

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’ OBJECTION TO DEFENDANTS’ MOTION *IN LIMINE* TO EXCLUDE EVIDENCE THAT ISBITSKI DISCLOSED 1999 TIMBERPEG PLANS TO DEFENDANTS

NOW COME Plaintiffs, T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“TEP”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully object to Defendants’ Motion *in Limine* to Exclude Evidence that Isbitski Disclosed 1999 Timberpeg Plans to Defendants and state as follows:

1. Timberpeg prepared a set of architectural plans in 1999 for Isbitski (the “1999 plans”). Timberpeg did not register the plans with the U.S. Copyright Office.
2. Defendants admit that Isbitski brought the 1999 plans to a meeting with Defendants. Defendants claim that he did so in order to show them what Isbitski “did not want” for a timberframe design. Defendants do not remember whether Isbitski took the 1999 plans with him after the meeting or left them with Defendants.
3. Defendants move *in limine* to exclude evidence that Isbitski disclosed the 1999 plans to Defendants. Defendants argue that the 1999 plans are irrelevant, and therefore

inadmissible, because they are not the copyrighted architectural work at issue in this infringement action.

4. Contrary to Defendants' characterization, the 1999 plans and the chronology of events surrounding Isbitski's use of those plans with Defendants, is plainly relevant in this action. Defendants' admission that they reviewed the 1999 plans supports an inference (if not a presumption) that Defendants reviewed subsequent plans that were also in Isbitski's possession, including the plans that embodied Plaintiffs' copyrighted architectural work. This inference is further supported by the multitude of similarities between Defendants timberframe and Plaintiffs' architectural work, as identified by the First Circuit. T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 112-15 (1st Cir. 2006).

5. The 1999 plans are also relevant because they bear on the question of Defendants' access, an element Plaintiffs must establish to prevail on their infringement claim based upon indirect evidence of copying. Where a plaintiff and defendant deal with a third party in possession of the copyrighted work during the same period of time, access by the defendant is established. T-Peg, 459 F.3d at 111. In this case, the 1999 plans are part of the chronology of events that establish that Plaintiffs and Defendants had simultaneous dealings with Isbitski. The 1999 plans, therefore, are part of the body of evidence Plaintiffs will submit to prove access and to establish infringement.

6. Defendants' review of the 1999 plans also supports Plaintiffs' claim for willful infringement. Even if Defendants never reviewed subsequent plans, Defendants, having reviewed the 1999 plans, deliberately turned a blind eye to the existence of subsequent plans by allowing Isbitski to convey instructions over the telephone about the placement of beams that

included detail down to an eighth of an inch, resulting in a strikingly similar design. Those facts easily support an inference of willful conduct.

7. Isbitski's disclosure of the 1999 plans to Defendants is relevant and admissible in this action because it places in context Defendants relationship with Isbitski and the events that gave rise to Plaintiffs' infringement claim. The 1999 plans also represent evidence relevant to the element of access. Defendants motion in limine to exclude Isbitski's disclosure of the 1999 plans to Defendants should therefore be denied.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Deny Defendants Motion *in Limine* to Exclude Evidence that Isbitski Disclosed 1999 Timberpeg Plans to Defendants; and,
- B. Grant such other and further relief as this Court deems just and equitable.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: August 28, 2009

/s/ Jonathan M. Shirley
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CERTIFICATE OF SERVICE

I hereby certify that on this day, August 28, 2009, a copy of the foregoing was transmitted to W.E. Whittington, Esquire in accordance with the Court's Administrative Procedures for Electronic Filing.

/s/ Jonathan M. Shirley
Jonathan M. Shirley