

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' MOTION TO REVIVE
MOTION FOR SUMMARY JUDGMENT
AS TO PROFITS REMEDY (DOCUMENT 44)

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant") respectfully move the court to revive the Motion For Summary Judgment as to the "recovery of profits" remedy, which was Heading II of their Motion For Summary Judgment filed November 1, 2004 (Document 44).

In support of this motion, defendants state as follows:

1. This is a case alleging copyright infringement of an alleged architectural work. One of the remedies sought in the amended complaint is recovery of defendants' alleged profits under 17 U.S.C. Section 504(b).
2. Defendant VTW¹ filed a summary judgment motion as to this remedy on November 1, 2004 (Document 44), which was fully briefed but never acted on.
3. Because the Court granted VTW's initial motion for summary judgment, it never ruled on Document 44, and denied it as "moot." (Document 90).

¹ Co-defendant Friant, VTW's principal, was not in the case at the time but, obviously, he now joins in the motion. He is filing a separate motion for joinder in the motion for summary judgment.

4. Although the First Circuit later reversed the summary judgment order, the motion for summary judgment as to profits was never revived because the Magistrate Judge entered an order barring plaintiffs from pursuing defendants' alleged profits. (Document 120)

5. On October 11, 2007, the Court modified the Magistrate Judge's order on the profits remedy, thus bringing the issue back into the case, at the eleventh hour and immediately before trial.

6. Based on the revival of the profits remedy as an issue, defendants are entitled to revive VTW's motion for summary judgment on the issue.

7. In accordance with Rule 7.1(c) of this Court, the undersigned certifies that he has contacted opposing counsel, Dan Will, in a good-faith effort to obtain assent to this motion, and plaintiffs have not assented to the relief requested.

8. No memorandum of law is submitted in support of this motion because the issue is procedural, obvious, and non-technical.

WHEREFORE, defendants respectfully request that the Court revive, and treat as a joint motion of both defendants, VTW's Motion For Summary Judgment as to the "recovery of profits" remedy, which was Heading II of their Motion For Summary Judgment filed November 1, 2004 (Document 44).

November 15, 2007

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

/s/ W. E. Whittington
W.E. Whittington

W. E. Whittington (Bar No. 6916)
Whittington Law Associates, PLLC
35 South Main Street
Hanover, NH 03755
(603) 643-2755
ned@whittington-law.com

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 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:

Daniel E. Will, Esq.
Jonathan M. Shirley, Esq.
Devine, Millimet & Branch, P.A.
111 Amherst Street
Manchester, NH 03105
dwill@deviinemillimet.com

/s/ W. E. Whittington
W.E. Whittington