

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CVS002076-590

JOHNSON BROS. CORPORATION,
A SOUTHLAND COMPANY,

Plaintiff,

v.

CITY OF CHARLOTTE,

Defendant.

**ORDER AND OPINION ON
PLAINTIFF'S MOTION FOR
RECONSIDERATION OR, IN THE
ALTERNATIVE, TO AMEND THE
COMPLAINT**

1. **THIS MATTER** is before the Court upon Plaintiff Johnson Bros. Corporation, a Southland Company's ("JBC") Motion for Reconsideration (the "Motion to Reconsider") or, in the Alternative, to Amend the Complaint (the "Motion to Amend"; together, the "Motions") pursuant to Rules 54(b) and 15(a), respectively, of the North Carolina Rules of Civil Procedure (the "Rule(s)") in the above-captioned case.¹

2. Having considered the Motions, the parties' briefs in support of and in opposition to the Motions, the relevant pleadings, and the arguments of counsel at the hearing on the Motions, the Court, in the exercise of its discretion, hereby **GRANTS in part** and **DENIES in part** the Motions as set forth below.

Robinson Bradshaw & Hinson, P.A., by Edward F. Hennessey, IV, Margaret R. McLoughlin, and Mark Hiller, and Cokinos Young, by John P. DiBiasi and Branson Rogers, for Plaintiff Johnson Bros. Corporation, a Southland Company.

¹ (Pl.'s Mot. Recons. or, in the Alt., Amend Compl. [hereinafter, the "Mots.'], ECF No. 105.)

Hamilton Stephens Steele + Martin, PLLC, by Rebecca K. Cheney, Bentford E. Martin, and Graham B. Morgan, for Defendant City of Charlotte.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. On 31 January 2023, JBC initiated this action by requesting and obtaining the issuance of a summons and permission from the Court to file its complaint within 20 days thereafter under Rule 3(a).² JBC then timely filed its original Complaint on 20 February 2023³ and thereafter filed its First Amended Complaint on 12 April 2023.⁴ In the First Amended Complaint, JBC asserted ten claims against Defendant City of Charlotte (the “City”), including claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and subcontractor pass-through claims (the “Contract Claims”).⁵

4. On 1 June 2023, the City filed its Motions to Dismiss, Answer to First Amended Verified Complaint and Counterclaim, seeking, in part, the dismissal of all

² (Application and Order Extending Time File Compl., ECF No. 9.)

³ (Verified Compl., ECF No. 10.)

⁴ (First Am. Verified Compl. [hereinafter, “FAC”], ECF No. 2.)

⁵ The contract at issue in this litigation is the contract JBC and the City entered into for the construction of the City’s CityLYNX Gold Line Streetcar extension project (the “Contract”). (FAC ¶¶ 7–9, 19.) The specific claims comprising the Contract Claims are the First Cause of Action (breach of contract), the Fourth Cause of Action (breach of the implied covenant of good faith and fair dealing), and the Tenth Cause of Action (sub-contractor pass-through claims). (FAC.)

of JBC's claims (the "Motion to Dismiss").⁶ The Court issued its Order and Opinion on the Motion to Dismiss on 27 February 2024 (the "Order" or the "February 27 Order").⁷ Among its rulings in the Order, the Court concluded that JBC's Contract Claims were time-barred in part and dismissed those claims with prejudice "to the extent those claims [arose] from conduct occurring before 31 January 2021."⁸

5. JBC filed the current Motions on 17 April 2024, seeking reconsideration of the Court's partial dismissal of the Contract Claims with prejudice and, alternatively, leave to file a second amended complaint.⁹ After full briefing, the Court convened a hearing on the Motions on 30 May 2024, at which all parties were represented by counsel (the "Hearing"). The Motions are now ripe for resolution.

II.

ANALYSIS

A. JBC's Motion for Reconsideration

6. JBC asks the Court to reconsider its conclusion that JBC's Contract Claims are partially time-barred and contends that the Court should deny the City's Motion

⁶ (Def. City Charlotte's Mots. Dismiss, Answer First Am. Verified Compl. and Countercl., ECF No. 3.)

⁷ (Order and Op. Def. City Charlotte's Mots. Dismiss [hereinafter, the "Order"], ECF No. 89; *Johnson Bros. Corp. v. City of Charlotte*, 2024 NCBC LEXIS 32 (N.C. Super. Ct. Feb. 27, 2024).)

⁸ (Order ¶¶ 73, 82(b); *Johnson Bros. Corp.*, 2024 NCBC LEXIS 32, at *42.)

⁹ (Mots.; Mem. Supp. Pl./Third-Party Pl.'s Mots. 21–30 [hereinafter, "JBC's Br. Supp."], ECF No. 106.)

to Dismiss these claims in their entirety and permit the Contract Claims to proceed to discovery and trial as to all relevant time periods.¹⁰

7. Rule 54 provides that “in the absence of [] a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” As such, under Rule 54, “[t]rial courts have the discretion to reconsider their interlocutory rulings until a final judgment has been entered.” *Ward v. FSC I, LLC*, 2017 NCBC LEXIS 19, at *6 (N.C. Super. Ct. Mar. 7, 2017); *see also, e.g., Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 250 N.C. App. 791, 798 (2016) (noting that when compared to Rule 59(e), Rule 54 grants “broader discretion to trial courts to amend their interlocutory orders before entry of a final judgment[]”).

