rest of the Building.

¶ 4 Vestal called Allison shortly after the hurricane passed to see if Plaintiff could help clean and dry out the Building. Allison told Vestal Defendant had already hired a local company to start restoring the Building. Allison further explained:

> Futrell and I had discussed going out of town to get new equipment to solve the problem -- the solution -- to get big enough equipment to dry out the basement with, but we had reviewed -- the internet and the phone calls. He had -- I'd done a couple to review the available equipment which -- I think the closest was Virginia, I think Richmond, Virginia. And we determined that the cost was too much for what we needed.

According to Allison, Vestal explained what Plaintiff could do to restore the Building for Defendant and stated "[Plaintiff] had all of the needed equipment locally that we would need including the big dryer machines and everything that we would need." Although Defendant had "already made arrangements," Allison told Vestal to call Futrell to "see if he might be interested in utilizing some of [Plaintiff's] equipment if [Vestal] had it locally, because we ruled out going out of town."

¶ 5 Vestal subsequently called Futrell the Monday after the hurricane, and the two met the next day. According to Futrell, Vestal "told [Futrell] Mr. Allison -- Keith Allison asked him to call . . . and when we met, that's when he said that Keith sent him down to help [Futrell] out with the situation." Futrell testified he understood

this to mean Allison wanted Futrell to hire Plaintiff. Futrell testified he told Vestal "we like to do business with local companies and did he have all the equipment to do this. And [Vestal] replied, yes. I have all the equipment. So I took that to mean that he had the equipment here in Fayetteville to handle this job." Harrison, from URI, accompanied Vestal at the meeting with Futrell and took moisture measurements as the three walked through the Building to discuss the work needed to restore the Building. After the meeting, Vestal sent Futrell an email stating Vestal estimated the work required to restore the Building would cost $121,550 but would cost more if the project took longer than seven days.

¶ 6 On 19 October 2016, Futrell signed a contract (CCI Contract), on Defendant's behalf, to have Plaintiff "Perform Emergency Restoration Services." The CCI Contract stated the "Scope of Services" included "all labor, materials, and equipment necessary to complete the Emergency Restorations Services Work" required to restore the Building. The CCI Contract contained a provision for "Labor" where Plaintiff retained "sole discretion on the definition, classification, engagement and/or utilization of any labor, including subcontractors, consultants or independent contractors, on the Work." It also provided:

> Payment is due from the Customer to CCI within thirty (30) days of the Customer's receipt of the invoice. . . . If the Customer objects to any item on an invoice, the Customer must expressly notify CCI's Billing Department in writing of the Customer's specific objection within 10 calendar days of the Customer's actual receipt

> of the invoice. . . . [F]ailure to timely notify CCI—in writing—of the specific nature of the objections shall be deemed a full and complete waiver of any objections to and a complete acceptance of the entire invoice.

Moreover, the CCI Contract included a merger clause stating: "This Contract embodies the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes all prior written or oral commitments, arrangements, or understandings with respect thereto."

¶ 7 On 19 October 2016, Plaintiff and URI arrived at the Building with equipment—some of which belonged to URI and came from out-of-state—to begin restoring the Building. Because humidity levels on the second through eleventh floors of the Building were high, Plaintiff used large desiccant driers and other dehumidifiers on all floors while simultaneously cleaning the basement with pressure washers. Negative air machines were used to clean the Building's air by pulling air down through the Building and pushing it outside. Plaintiff completed cleaning the basement and first floor on 22 October 2016. Plaintiff reduced the number of negative air machines and dehumidifiers as the moisture levels went down; however, some driers and air scrubbers remained in place.

¶ 8 During the time Plaintiff was restoring the Building, Defendant hired Terracon Consultants (Terracon) to evaluate the Building's air quality and restoration progress and to make recommendations on restoration processes and

when to clear the Building for tenants. On 26 October 2016, a Terracon representative met with Futrell and a CCI representative, and the group decided to keep using desiccant driers for one to two more weeks and to keep using air scrubbers and dehumidifiers until power was restored to the Building. The Building regained power on 2 November 2016, and Plaintiff removed dehumidifiers and supporting equipment the next day.

¶ 9 Plaintiff sent Futrell the first invoice on 24 October 2016 totaling $110,988.46 for work completed through 23 October according to the CCI Contract. By 4 November, the basement and rest of the Building reached safe humidity levels. Plaintiff and URI removed the remaining drying equipment from the Building. Once mold levels dropped to safe levels, Terracon cleared the Building of mold concerns on 8 November 2016. Plaintiff sent Futrell a second invoice on 10 November 2016 totaling $123,373.48 including work done from 24 October to 10 November.

¶ 10 Shortly thereafter, Allison decided to have all of the contractors working for Defendant sign anti-price-gouging affirmation statements before Defendant would pay the contractors. Vestal signed a statement (Affirmation) for Plaintiff on 15 November 2016. Defendant paid Plaintiff for the first invoice on 16 November 2016.

¶ 11 Defendant did not pay the second invoice within thirty days per the CCI Contract. Instead, per the Affirmation, Defendant commissioned an audit of Plaintiff's invoices and sent auditors to Plaintiff's office in January of 2017. After the

audit, Defendant still refused to pay Plaintiff for the second invoice. On 28 April 2017, Plaintiff filed a Complaint alleging Defendant breached the CCI Contract for work done on the Building. Plaintiff sought $106,013.33—the amount of the second invoice minus $17,360.15 in mistaken fuel charges on both the first and second invoices—in damages as well as interest and attorneys' fees. On 3 July 2017, Defendant filed an Answer that included no counterclaims but did include the Affirmative Defenses of Unclean Hands and Fraudulent Inducement.

¶ 12 On 29 June 2018, Defendant filed a Motion to Amend Counterclaim seeking to "pursue claim for fraud, unfair and deceptive trade practices, and in the alternative, breach of Contract." "After argument from counsel for both parties . . . ," the trial court granted Defendant's Motion with respect to Counterclaims for Fraud, and in the alternative, Breach of Contract, but it denied Defendant's Motion regarding the unfair and deceptive trade practices counterclaim. The Record does not include a transcript of the Motion hearing. Defendant filed an Answer, Affirmative Defenses, & Counterclaims (Amended Answer) on 13 July 2018. Defendant's Amended Answer included two Counterclaims for Fraud and two Counterclaims for Breach of Contract in addition to the Affirmative Defenses included in the first Answer.

¶ 13 Defendant's Fraudulent Inducement Counterclaim alleged Plaintiff, through Vestal, "represented to [Allison and Futrell] that Plaintiff had the appropriate equipment, knowledge, skill and man-power to complete the type of remediation and

repair work that Defendant Allison required" when, in fact, Plaintiff had never "completed a similar contract to dry out flooded areas of a building to repair and remediate the same" and "did not have nor possess the appropriate equipment, knowledge, skill and man-power to complete the type of" work required. Because Plaintiff "concealed from Defendant Allison that Plaintiff was simply acting as a local face and front company for the third-party vendor[,]" and Defendant relied on Plaintiff's alleged misrepresentations, Defendant claimed Plaintiff fraudulently induced Defendant into signing the CCI Contract when Defendant otherwise would not have. Defendant's second Fraud Counterclaim alleged Plaintiff "submitted to Defendant Allison invoices for work, labor, and services that were not necessary to repair and remediate the Systel building," "submitted invoices for inflated and false amounts for the work, labor and services allegedly provided to Defendant Allison," and submitted invoices "for work, labor and services that were never provided to Defendant Allison."

¶ 14 Defendant's first Breach of Contract Counterclaim alleged Plaintiff "breached [the CCI Contract] by providing work, labor and materials that were not 'necessary' . . . , but instead were provided . . . for the sole purpose of Plaintiff being able to bill and charge Defendant Allison additional sums of money to increase Plaintiff's profits on said contract." Defendant's second Breach of Contract Counterclaim alleged Plaintiff breached the Affirmation agreement because Plaintiff failed "to provide the

appropriate access to 'books, records and information' " regarding Plaintiff's charges on other projects in the sixty-day period prior to the hurricane, as required by N.C. Gen. Stat. §§ 75-37 and 75-38, during the audit of Plaintiff's records.

¶ 15 This case came on for trial on 10 June 2019. Both parties presented expert testimony as to whether the work Plaintiff performed and invoiced was necessary under the circumstances. Joshua Aponte (Aponte), a project coordinator with Balfour USA, who had twenty years of experience in commercial remediation and restoration, testified as an expert for Plaintiff in "water remediation, mold remediation, and drying of flood damaged properties." In Aponte's opinion, Plaintiff using desiccant driers, dehumidifiers, and negative air machines while simultaneously pressure washing the basement and cleaning the first floor of the Building was appropriate under the circumstances.

