

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

T-PEG, INC and)
TIMBERPEG EAST, INC.,)
Plaintiffs,)
)
vs.) No. 03-CV-462-M
)
VERMONT TIMBER WORKS, INC.,)
and DOUGLAS FRIANT,)
Defendants.)

DEFENDANTS' REPLY MEMO SUPPORTING
THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

MJOP is the proper procedural device. Plaintiffs' principal objection (Obj. at 1-3) is to mischaracterize defendants' motion for judgment on the pleadings as a "motion to strike" and then attack it procedurally under FRCP 12(f) – which is not the rule under which it was brought.

Of course, it is obvious that

- Striking the portions of the amended complaint on which defendants seek judgment is only a portion of the relief defendants request.
- Many rules other than FRCP 12(f) allow striking of a pleading or portion. E.g., FRCP 37(b).
- No motion to strike could have been made here "before filing a responsive pleading" because plaintiffs' positions were as yet unclear.
- The requirements for judgment on the pleadings – based on plaintiffs' pleadings and court orders after the amended complaint – have been met.

Plaintiffs concede substance of motion. Plaintiffs now state (Obj. at 3) that they have "never pressed the 'claims' described by VTW." VTW strongly disagrees, and lists chapter and verse of plaintiffs' prior attempts at pp. 3 and 6 of its motion, but in any event, the concession now makes it self-evident that motion should be granted.

The “Plans” Are Not Relevant Or Appropriate To The Claim In The Case. Plaintiffs want to continue to press violation of “the Plans” to the jury, which would be improper (as well as prejudicial and confusing). The only intellectual property subject to the claim is the architectural work which is embodied in the five pages submitted to the Copyright Office. These pages are not synonymous with “the Plans,” a term defined in Paragraph 16 of the Amended Complaint as the entire set of plans which Timberpeg allegedly prepared after meeting with Isbitski. These include numerous drawings and plans which were never filed with the Copyright Registration. Moreover, Paragraphs 22, 44, 45, 77 and 79 clearly allege copying of these “Plans,” not the architectural work, which is improper, is not supported by the registration, is inconsistent with orders of this Court and the First Circuit, and would be confusing to the jury.

The 1999 “Design Deposit Agreement” Is Not Relevant To The Claim On The 2001 Architectural Work. The claim here is based on the architectural work allegedly created in April 2001. Plaintiffs admit (Document 124, Ex. G, Para. 3) that the 2001 plan was a “new floorplan,” and it is clear from the quickest perusal that it is entirely different from the 1999 plan. By its terms the Deposit Agreement – an agreement between Isbitski and plaintiffs only – relates to the 1999 plan, not the 2001 one. Moreover, there is no evidence that defendants ever saw it or were aware of it, and it is impossible to imagine that Isbitski would have shown it to VTW or that VTW would have been interested in it. It has no proper function in the case, it cannot be the basis of plaintiffs’ claims, and it should be removed from the case.

The Prior And Subsequent Designs Are Not Relevant Or Appropriate To The Claim In The Remaining Case. Plaintiffs admit that the 1999 plans and the subsequent plans are different from the 2001 work at issue, but nonetheless want to try the case based on them to “support inferences” of facts for which they have no evidence at all. This would be blatantly

improper, and grossly prejudicial and confusing, which is apparently precisely what plaintiffs want. They attempted to confuse this court as to which plans applied, and this Court ruled that only the 2001 work is at issue. This was never challenged on appeal, and is now law of the case.

The motion for judgment on the pleadings should be granted.

Date: July 26, 2007

VERMONT TIMBER WORKS, INC.
and DOUGLAS FRIANT,
Defendants,

/s/ W. E. Whittington
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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2007, I served the foregoing pleading on the following counsel of record, by causing it to be filed electronically via the CM/ECF filing system or mailed by first-class United States Mail, postage pre-paid, or in such other manner as may be indicated:

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/s/ W. E. Whittington
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