

<b>Real Bldrs. Inc. v Full Stack Modular LLC</b>
2020 NY Slip Op 33031(U)
September 15, 2020
Supreme Court, New York County
Docket Number: 652123/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

REAL BUILDERS INC.

Plaintiff,

- v -

FULL STACK MODULAR LLC,

Defendant.

-----X

INDEX NO. 652123/2020
MOTION DATE 07/24/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT .

Upon the foregoing documents and for the reasons set forth on the record (9/15/2020), Full Stack Modular LLC's (FSM) motion to amend the court's prior injunction is denied, and Real Builders Inc.'s (Real Builders) cross motion for contempt is also denied.

THE FACTS RELEVANT TO THE INSTANT MOTION

The facts of this matter are set forth in the court's prior decision and order dated July 1, 2020 (the Prior Order; NYSCEF Doc. No. 60; 84). As relevant, per the Prior Order, the court issued a preliminary injunction requiring FSM 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.

(*id.* at 8-9 [emphasis added]).

The Prior Order also directed Real Builders to post an undertaking in the sum of \$100,000 (*id.* at 8), which FSM did on July 13, 2020 (NYSCEF Doc. No. 86).

FSM provided assignments of some subcontracts to Real Builders on July 7, 2020 (NYSCEF Doc. No. 87) but did not assign the subcontracts of Manni Green Tech S.r.l. (**Manni**) and ICOM Engineering S.P.A. (**ICOM**) as directed it do immediately by the Prior Order. Among other things, FSM seeks to avoid turning over a pedestal fixture that Real Builders already paid for as a direct project expense. The parties appear to have engaged in a meet and confer process with respect to the outstanding assignments (*see* Letters, NYSCEF Doc. Nos. 87-90).

On July 23, 2020, FSM filed the instant motion by Order to Show Cause, by which FSM now seeks to modify the foregoing to exclude assignment of the Manni and ICOM subcontracts and to "clarify" that the "intellectual property license granted in part 2(e) of the Order only applies to the extent that Real Builders has fully paid for the Instruments of Service, as defined in the Modular Design, Fabrication, Construction and Delivery Agreement dated as of December 20,

2019 between Real Builders and FSM” (the **Construction Agreement**) (NYSCEF Doc. No. 79 at 1-2).

## **DISCUSSION**

### **I. Motion to Amend/Modify Prior Order**

A motion to amend or modify a preliminary injunction order may only be granted upon “compelling or changed circumstances that render continuation of the injunction inequitable” (*Wellbilt Equip. Corp. v Red Eye Grill, L.P.*, 308 AD2d 411, 411-12 [1<sup>st</sup> Dept 2003]). FSM has presented no compelling changed circumstances here, or, indeed, any changed circumstances at all. Accordingly, FSM’s motion is denied.

### **II. Motion for contempt**

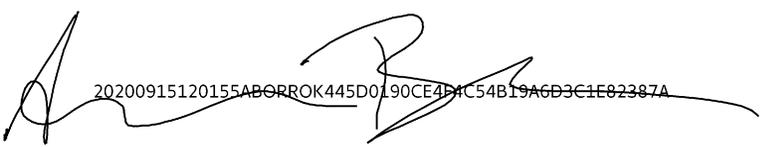
To make a finding of civil contempt, a court must find that: (1) “a lawful order of the court clearly expressing an unequivocal mandate, was in effect,” (2) the order was disobeyed “with reasonable certainty,” (3) the party to be held in contempt must have had knowledge of the court’s order, and (4) prejudice to the right of a party to the litigation has been demonstrated (*McCormick v Axelrod*, 59 NY2d 574 [1983]; Judiciary Law §§ 750, *et seq.*). Civil contempt must be proved with “reasonable certainty,” which requires “a quantum of proof greater than a preponderance of evidence but less than proof beyond a reasonable doubt akin to the clear and convincing evidence standard” (*El-Dehdan v El-Dehdan*, 114 AD3d 4, 10 [2d Dept 2013] [internal quotation and citation omitted]).

Although, here, the first and third elements of the contempt standard have plainly been met (i.e., not all of the contracts and agreements required to be assigned were immediately assigned and, indisputably, FSM had knowledge of the Prior Order), it is not clear that FSM intentionally disobeyed the preliminary injunction set forth in the Prior Order with “reasonable certainty” (the second element) and, in any event, Real Builders’ rights have not been substantially prejudiced as a result of the brief delay in having this application decided (the fourth element). Following FSM delivering certain assignments, the parties then engaged in what appears to be a “meet and confer” about additional contracts and items subject to the court’s Prior Order. On July 23, FSM filed its motion to modify. While the court is mindful of Real Builders’ claim that this motion practice was undertaken as a delay tactic, it cannot make a finding of contempt on these facts with reasonable certainty. Therefore, the cross-motion is denied without prejudice.

Accordingly, it is

ORDERED that the motion is denied and cross motion is denied without prejudice.

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**ANDREW BORROK, J.S.C.**

9/15/2020  
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**DATE**

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