¶ 16 Defendant introduced Clinton Ford (Ford) as an "expert in building construction, environmental standards, water remediation, mold prevention, and drying, as well as lost estimator." In Ford's opinion, it was not proper for Plaintiff to use desiccant driers, dehumidifiers, and negative air machines while simultaneously using an "open air" method of drying where the doors to the Building were left open bringing in humidity from outside air.

¶ 17 After the close of evidence, Plaintiff moved for directed verdict on all four of Defendant's Counterclaims. As to Defendant's Fraudulent Inducement

Counterclaim, Plaintiff argued Defendant had not shown evidence Vestal told Futrell that Allison had already hired Plaintiff to do the work when Vestal first talked to and met with Futrell.[1] However, Plaintiff contended, the testimony revealed Vestal never expressly stated Allison had decided to hire Plaintiff, and Futrell just assumed that to be the case. Defendant argued Vestal "play[ed] the telephone game" in convincing Futrell that Allison wanted Futrell to hire Plaintiff and, at the very least, this was an issue of fact in dispute. The trial court granted Plaintiff's Motion for Directed Verdict on Defendant's Fraudulent Inducement Counterclaim. The trial court also denied Defendant's Motion to allow its Fraudulent Inducement Affirmative Defense to go to the jury.

¶ 18 As to Defendant's second Fraud Counterclaim, Defendant argued there was evidence Plaintiff performed unnecessary work, added erroneous fuel charges, and that one of Plaintiff's employees billed at different rates on different days. Plaintiff argued there was no evidence of fraud because: (1) the erroneous fuel charges were a mistake, and Plaintiff credited Defendant for those charges in Plaintiff's Claim; (2) the employee billing error was merely a mistake; and (3) the evidence of unnecessary work could support a breach claim but did not constitute fraud. The trial court

[1] In its opening statements, Defendant described its Fraudulent Inducement Counterclaim as "a little bit of the telephone game," where Vestal allegedly told Futrell Allison wanted to hire Plaintiff.

granted Plaintiff's Motion for Directed Verdict on Defendant's second Fraud Counterclaim.

¶ 19 For Defendant's first Breach of Contract Counterclaim, Defendant argued the evidence supported its claim Plaintiff performed unnecessary work and billed unnecessary charges. Plaintiff, again, argued there was no evidence of unnecessary work and that the erroneous fuel charge "is what it is." The trial court denied Plaintiff's Motion for Directed Verdict on Defendant's first Breach of Contract Counterclaim. As for Defendant's second Breach of Contract Counterclaim, Plaintiff argued the Affirmation was not an enforceable contract because there was no consideration for the agreement. Specifically, Plaintiff argued Defendant was already obligated to pay Plaintiff for the first invoice under the CCI Contract and that the evidence showed Allison would not have paid Plaintiff at all unless Plaintiff signed the Affirmation. Defendant argued Allison promised to pay Plaintiff earlier than the thirty days allowed under the CCI Contract, constituting fresh consideration supporting the Affirmation. The trial court granted Plaintiff's Motion for Directed Verdict on Defendant's second Breach of Contract Counterclaim.

¶ 20 The trial court instructed the jury on Plaintiff's Breach of Contract Claim and Defendant's Breach of Contract Counterclaim related to the CCI Contract. The jury found in favor of Plaintiff's Breach of Contract Claim and awarded Plaintiff $106,133.33 in damages and found against Defendant's Breach of Contract

Counterclaim. The trial court entered Judgment consistent with the jury's verdict on 28 August 2019. On 11 September 2019, Plaintiff filed a Motion for Attorney's Fees, Costs, and Prejudgment Interest "pursuant to N.C. Gen. Stat. §§ 6-20; 6-21.2; and 7A-305." On 18 September 2019, the trial court granted Plaintiff attorneys' fees "in the amount of $15,901.99." Defendant filed written Notice of Appeal of the Judgment and various, underlying rulings on 26 September 2019.

Issues

¶ 21 The issues Defendant presents on appeal are whether the trial court erred in: (I) granting Plaintiff directed verdicts on Defendant's (A) Fraudulent Inducement Counterclaim and Fraudulent Inducement Affirmative Defense, (B) second Fraud Counterclaim, and (C) second Breach of Contract Counterclaim; (II) sustaining Plaintiff's objections to Defendant's witness's testimony on relevance grounds; (III) denying Defendant's Motion to Amend, in part; and, if so, (IV) awarding Plaintiff attorneys' fees.

