SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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REAL BUILDERS INC.

Plaintiff,

- v -

FULL STACK MODULAR LLC,

Defendant.

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INDEX NO. 652123/2020

MOTION DATE 06/08/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 28, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents and for the reasons set forth on the record (6/30/2020), Real Builders Inc.'s (**Real Builders**) motion for a preliminary injunction pursuant to CPLR §§ 6301 and 6311 is granted.

Relevant Factual Background

Reference is made to a Modular Design, Fabrication, Construction and Delivery Agreement (the **Construction Agreement**) dated December 20, 2019 by and between Real Builders and Full Stack Modular LLC (**FSM**) (NYSCEF Doc. 2).

Pursuant to the Construction Agreement, Real Builders, a general contractor engaged in constructing affordable apartments for low-income households in downtown Far Rockaway (the **Project**), engaged FSM, a modular construction company, to design, fabricate, assemble, construct and deliver certain "Products" for the Project. Per the Construction Agreement, FSM

was permitted to retain sub-consultants to carry out work on the Project. Further, FSM agreed that in the event that Real Builders terminated its contract with FSM – whether for cause or simply for convenience – FSM would assign these subcontracts to Real Builders and provide reasonable assistance in transitioning the project.

On April 2, 2020, Real Builders exercised its right to terminate the Construction Agreement with FSM for convenience (NYSCEF Doc. No. 15). On May 7, 2020, notwithstanding that Real Builders had already terminated the Construction Agreement, FSM sent Real Builders its own notice of default, seeking to terminate the Construction Agreement for cause (NYSCEF Doc. No. 47). Starting April 2, 2020 and thru the present, Real Builders has continuously requested assignment of the subcontracts as set forth in the Construction Agreement and for FSM to provide Real Builders with the additional items necessary in order for Real Builders to successfully and efficiently continue work on the project.

FSM has refused to make such assignments until Real Builders pays it over $2 million that it claims it is still owed by FSM pursuant to the Construction Agreement. Real Builders disputes this amount, claiming that FSM has already been paid for all of the work it performed on the Project and that to the extent that FSM claims that additional money is owed pursuant to requisition request no. 7, FSM has failed to provide any backup documentation at all in support of its final requisition (*see* NYSCEF Doc. Nos. 5, 10). Nonetheless, inasmuch as FSM claims money is due and owing under the Construction Agreement and has filed a Mechanic's Lien in Queens County (NYSCEF Doc. No. 52), Real Builders has posted a bond in the amount of $2,246,169.06 (i.e., 110%) with the Queens County Clerk in connection with the Mechanic's Lien placed on the subject property by FSM (NYSCEF Doc. No. 55).

Real Builders moves for a preliminary injunction as follows:

> 1. Ordering defendant FSM to immediately assign to Real Builders the Subcontracts between FSM and its Sub-consultants, including but not limited to subcontracts with Ove Arup and Partners, Fulcro Engineering Services, Isley Welding Services/IWS Acquisition Corp., MG McGrath, Inc., Manni Green Tech S.r.l. and ICOM Engineering S.P.A.; and
>
> 2. Ordering FSM to immediately provide to Real Builders (a) a copy of all plans, drawings, specifications, shop drawings, cuts, samples, material lists and other documents for the Work [hereinafter defined] (including but not limited to designs for the assembly and construction of the Product[s][hereinafter defined]) prepared by FSM and/or its Subconsultants as of the date of termination; (b) possession of all portions of the Work (if any) produced as of the date of termination and/or stored or otherwise located at FSM's or any of its Sub-consultants' facilities or storage sites; (c) a copy of all licenses, permits, certifications and approvals (if any) that FSM obtained from any governmental authorities for the design or construction of the Product(s) or the Work; (d) a copy of all Subcontracts and any other agreements regarding the Project executed by and between FSM and any of its Sub- consultants and/or suppliers; and (e) an irrevocable, perpetual, fully-paid up, royalty-free license to use the Instruments of Service as defined in Section 6.1, the design of the Project, and the documents on which such design is reflected.

Discussion:

To establish an entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence, "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; see also CPLR 6301). The decision to grant or deny a preliminary injunction is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abused of discretion (*id.*) The mere presence of disputed factual issues does not preclude a court from granting an injunction, all that is required is likelihood of success, not conclusive proof (*Ying Fun Moy v Hohi Umeki,* 10 AD3d 604, 605 [2d Dept 2004] [rejecting appellants' argument that

"injunctive relief may not be granted where the facts are in dispute"]). As the First Department has explained:

> even when facts are in dispute, the *nisi prius* court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be "conclusive" (*Demartini v Chatham Green*, 169 AD2d 689, 690). As we have previously noted: "Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced" (*Republic of Lebanon v Sotheby's*, 167 AD2d 142, 145).

(*Sau Thi Ma v Xuan T. Lien,* 198 AD2d 186 [1st Dept 1993]).

Here, Real Builders argues that it is likely to succeed on the merits because pursuant to the Construction Agreement FSM must assign the subcontracts and provide other items necessary to complete construction on the Project at Real Builders' election (NYSCEF Doc. No. 2, §§ 2.2.1, 2.2.2; *see also id.*, § 13.6). Section 2.2.2 plainly provides that either party may terminate the Construction Agreement at any time for convenience:

> ***The Buyer or Lender shall have the right to terminate this Agreement "for convenience" at any time for any reason or no reason upon written notice given to Seller at the address of Seller set forth above***. In the event of a termination of this Agreement for convenience by the Buyer or Lender, the Buyer shall promptly pay to Seller a sum equal to: (i) any unpaid balance owing for Work completed and delivered to Project Site or work-in-progress in accordance with this Agreement as of the date of termination (including amounts Seller paid to its suppliers in accordance with this Agreement as of the date of termination), plus (ii) all other reasonable, substantiated out-of-pocket costs and expenses incurred by Seller in connection with this Agreement or relating to the Work; provided that Seller has included termination for convenience provisions in its Sub-consultant agreements and has not agreed in its Sub-consultant agreements to pay such Subconsultant for any portion of the Work not yet completed. This shall be Seller 's sole remedy in the event of such termination, and, in no event shall the Buyer be liable to the Seller (i) for an amount in excess of the Contract Sum, (ii) lost profits, (iii) home office overhead, or (iv) any other type of damages, including consequential, special and indirect damages. Such Payment shall be made within thirty (30) days after Buyer's receipt of Seller's final Application for Payment, and all lien releases, deliverables and other close out documentation required by this Agreement. In no event shall Lender have any liability whatsoever to Seller for any such termination and Seller shall look solely to the Buyer for any amounts due hereunder. ***In the event of a***

termination for convenience by Buyer or Lender, Buyer and Lender shall have all the rights and remedies set forth in Section 2.2.1(a)-(c) above with respect to any Work (including Products and materials) for which it has made payment to Seller hereunder.

(NYSCEF Doc. No. 2, § 2.2.2 [emphasis added]).

Section 2.2.1 (a)-(c) states:

> …In the event of termination for cause by Buyer, Buyer may, at its option: (a) take possession, for the purpose of completing the Work, of all plans, drawings and specifications for the Work, all portions of the Work produced and delivered as of the date of termination, and all portions of the Work (including Products and materials) stored or otherwise located at the Seller's or any of its Sub-consultants' facilities or storage sites (and Seller and its Sub-consultants shall be required to allow Buyer, Owner and Lender by itself or through others access to their facilities and storage sites to effectuate such possessory right); (b) ***take assignment of any or all Sub-consultant agreements and purchase orders***; and/or (c) either itself or through others obtain the Work (including all Products and materials) and complete the Work by whatever method Buyer, Owner or Lender, as applicable, may deem expedient. In case of termination for cause by Buyer, Seller shall not be entitled to receive any further payment (if any) until the Work is fully supplied, completed and accepted by Buyer and Owner, and payment in full is made by the Owner to Buyer. In such case, if the unpaid balance of the Contract Sum upon final completion of the Work exceeds the costs incurred by Buyer in finishing the Work, including compensation for the Buyer's costs, services and expenses made necessary thereby, and other damages (not expressly waived herein) incurred by the Buyer in completing the Work, including liquidated damages (if any) to which Buyer is entitled hereunder, then Seller shall be paid for the portion of the Work completed by Seller in accordance with this Agreement prior to termination and not yet paid (including amounts Seller paid to its suppliers in accordance with this Agreement as of the date of termination). If such costs, damages and expenses exceed the unpaid balance of the Guaranteed Maximum Price, Seller shall pay the difference to Buyer. However, in no event shall the Buyer be liable to the Seller for (i) an amount in excess of the Contract Sum, (ii) lost profits, (iii) home office overhead, or (iv) any other type of damages, including consequential, special and indirect damages. Moreover, the affidavits and releases required as condition precedent to final payment must be provided to the Buyer as a condition precedent to such payment and such payments to the Seller shall be reduced by any setoffs to which the Buyer is entitled under this Agreement.

(NYSCEF Doc. No. 2, 2, § 2.2.1 [emphasis added]).

FSM argues that Real Builders could not have terminated the Construction Agreement for convenience because FSM has not been fully paid for its work (and that, therefore, FSM terminated the Construction Agreement for cause on May 7, 2020 for nonpayment). However, as Section 2.2.2 makes clear, the right to terminate for convenience is simply not dependent on payment being made first. The right to succeed to the rights for the Work paid for set forth in Section 2.2.1(a)-(c) springs from the payment but the termination's effectiveness is not contingent upon any such payment. Put another way, Real Builders' notice of termination was effective when given but it only has the rights set forth in Section 2.2.1(a)-(c) for that which it has paid.

Inasmuch as FSM argues, in the alternative, that Real Builders was without authority to terminate the Construction Agreement and/or assign any subcontracts because this required the consent of the lender, Bank of America, this protection was not for the benefit of FSM. It was for the benefit of the lender. Putting that aside, Bank of America has now consented (NYSCEF Doc. No. 56) so aside from being unavailing, the argument is now moot in any event.

To the extent that the parties dispute whether additional funds are owed, Real Builders came forward with evidence that it is likely to prevail on this issue by showing that FSM has not submitted the required supporting documents, as required by the Construction Agreement for payment, in support of its final requisition request.

Turning to irreparable harm, delay in assigning the subcontracts will undeniably cause irreparable harm because the subcontractors will not stand by and wait forever. They will

undoubtedly take on other work. In addition, Real Builders will not have access to the necessary plans, shop drawings, specifications and licenses (*Klein, Wagner & Morris v Lawrence A. Klein*, 186 AD2d 631, 633 [2d Dept 1992]). As it is, Real Builders alleges that the Project has come to a standstill and that financing as well as the Project as a whole is at risk of default and foreclosure (Rad Aff., ¶¶ 32-33). If the Project is delayed in moving forward or is foreclosed upon, Real Builders, the subconsultants and the larger community awaiting the Project's completion will all be harmed.

Finally, balance of the equities favors Real Builders as the assignment will not harm or damage FSM. The draft assignment agreement that Real Builders provided to FSM includes a provision releasing FSM from any liability under subcontracts (Bernstein Aff., Ex. 10 at 5). Significantly, although Real Builders maintains that it already paid FSM in full for all its completed work, plus any Break Up Fee, Real Builders has also paid the sub-consultants all amounts it could determine that they are owed (*id.*). If FSM is owed any additional monies, as it claims, it will have the opportunity to present its claim to the court in this action. Nothing about the injunction will bar such relief. Thus, on balance, the equities clearly favor Real Builders (*Ma v Lien*, 198 AD2d 186, 187 [1st Dept 1993] [granting preliminary injunction where court could "perceive no great harm" to non-movant].

Accordingly, it appearing to this court that a cause of action exists in favor of Real Builders and against FSM and that Real Builders is entitled to a preliminary injunction on the ground that the FSM is suffering to be done, an act in violation of the Real Builders' rights respecting the subject

of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision and on the record at oral argument, it is

ORDERED that the undertaking is fixed in the sum of $100,000.00 conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are directed to:

1. Immediately assign to the plaintiff any Subcontracts between FSM and its Sub-consultants, including but not limited to subcontracts with Ove Arup and Partners, Fulcro Engineering Services, Isley Welding Services/IWS Acquisition Corp., MG McGrath, Inc., Manni Green Tech S.r.l. and ICOM Engineering S.P.A.; and

2. Provide, within ten days of this decision and order, to plaintiff (a) a copy of all plans, drawings, specifications, shop drawings, cuts, samples, material lists and other documents for the Work (including but not limited to designs for the assembly and construction of the Product[s]) prepared by defendant and/or its Subconsultants that is in defendant's possession, as of the date of termination; (b) possession of all portions of the Work (if any) produced as of the date of termination and/or stored or otherwise located at defendant's facilities or storage sites; (c) a copy of all licenses, permits, certifications and approvals (if any) that defendant obtained from any governmental authorities for the design or construction of the Product(s) or the Work; (d) a copy of all Subcontracts and

any other agreements regarding the Project executed by and between defendant and any of its Sub- consultants and/or suppliers; and (e) an irrevocable, perpetual, fully-paid up, royalty-free license to use the Instruments of Service as defined in Section 6.1, the design of the Project, and the documents on which such design is reflected.

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6/30/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE