

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.)	
_____)	

OBJECTION TO DEFENDANTS’ MOTION *IN LIMINE*
TO PRECLUDE PLAINTIFFS FROM OFFERING EVIDENCE
OF NON-REGISTERED PLANS

NOW COME Plaintiffs, T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“TEI”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully object to Defendants’ Motion *in Limine* to Preclude Plaintiffs from Offering Evidence of Non-Registered Plans and state as follows:

1. Defendants move *in limine* to exclude unregistered sketches and plans that Plaintiffs created for Isbitski from December 1999 to September 2001. Defendants argue that these documents serve “no legitimate purpose” and are irrelevant to the substantial similarity analysis because they do not embody the copyrighted architectural work that forms the basis of this infringement action.
2. Plaintiffs object to Defendants motion because the sketches and plans Defendants seek to exclude are relevant to the action for reasons other than substantial similarity.

3. Documents marked TIM 058-069, for example, are hand drawn sketches dated March 26, 2001 that were prepared by Lynn Cole of TEI. These sketches were converted to the scaled architectural plans that were ultimately registered with the United States Copyright Office. These sketches establish that Cole authored the copyrighted architectural work and that, under the work for hire doctrine, ownership in the copyright vested in TEI. The sketches also evidence in striking fashion that Plaintiffs' copyrighted architectural work is original and that it evolved only after significant design effort by Cole. These sketches are also important to the jury's understanding of the design process, particularly since Defendants appear to be challenging originality of the design, or copyrightability. As such, the sketches are relevant and admissible at trial because they establish authorship, ownership, and originality of the copyrighted work, elements of Plaintiffs' infringement action that have already been established but that Defendants continue to challenge.¹

4. Documents marked TIM 396-403 are the plans Plaintiffs prepared and delivered to Isbitski in 1999. Defendants have filed a separate motion *in limine* to exclude these documents. See Document 191. Plaintiffs respectfully refer the Court to their objection to Defendants' separate motion *in limine*, which sets forth the reasons why the 1999 plans are relevant and admissible at trial.

5. Defendants also seek to exclude (i) pages of Plaintiffs' April 2001 plans not registered and (ii) all subsequent iterations of the plans and timberframe designs that Plaintiffs created for Isbitski in August and September 2001. At the same time Defendants request this relief, they admit that they intend to introduce two sheets from the "irrelevant" portion of the

¹ Plaintiffs have moved *in limine* to preclude Defendants from challenging authorship, ownership and originality given that this Court and/or the First Circuit have already resolved these questions in Plaintiffs favor. Order of 3/27/09; T-Peg, 459 F.3d 97 (1st Cir. 2006). Nevertheless, Plaintiffs must reserve the right to introduce the sketches should Defendants be allowed to challenge these issues at trial.

April 2001 plans because, in Defendants' estimation, "these drawings demonstrate in dramatic form that the VTW frame design is completely different from Plaintiffs' frame design."

Document 179 at 2. Defendants apparently intend to do precisely what their motion is intended to prevent: to have the jury compare Defendants' shop drawings and timberframe to unregistered portions of Plaintiffs' plans.

6. In any event, the unregistered portions of Plaintiffs' April 2001 plans, as well as the later iterations of the plans and timberframe designs from August and September 2001, are relevant and admissible because they evidence Isbitski's ongoing dealings with Plaintiffs while he was simultaneously dealing with Defendants. This evidence establishes as a matter of law the Defendants had access to Plaintiffs' copyrighted architectural work. T-Peg, Inc. v. Vermont Timberworks, Inc., 459 F.3d 97, 111 (1st Cir. 2006).

7. In short, the sketches and unregistered plans that Defendants seek to exclude will have tangible relevance at trial for reasons well outside the question of substantial similarity. For these reasons, Plaintiffs respectfully request that Defendants' motion be denied.

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Deny Defendants' Motion *in Limine* to Preclude Plaintiffs from Offering Evidence of Non-Registered Plans; and
- B. Grant such further and other 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

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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 28, 2009

/s/ Jonathan M. Shirley
Jonathan M. Shirley

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