Analysis

I. Directed Verdict

¶ 22 This Court reviews a grant of a motion for directed verdict de novo. *Smith v. Herbin*, 247 N.C. App. 309, 312, 785 S.E.2d 743, 745 (2016) (citing *Denson v. Richmond Cnty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)). A directed verdict is proper where "it appears, as a matter of law, that a recovery cannot be had

by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (citation and quotation marks omitted). "A trial court must deny a motion for directed verdict if, viewing the evidence in the light most favorable to the non-movant, there is 'more than a scintilla of evidence supporting each element of the non-movant's claim.' " *Smith*, 247 N.C. App. at 312, 785 S.E.2d at 745 (quoting *Denson*, 159 N.C. App at 412, 583 S.E.2d at 320).

A. Fraudulent Inducement

¶ 23 Defendant argues the trial court erred in granting Plaintiff's Motion for Directed Verdict on Defendant's Fraudulent Inducement Counterclaim because there was at least a scintilla of evidence supporting its claim Vestal misrepresented Defendant's experience and whether Defendant had the necessary equipment for the work locally available. Plaintiff argues the trial court properly granted directed verdict on Defendant's Fraudulent Inducement Counterclaim because there was neither a misstatement by Plaintiff nor reasonable reliance on such a statement.

¶ 24 The essential elements of fraud in the inducement are:

> (i) that defendant made a false representation or concealed a material fact he had a duty to disclose; (ii) that the false representation related to a past or existing fact; (iii) that defendant made the representation knowing it was false or made it recklessly without knowledge of its truth; (iv) that defendant made the representation intending to deceive plaintiff; (v) that

> plaintiff reasonably relied on the representation and acted upon it; and (vi) plaintiff suffered injury.

Harton v. Harton, 81 N.C. App. 295, 298-99, 344 S.E.2d 117, 119-20 (1986) (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 253, 266 S.E.2d 610, 615 (1980)).

¶ 25 Defendant contends Plaintiff knowingly made false statements regarding its experience and ability to repair the Building. However, there is no evidence Plaintiff, through Vestal, made any statements to Futrell—Defendant's contracting agent—regarding its experience. Futrell testified he asked Vestal, "did he have all the equipment to do this. And [Vestal] replied, yes. I have all the equipment." Futrell did not testify—nor did Defendant provide other evidence—Plaintiff made *any* statements regarding its experience. Further, Futrell did not testify he inquired into Plaintiff's experience. Thus, because Plaintiff did not make any false representation or conceal a material fact, there is insufficient evidence to support a fraudulent inducement claim.

¶ 26 Moreover, even if Vestal misrepresented Plaintiff's experience when Vestal told Allison that Plaintiff was experienced in this type of project, Allison did not sign the CCI Contract, and Vestal made no such statement to Futrell. As such, Futrell could not have reasonably relied on that misrepresentation.

> [R]eliance is not reasonable if a [party] fails to make any independent investigation unless the [party] can demonstrate: (1) it was denied the opportunity to investigate . . . , (2) it could not discover the truth . . . by exercise of reasonable diligence, or (3) it

> was induced to forego additional investigation by the defendant's misrepresentations.

RD&J Props. v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (citation and quotation marks omitted). Here, there is no evidence Defendant independently investigated the alleged misrepresentations. Futrell reported directly to Allison, met with him weekly, and was able to call and communicate with him at any time. Thus, Futrell could have spoken directly with Allison to investigate any statement made by Vestal, but he failed to do so.

¶ 27 Defendant further argues Vestal stated Plaintiff had the necessary equipment locally when, in fact, much of the equipment was URI's and came from out-of-state. As such, Defendant contends this was a material misrepresentation. However, as discussed above, according to his own testimony, Futrell did not ask Vestal if Plaintiff had the equipment locally or if it would use subcontractors from out-of-state. Allison did testify that Vestal told him Plaintiff had the equipment locally, but Allison and Futrell were not in communication regarding the CCI Contract; indeed, Allison was not even aware Futrell had hired Plaintiff until after the CCI Contract had been signed. Therefore, even if Vestal's statements about the equipment to Futrell could have been material misrepresentations, Defendant could not have reasonably relied on such statements when Futrell could have confirmed with Allison regarding Vestal's alleged statements to Allison regarding the equipment. *See C.F.R. Foods,*

Inc. v. Randolph Development Co., 107 N.C. App. 584, 589, 421 S.E.2d 386, 389 (1992) (holding there was no reasonable reliance on fraud where the party had "a full opportunity to make pertinent inquiries and failed to do so" (citation and quotation marks omitted)).

¶ 28 Moreover, the CCI Contract plainly stated Plaintiff reserved the right to hire outside subcontractors to help do the work. Therefore, because there was neither a misrepresentation by Plaintiff nor reasonable reliance on the statements made by Vestal, the trial court did not err in granting Plaintiff's Motion for Directed Verdict as to Defendant's first Fraud Counterclaim.

¶ 29 Similarly, Defendant's Fraudulent Inducement Affirmative Defense alleges Plaintiff fraudulently misrepresented and concealed certain information to induce Defendant to enter into a contract. This defense fails for the same reasons Defendant's Fraudulent Inducement Counterclaim fails: (1) there was not sufficient evidence Plaintiff made any false representation or concealed a material fact; and (2) there was no reasonable reliance by Futrell.

B. Defendant's Second Fraud Counterclaim

¶ 30 As a threshold matter, Plaintiff contends the Economic Loss Rule bars Defendant from asserting its second Fraud Counterclaim. " '[T]he economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law.' " *Beaufort Builders, Inc. v. White Plains Church*

Ministries, Inc., 246 N.C. App. 27, 33, 783 S.E.2d 35, 39 (2016) (quoting *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639, 643 S.E.2d 28, 30 (2007)). However, "this Court has expressly set forth that the economic-loss rule does not bar fraud claims, even where the alleged fraud also breaches a contractual term between the parties." *Cummings v. Carroll*, 270 N.C. App. 204, 231, 841 S.E.2d 555, 574 (2020) (citing *Bradley Woodcraft, Inc. v. Bodden*, 251 N.C. App. 27, 34, 795 S.E.2d 253, 259 (2016)). Assuming Defendant's second Fraud Counterclaim is not barred by the Economic Loss Rule, the trial court did not err in granting Plaintiff directed verdict on this issue for the following reasons.

¶ 31 Defendant argues the trial court erred in granting Plaintiff's Motion for Directed Verdict on Defendant's second Fraud Counterclaim alleging Plaintiff submitted invoices concealing information and containing false representations. In support of this Counterclaim, Defendant points to evidence that Plaintiff: (1) performed unnecessary work; (2) submitted inflated invoices; and (3) improperly billed a fuel surcharge. Both parties presented expert testimony as to whether the work Plaintiff performed and invoiced was necessary under the circumstances. While Plaintiff contends there is no evidence of fraud, Defendant offered conflicting expert testimony. Specifically, in Ford's opinion, it was not proper for Plaintiff to use desiccant driers, dehumidifiers, and negative air machines—all of which are necessary for a "closed-drying" system—when utilizing an "open-drying" system.

¶ 32 Given Ford's testimony, which was based on industry-standard definitions of a closed-drying system and an open-drying system, there is "more than a scintilla of evidence" to establish a claim of fraud. *Smith*, 247 N.C. App. at 312, 785 S.E.2d at 745. To state a claim of fraud, a party must allege:

> (1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with intention that it should be acted upon; (5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and (6) that [the misrepresentation] resulted in damage to the injured party.

Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 594, 394 S.E.2d 643, 647 (1990) (alteration in original) (quoting *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 189-90, 374 S.E.2d 135, 137 (1988)).

¶ 33 "The required scienter for fraud is not present without both knowledge and an intent to deceive, manipulate, or defraud." *RD&J Props.*, 165 N.C. App. at 745, 600 S.E.2d at 498 (citation omitted). Here, Defendant presented evidence demonstrating Plaintiff knew or had reason to know its work was noncompliant with the industry standard. Further, despite the industry standard, Plaintiff performed arguably unnecessary work and submitted invoices for such work. Plaintiff's actions and the conflicting expert testimony presented by Defendant creates an issue of fact—whether or not the work was necessary and whether Plaintiff billed for work it had

reason to know was unnecessary—which should have been submitted to the jury. Thus, the trial court erred in directing a verdict for Plaintiff on Defendant's second Fraud Counterclaim. But, for the reasons discussed below, this error was harmless.

¶ 34 "No error . . . in any ruling or order . . . is ground . . . for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right." N.C. Gen. Stat. § 1A-1, Rule 61 (2019). " 'The burden is on the appellant not only to show error, but to show prejudicial error, *i.e.*, that a different result would have likely ensued had the error not occurred. [N.C.]G.S. § 1A-1, Rule 61[.]' " *O'Mara v. Wake Forest Univ. Health Scis.*, 184 N.C. App. 428, 440, 646 S.E.2d 400, 407 (2007) (quoting *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983)).

¶ 35 Defendant's first Breach of Contract Counterclaim, which was submitted to the jury, alleged Plaintiff "breached said contract by providing work, labor and materials that were not 'necessary' to remediate and repair the property owned by Defendant Allison," but "were provided and/or performed for the sole purpose of Plaintiff being able to bill and charge Defendant Allison additional sums of money to increase Plaintiff's profits on said contract." The jury found against Defendant on this Counterclaim. In its second Fraud Counterclaim, Defendant similarly alleged, Plaintiff: (1) "submitted . . . invoices for work, labor, and services that were not necessary to repair and remediate the Systel building"; (2) "submitted invoices for

inflated and false amounts for the work, labor and services allegedly provided to Defendant"; and (3) "submitted . . . invoices for work, labor and services that were never provided to Defendant[.]" The jury ruled against Defendant on its Breach of Contract Counterclaim; thus, it is not probable that the jury would have ruled differently on Defendant's second Fraud Counterclaim, alleging the same facts. *See Boone Ford, Inc. v. IME Scheduler, Inc.*, 262 N.C. App. 169, 175, 822 S.E.2d 95, 100 (2018) ("[E]ven if IME Scheduler's negligent misrepresentation claim should have been submitted to the jury, any error arising from the ruling was harmless" where the jury verdict established reliance on any such misrepresentations would have been unjustified.). Consequently, although the trial court did, in fact, err in granting Directed Verdict in favor of Plaintiff, such error was not prejudicial.

C. Breach of Contract

¶ 36 Defendant also argues the trial court erred in granting Plaintiff's Motion for Directed Verdict on Defendant's second Breach of Contract Counterclaim. Defendant's second Breach of Contract Counterclaim stemmed from the Affirmation Defendant required from all of its contractors during this period. The Affirmation required Plaintiff to affirm it was complying with anti-price-gouging regulations in effect at the time and to submit to billing audits as Defendant required. Plaintiff had already sent Defendant the first invoice on 24 October 2016, before Defendant made Plaintiff sign the Affirmation on 15 November 2016. Under the CCI Contract,

payment on the first invoice was due within thirty days of 24 October 2016. At trial, Plaintiff argued the Affirmation was not a valid contract because there was no consideration supporting the agreement—Defendant already owed Plaintiff for work billed on the first invoice per the CCI Contract. Defendant, on appeal, argues the trial court erred in granting Plaintiff's Motion for Directed Verdict on Defendant's Breach of Contract Counterclaim related to the Affirmation because there was fresh consideration—specifically, Defendant agreed to pay Plaintiff earlier than the thirty days allowed under the CCI Contract.

¶ 37 "Generally, for a contract to be enforceable it must be supported by consideration." *Burton v. Williams*, 202 N.C. App. 81, 85, 689 S.E.2d 174, 178 (2010) (citation and quotation marks omitted). "[A] promise to perform an act which the promisor is already bound to perform cannot constitute consideration to support an enforceable contract." *Id.* (citation and quotation marks omitted). "When, however, 'the new promise entails some additional benefit to be received by the [promisor] or some detriment to the promisee, the new promise is supported by consideration.' " *Id.* (alteration in original) (quoting *Sam Stockton Grading Co. v. Hall*, 111 N.C. App. 630, 632, 433 S.E.2d 7, 8 (1993)). Thus, we must determine if there was sufficient evidence, taken in the light most favorable to Defendant, supporting Defendant's contention it promised to pay Plaintiff earlier than required under the CCI Contract as an additional benefit supporting the Affirmation.

¶ 38 The Affirmation states "[f]or consideration provided" in its first sentence, but the Affirmation does not describe what that consideration might be. Defendant argues Plaintiff asked for payment on the first invoice when Plaintiff submitted the second invoice on 10 November 2016, before payment on the first invoice was due. Indeed, Vestal testified Plaintiff wanted to be paid as soon as possible. Although Vestal's testimony evinces Plaintiff's desire to be paid before the end of the thirty-day period allowed under the CCI Contract, Allison's testimony regarding his discussions with Vestal speaks directly to what Defendant may have actually promised Plaintiff. Allison testified to the following regarding consideration supporting the Affirmation:

> Q. All right. Now the first few words, it says "for consideration provided." What was provided to CCI?
>
> A. They had requested before they -- 110,988.46.
>
> Q. All right. Would you have released that check if they had not signed [the Affirmation]?
>
> A. Not at that time, no.
>
> Q. All right. Why?
>
> A. Because there was -- first of all, there was no . . . supporting documentation on some of the charges. We had questions. And if I recall, this was like a Thursday or Friday. They wanted it by the weekend. We released other draws and other advances to contractors under this document. So they were one of several. We didn't single them out.
>
> Q. So CCI was paid contingent upon signing [the Affirmation]?

A. That's correct.

¶ 39 Allison's testimony does not support Defendant's contention it promised to pay Plaintiff for the first invoice before it was due. First, Allison plainly stated the consideration supporting the Affirmation was the "110,988.46" already owed by Defendant. Based on Allison's testimony, Defendant did not intend to pay Plaintiff for the first invoice unless and until Plaintiff signed the Affirmation. However, under the CCI Contract, Defendant was already obligated to do so within the thirty-day window. Allison did not testify that Defendant promised to pay Plaintiff before the date required under the CCI Contract—even though Defendant paid Plaintiff for the first invoice the day after Vestal signed the Affirmation and before the end of the thirty-day window. Indeed, Vestal testified Allison told him: "if you'll sign this document, we'll get you paid. We can't pay until you sign this document." Therefore, there was not sufficient evidence supporting fresh consideration for the Affirmation. Consequently, the trial court did not err in granting Plaintiff's Motion for Directed Verdict on this issue.

II. Relevant Testimony

¶ 40 Defendant argues the trial court erred in improperly excluding relevant evidence regarding Defendant's Fraudulent Inducement Counterclaim and Affirmative Defense. Although Defendant points to "five occasions" where the trial court sustained Plaintiff's objections to Allison's testimony, Defendant does not

precisely explain the testimony to which Plaintiff objected. However, review of the Record reveals these objections included Allison's testimony: he was "upset" that Futrell signed the CCI Contract; regarding Defendant's contracting procedures during disasters generally; and that Futrell was "fraudulently induced" into signing the CCI Contract. Moreover, although Defendant claims the trial court sustained all the challenged objections on relevance grounds, the Record indicates the trial court sustained Plaintiff's objection to Allison testifying Futrell was "fraudulently induced" into signing the CCI Contract because the testimony presented a legal conclusion Allison was not permitted to make.

¶ 41 " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Allen*, 265 N.C. App. 480, 489, 828 S.E.2d 562, 570, *appeal dismissed, rev. denied*, 373 N.C. 175, 833 S.E.2d 806 (2019) (citation and quotation marks omitted).

¶ 42 Defendant, presumably, first argues the trial court erred in sustaining Plaintiff's objection to Allison's testimony he was "upset" Futrell signed the CCI contract and Allison's testimony regarding Defendant's contracting procedures

during disasters generally. In this case, the salient factual determination regarding whether Vestal fraudulently induced Futrell to sign the CCI Contract is whether Vestal made misrepresentations to Futrell in the first place. Without such misrepresentations, Defendant could not prove fraud. *See Harton*, 81 N.C. App. at 298-99, 344 S.E.2d at 119-20. Allison's testimony he was "upset" Futrell had signed the CCI Contract had no tendency to make the existence of any alleged misrepresentations by Vestal any more or less likely. Similarly, Allison's testimony as to Defendant's contracting procedures during disasters did not make the existence of such misrepresentations any more or less likely. Consequently, the trial court did not err in sustaining Plaintiff's objections to this testimony on relevance grounds.

¶ 43 Last, Defendant argues the trial court erred in sustaining Plaintiff's objection to Allison's testimony: "I learned during this process that Mr. Futrell was fraudulently induced into signing a contract." The trial court reasoned Allison was "not qualified to make that determination." The trial court even heard defense counsel on the issue outside the jury's presence. Defense counsel argued the testimony was "in the pleadings" and was a "factual assertion." The trial court explained: "[counsel] can elicit the facts about the conversations," but Allison could not "decide or . . . say whether or not Stan Futrell was fraudulently induced to sign a contract." Thus, because Allison provided a legal conclusion, properly within the jury's province, the trial court did not err in sustaining Plaintiff's objection to the

testimony. *See State v. Silvers*, 323 N.C. 646, 653, 374 S.E.2d 858, 863 (1989) ("The question improperly asked for a legal conclusion, and witnesses may not testify to legal conclusions," without proper foundation for opinions under the Rules of Evidence.). Consequently, the trial court did not err in sustaining any of Plaintiff's objections to Allison's testimony as it related to Defendant's Fraudulent Inducement Counterclaim and Affirmative Defense.

III. Motion to Amend

¶ 44 Defendant further argues the trial court erred in denying, in part, its Motion to Amend Counterclaim.

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2019). "When reviewing the denial of a motion to amend, the standard of review is whether the trial court's denial amounted to a manifest abuse of discretion." *Pruett v. Bingham*, 238 N.C. App. 78, 86, 767 S.E.2d 357, 363 (2014), *aff'd per curiam*, 368 N.C. 709, 782 S.E.2d 510 (2016) (citation omitted).

¶ 45 In this case, Defendant filed its Answer and Affirmative Defenses on 3 July 2017. On 29 June 2018, Defendant filed a Motion to Amend Counterclaim seeking to add counterclaims for fraud, unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, and "in the alternative" for breach of contract. The trial court granted Defendant's Motion to Amend regarding Defendant's Fraud and Breach of Contract Counterclaims but denied the part of the Motion seeking to add a counterclaim for unfair and deceptive trade practices. However, the trial court did not provide findings of fact or explain why it denied Defendant's Motion as it pertained to the proposed unfair and deceptive trade practices counterclaim in its Order. Moreover, the Record on appeal does not contain a transcript of the hearing on Defendant's Motion. Thus, specifically, Defendant argues the trial court abused its discretion in denying Defendant's Motion seeking to add a counterclaim of unfair and deceptive trade practices as the trial court did not provide any express reasons for denying the Motion.

¶ 46 "When 'there is no suggestion in the record that defendant asked for findings of fact or conclusions of law to be included in the trial court's order, the court's failure to do so is not reversible error.' " *Couch v. Bradley*, 179 N.C. App. 852, 855, 635 S.E.2d 492, 494 (2006) (quoting *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 494, 586 S.E.2d 791, 798 (2003)). Because the Record here does not indicate Defendant asked

for findings of fact in the trial court's Order, the trial court did not necessarily commit reversible error by not doing so.

¶ 47 "In the absence of any declared reason for the denial of leave to amend, this Court may examine any apparent reasons for such denial." *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985) (citation and quotation marks omitted). As Defendant waited almost one year from when it filed its original Answer to file its Motion to Amend, the trial court could have based its denial of the Motion, at least as it relates to this specific counterclaim, on Defendant's delay in filing. *See JPMorgan Chase Bank v. Browning*, 230 N.C. App. 537, 541, 750 S.E.2d 555, 559 (2013) (citing undue delay as a reason for denying a motion to amend); *see also Rabon v. Hopkins*, 208 N.C. App. 351, 354, 703 S.E.2d 181, 184 (2010) ("[A] trial court may appropriately deny a motion for leave to amend on the basis of undue delay where a party seeks to amend its pleading after a significant period of time has passed since filing the pleading and where the record or party offers no explanation for the delay."). Here, neither the Record nor Defendant offers any explanation for the delay in seeking to amend the Answer to include the unfair and deceptive trade practices counterclaim. Consequently, the trial court did not err in denying Defendant's Motion to Amend Counterclaim as to the unfair and deceptive trade practices counterclaim.

IV. Attorneys' Fees

¶ 48 Last, Defendant argues the trial court erred in granting Plaintiff attorneys' fees because the trial court, according to Defendant, erred in entering Judgment in Plaintiff's favor. Thus, because we have concluded the trial court did not err in entering the Judgment as explained above, the trial court did not err in granting Plaintiff's Motion for fees.

Conclusion

¶ 49 Consequently, for the foregoing reasons, the trial court's Judgment is affirmed.

AFFIRMED.

Chief Judge STROUD and Judge GRIFFIN concur.

Report per Rule 30(e).