

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 FOR LEAVE TO FILE
SUPPLEMENTAL MEMORANDUM SUPPORTING
THEIR MOTION FOR SUMMARY JUDGMENT II BASED ON
NON-COPYRIGHTABILITY (Document 44, pp. 4-9)

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant"), respectfully move the Court for leave to file a supplement memorandum supporting their Motion For Summary Judgment Based On Non-Copyrightability (Ex. 1, attached).

In support of this motion, defendants state:

Procedural History

1. Defendant VTW filed its Second Motion For Summary Judgment on November 1, 2004, concerning "non-copyrightability"¹ of numerous of plaintiffs' design elements, which analysis is required under the Supreme Court Feist case.
2. The motion was fully briefed (Document 44, MSJ & Memo; Document 56, Obj; Document 60, Reply Memo), but was denied without prejudice as "moot" when the Court

¹ Probably the better term would have been the broader term "non-protectibility," since some elements are non-copyrightable, but others are copyrightable but non-protectible because defendants authorized their use by the owner, Isbitski. The formulation from Feist is that "to establish infringement, [a plaintiff must show] copying of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 361 (1991).

granted defendants judgment on their First Motion For Summary Judgment. (Document 90, Order dated 02/09/05)

3. On appeal, the First Circuit vacated the judgment and remanded the case. By Orders dated 03/09/07 & 03/12/07, the Court revived the Motion, and it remains pending for ruling.

4. After the remand, the parties agreed that Friant – who was not yet a defendant in the case at the time the motion was made, would be deemed to have joined all motions filed by defendant VTW.

Subsequent Rulings Make New Memo Appropriate

5. In the three and a half years since defendants MSJ II was briefed, there have been significant legal developments relating to the issues at hand:

(a) Although the First Circuit ruling in this case did not address the “dissection” or “non-protectibility” issue of the MSJ II, there has been a subsequent ruling by the First Circuit, Johnson v. Gordon, 409 F. 3d 12 (1st Cir.2005), which did (albeit not in an “architectural works” case).

(b) There have been significant “dissection” or “non-protectibility” rulings in architecture cases in other jurisdictions, notably Tiseo Architects, Inc. v. B & B Pools Service, 495 F. 3d 344 (6th Cir. 2007), and Trek Leasing, Inc. v. The United States, 66 Fed. Cl. 8 (Fed. Ct. of Claims 2005).

No memorandum of law is filed with this motion as the relief is within the Court’s discretion.

The undersigned certifies that he has contacted opposing counsel to seek assent and plaintiffs do not assent to the relief requested.

Date: March 7, 2008

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

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

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2008, 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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