

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)	
T-Peg, Inc. and Timberpeg East, Inc.)	
)	
Plaintiffs,)	
)	
v.)	No. C-03-462-SM
)	
Vermont Timber Works, Inc. and Douglas Friant)	
)	
Defendants.)	
_____)	

**PLAINTIFFS’ MOTION IN LIMINE NO. 4, TO EXCLUDE
EVIDENCE, TESTIMONY, AND ARGUMENT
CONCERNING DEFENDANTS’ LACK OF PROFITS
FROM THE PREPARATION OF SHOP DRAWINGS
OF THEIR TIMBERFRAME**

NOW COME Plaintiffs, T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“TEI”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and move in limine to exclude evidence, testimony, and argument concerning Defendants’ lack of profits from the preparation of shop drawings of their timberframe. In support of this motion, Plaintiffs state as follows:

Background

1. Plaintiffs claim Defendants’ timberframe, as reflected in shop drawings and as erected, infringes Plaintiffs’ copyrighted architectural work.
2. In discovery, Defendants have advanced an argument that they enjoyed no profits from drafting their timberframe, i.e., the preparation of shop drawings which show their timberframe. See Potvin Report, attached hereto as Exhibit A. Notably, Defendants do not claim that they made no profit on the Isbitski job as a whole, and, to the contrary,

have produced an internal accounting document that reflects a profit from the Isbitski project. Plaintiffs now move in limine to exclude evidence of Defendants' lack of profits from the drafting of shop drawings.

Argument

3. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that Defendants made no profits from the drafting of the shop drawings falls short of Rule 401's standard for relevance. Plaintiffs neither limit their claims of infringement to Defendants' preparation of shop drawings nor limit Plaintiffs' damages to profits Defendants made from the preparation of the shop drawings.

4. Instead, Plaintiffs allege that the shop drawings Defendants drafted and the timberframe Defendants manufactured and erected infringed Plaintiffs' copyrighted architectural work, and, under applicable copyright law, Plaintiffs are entitled to disgorgement of Defendants' gross profits "derived from the infringement," i.e., the sale of the timberframe. 17 U.S.C. § 504(b). Plaintiffs' position is consistent with the that of the United States Circuit Court of Appeals for the First Circuit, which found that both Defendants' shop drawings and the timberframe Defendants manufactured and erected could constitute infringing works. T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 112 (1st Cir. 2006). As such, whether Defendants profited from the drafting of the shop drawings does not tend to make the fact of Defendants' profits from the Isbitski project more or less probable. Indeed, Defendants' own internal accounting document confirms that Defendants did profit from the Isbitski project.

3. Rule 402 of the Federal Rules of Evidence provides that evidence which is not relevant is not admissible. As evidence of Defendants' profits or lack of profits from the preparation of shop drawings is not relevant, such evidence should not be admitted.

4. Rule 403 of the Federal Rules of Evidence allows otherwise relevant evidence to be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Assuming evidence that Defendants made no profits from the drafting of their shop drawings could be characterized as relevant, its attenuated probative value is far outweighed by the danger it will cause unfair prejudice, confuse the issues and mislead the jury. Such evidence will unfairly prejudice Plaintiffs because it will create the risk of confusion as to what damages Plaintiffs seeks and what damages are available to Plaintiffs. Such evidence will tend to mislead the jury into thinking that Defendants enjoyed no profits from the infringement, when even Defendants do not dispute that they profited from the Isbitski project. In short, any evidence as to profits from drafting will tend to reduce the overall damages picture in the jury's mind. Given the lack of direct relevance to any issue in this action, such evidence should be excluded.

5. For all of the above reasons, Plaintiffs respectfully request that this Court exclude any evidence or argument that Defendants made no profits from the preparation of their shop drawings.

6. Given the dispositive nature of this motion, no concurrence is necessary.

See LR 7.1.

7. Given the authorities and argument cited herein, no accompanying memorandum of law is necessary. See L.R. 7.1.

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Exclude evidence and argument concerning Defendants' lack of profits from the drafting of the shop drawings; and

B. Grant such further and other relief as this Court deems just, proper, and equitable.

Respectfully submitted,

T-PEG, INC. AND TIMBERPEG
EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: August 14, 2009

/s/ Jonathan M. Shirley
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was this day forwarded to W.E. Whittington, Esquire, by electronic transmission through the Court's Electronic Case Filing system.

Dated: August 14, 2009

/s/ Jonathan M. Shirley
Jonathan M. Shirley

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