8. After a further, careful review of the allegations of JBC’s First Amended Complaint, and upon consideration of the parties’ briefing and arguments on the Motion to Reconsider, the Court concludes, in the exercise of its discretion, that the interests of justice require that JBC’s Contract Claims be dismissed without prejudice, rather than with prejudice as provided in the Court’s Order. Indeed, it was not the Court’s intention in the Order to deny JBC an opportunity to replead its Contract Claims as to all relevant time periods on a non-payment theory of breach of contract, which the Court concluded had not been pleaded in the First Amended Complaint. Moreover, JBC has offered new factual allegations with supporting documents in support of its Contract Claims that suggest JBC may be able to replead

¹⁰ (JBC’s Br. Supp. 21–25.)

those claims as timely under the applicable statute of limitations and in satisfaction of the strictures of Rule 12(b)(6). Accordingly, the Court will exercise its discretion to modify the Order to reflect that the Contract Claims are dismissed without prejudice. *See, e.g. First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013) (“The decision to dismiss an action with or without prejudice [under Rule 12(b)(6)] is in the discretion of the trial court[.]”). JBC’s Motion to Reconsider, however, is otherwise denied.

B. JBC’s Alternative Motion to Amend

9. Since the Court has not granted JBC the complete relief it sought through the Motion to Reconsider, the Court will consider JBC’s alternative Motion to Amend. JBC’s proposed Second Amended Complaint makes allegations which support and clarify JBC’s theory of breach of contract. JBC’s theory posits that the City required JBC to perform work that exceeded the scope of the Contract, JBC was entitled to additional compensation and time extensions as a result, JBC requested this additional compensation and time extensions through a formal claim to the City, and the City breached the Contract by denying JBC’s formal claim and refusing to compensate JBC or grant the requested time extensions.¹¹ The proposed Second Amended Complaint also includes factual allegations that seek to support JBC’s assertions that (i) the City waived all conditions precedent to claims under the

¹¹ (JBC’s Br. Supp. Ex. 1–Proposed Second Am. Verified Compl. ¶¶ 14, 30, 33, 37, 41, 48–49, 52, 59, 63–64, 86–89, 92–98 [hereinafter, “Proposed SAC”], ECF No. 106.2.)

Contract through their conduct and (2) the City should be equitably estopped from asserting the statute of limitations as a defense to JBC's claims.¹²

10. When a party seeks leave of court to amend a pleading, "leave shall be freely given when justice so requires." N.C. R. Civ. P. 15(a). "A motion to amend is addressed to the sound discretion of the trial [court]" and is reviewable only for abuse of discretion. *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 282 (1991). Our courts have held that a motion to amend may be denied for "(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 282–83. The Supreme Court of North Carolina, however, has long made clear that "amendments should be freely allowed unless some material prejudice to the other party is demonstrated." *Mauney v. Morris*, 316 N.C. 67, 72 (1986). "The burden is upon the opposing party to establish that that party would be prejudiced by the amendment." *Id.*

11. The City opposes JBC's request for leave to amend on the grounds of futility and undue delay.¹³

a. Futility

12. "The futility standard under Rule 15 is essentially the same standard used in reviewing a motion to dismiss under Rule 12(b)(6)" but courts have "liberal discretion to find that an amendment lacks futility." *Simply the Best Movers, LLC v.*

¹² (Proposed SAC ¶¶ 65–66, 74–79.)

¹³ (Def. City Charlotte's Br. Opp'n Pl.'s Mots. 12–19 [hereinafter, "City's Br. Opp'n"], ECF No. 112.)

Marrins' Moving Sys., Ltd., 2016 NCBC LEXIS 28, at *5–6 (N.C. Super. Ct. Apr. 6, 2016). “[A] motion to amend is not futile when ‘the allegations of the [amendment], treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.’” *Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 159, at *15 (N.C. Super. Ct. Nov. 29, 2023) (quoting *Harris v. NCNB Nat’l Bank*, 85 N.C. App. 669, 670 (1987)).

13. On the other hand, “[a] motion for leave to amend is futile and appropriately denied when the ‘proposed amendment could not withstand a motion to dismiss for failure to state a claim.’” *Insight Health Corp. v. Marquis Diagnostic Imaging N.C., LLC*, 2016 NCBC LEXIS 77, at *6 (N.C. Super. Ct. Oct. 7, 2016) (quoting *Smith v. McRary*, 306 N.C. 664, 671 (1982)). Dismissal of a pleading for failure to state a claim under Rule 12(b)(6) is proper only: “(1) when the [pleading] on its face reveals that no law supports [the] claim; (2) when the [pleading] reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the [pleading] necessarily defeats the . . . claim.” *Oates v. JAG, Inc.*, 314 N.C. 276, 278 (1985). Importantly here, this Court has recognized that “[w]hether a statute of limitations defense should be resolved by a Rule 12(b)(6) motion or must await a Rule 56 motion for summary judgment depends on whether the facts necessary to adjudicate the defense are demonstrated by the complaint itself or whether additional evidence must be considered.” *BDM Invs. v. Lenhil, Inc.*, 2012 NCBC LEXIS 7, at *29 (N.C. Super. Ct. Jan. 18, 2012).

