

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 IN LIMINE
TO EXCLUDE EVIDENCE THAT ISBITSKI DISCLOSED
1999 TIMBERPEG PLANS TO DEFENDANTS

Defendants respectfully move in limine to exclude evidence that Isbitski disclosed Timberpeg’s unregistered, 1999 preliminary plans to defendants.

The evidence on this point is uncontested. Isbitski brought Timberpeg’s 1999 preliminary plans to defendants “as an example of what he did not want.”¹ Defendants have testified that they

¹ As stated by defendants’ sales person who met with Isbitski, Kim Hentschel:

At this initial meeting he brought a Hearthstone photo and another page from the Hearthstone catalogue, which showed the way he wanted the timberframe, and had me copy the picture of the Hearthstone drawing. In that initial meeting he also showed me a set of Timberpeg drawings. He said he was very frustrated because Timberpeg wouldn’t give him the frame design he wanted, and wasn’t spending enough with him to understand what he wanted. He said he did not want to use this Timberpeg design. These plans were dated prior to the time of our meeting. I believe he took his Timberpeg drawings with him at the end of this meeting, although it is possible he may have left them with me for a couple of days. I did not use them as he indicated the Timberpeg concept was not what he wanted. He did not like the Timberpeg design, and he also liked the fact that VTW’s beams were hand-crafted, using traditional joinery, with mortise, tenons, and hardwood pegs

did not look at those plans and plaintiffs apparently hope that the jury will assume that defendants not only looked but copied..

Whether defendants looked or not is irrelevant since these 1999 plans were not registered and are not at issue.

As noted by the First Circuit, it is only the registered plans which are at issue:

Timberpeg created a first set of preliminary plans on December 29, 1999 [TIM 396-403] and gave them to Isbitski. . . . [T]hese plans were never registered with the Copyright Office.

In early 2001, Isbitski met again with Timberpeg, saying that he was unsatisfied . . . Timberpeg completed a new design for Isbitski on April 20, 2001 [and] these second preliminary plans [actually, only 5 sheets thereof, TIM 454-458] were registered as an “architectural work.” It is only this second, registered set of preliminary plans that is at issue here.

T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F. 3d 97, 103-04 (1st Cir. 2006) (emphasis added).

It serves no legitimate purpose for the jury to hear that Isbitski brought the 1999 plans to defendants, and this would do nothing but confuse the jury in its attempt to determine whether defendants viewed and copied the April 2001 registered plans. The Court should exclude this evidence under FRE 403, relevancy, prejudice and confusion.

WHEREFORE, defendants respectfully request that the Court exclude evidence that Isbitski brought the 1999 plans to defendants.

Date: August 14, 2009

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 August 14, 2009, I served the foregoing pleading on the following counsel of record, by causing it to be filed electronically via the CM/ECF filing system.

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

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