14. The City contends that granting leave for JBC to assert its revised Contract Claims would be futile for several reasons.

15. First, the City contends that JBC's revised Contract Claims are barred by the applicable statute of limitations because the City denied JBC's claim for additional compensation and time extensions more than two years before this action was filed on 31 January 2023¹⁴ by assessing liquidated damages from October 2018¹⁵ through at least November 2021.¹⁶ Based on its review of the Second Amended Complaint, however, the Court concludes that JBC's proposed allegations—in particular, those asserting that the City repeatedly failed to “provide any substantive response” to JBC's requests for additional compensation or extra time until it denied those requests on 27 January 2023¹⁷—are sufficient to state the Contract Claims for purposes of Rule 12(b)(6).

16. The City next contends that JBC's revised Contract Claims are time-barred at least to the extent they are based on the reconstruction of the Hawthorne Lane Bridge. The City argues that JBC admits in its proposed pleading that the City informed JBC in February 2019 that it “had no intention of granting any time or cost extension with respect to the work pertaining to the [Hawthorne Lane] bridge,”¹⁸

¹⁴ See N.C.G.S. § 1-53(1) (establishing two-year statute of limitations for most contract claims against local governments).

¹⁵ (See Proposed SAC ¶ 48.)

¹⁶ (See Proposed SAC ¶¶ 59–60.)

¹⁷ (See Proposed SAC ¶¶ 46, 48, 51–52, 54, 57, 59–60, 78.)

¹⁸ (See Proposed SAC ¶ 49.)

thereby triggering the two-year statute of limitations and rendering the revised claims time-barred as of February 2021. But the Court cannot conclude that the City's alleged expression of intent in JBC's proposed pleading necessarily equates to a rejection of a yet-to-be-filed formal claim. Indeed, JBC alleges in its proposed Second Amended Complaint that, in February 2019, "JBC had not yet submitted, pursuant to the Contract, a request for additional compensation and time extensions related to the Project for the additional and/or extra work the City had required and was requiring JBC to perform."¹⁹ Therefore, this argument for futility, too, must fail.

17. Finally, the City contends that JBC should not be granted leave to assert its proposed allegations concerning the City's alleged waiver of conditions precedent and equitable estoppel because JBC has failed to allege each factual element necessary for those doctrines to apply.²⁰ After careful review, however, the Court concludes that JBC's factual allegations concerning waiver and estoppel are sufficient to survive Rule 12(b)(6) dismissal and that the application of these doctrines is better evaluated upon the presentation of evidence at the summary judgment stage of the litigation.

18. Accordingly, based on the above, the Court concludes that the City's various futility arguments are unavailing.

¹⁹ (Proposed SAC ¶ 49.)

²⁰ (City's Br. Opp'n 14–15.)

b. Undue Delay and Unfair Prejudice

19. The City also contends that leave to amend should be denied because JBC unduly delayed in seeking leave to amend.²¹ The Court disagrees. Although this case was filed on 31 January 2023, the Court did not hear the City's Motion to Dismiss until 2 November 2023²² and issued its ruling on that motion on 27 February 2024.²³ Under these circumstances, the Court is unable to conclude that JBC unduly delayed in seeking leave to amend, particularly when the City has not offered any persuasive evidence or argument that the proposed amendment would cause it any material or unfair prejudice. *See, e.g., Mauney*, 316 N.C. at 72 (“[A]mendments should be freely allowed unless some material prejudice to the other party is demonstrated.”)

III.

CONCLUSION

20. **WHEREFORE**, for the reasons set forth above, the Court, in the exercise of its discretion, hereby **GRANTS in part** and **DENIES in part** the Motion for Reconsideration, **GRANTS** the Motion to Amend, and **ORDERS** as follows:

- a. The Motion for Reconsideration is **GRANTED in part** and Paragraph 82(b) of the February 27 Order is hereby amended to state in its entirety as follows:

The Motion is **GRANTED** under Rule 12(b)(6) on JBC's claims for breach of contract (First Cause of Action), breach of the implied covenant of good faith and fair dealing

²¹ (City's Br. Opp'n 17–19.)

²² (Am. Notice Hr'g, ECF No. 76.)

²³ (Order.)

(Fourth Cause of Action), and pass-through claims (Tenth Cause of Action) to the extent those claims arise from conduct occurring before 31 January 2021, and those claims are hereby **DISMISSED** as time-barred **without prejudice**.

- b. The Motion for Reconsideration is otherwise **DENIED**, and this Order shall not otherwise alter or modify any other provisions of the February 27 Order.
- c. The Motion to Amend is **GRANTED**, and JBC shall file its proposed Second Amended Complaint no later than 12 June 2024.

SO ORDERED, this the 7th day of June, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge