

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
TO ADMIT DX "L" (FOUNDATION PLAN)
IN ADVANCE OF OPENING STATEMENTS

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant"), respectfully move to admit Defendants' Exhibit "L" (the Foundation Plan) in advance of opening statements so that it can be referred to in opening. A copy of DX "L" is attached as Exhibit 1.

In support, defendants state:

1. The point of the Foundation Plan is that plaintiffs gave it to Isbitski and authorized him to use it, and exactly matches the footprint which Isbitski installed and which defendants used.

2. It is not disputed that plaintiffs delivered the Foundation Plan to their client, Isbitski.

The already-admitted evidence includes the following:

- DX "K," plaintiffs' note that it would send Isbitski the Foundation Plan in exchange for \$1,500. (Ex. 2 to this pleading)
- DX "J," plaintiffs' order to "send 2 extra Foundation plans to customer (Isbitski)" (Ex. 3 to this pleading)

3. Defendants represent that Lynn Cole, plaintiffs' sales representative dealing with Isbitski, will testify in accordance with his deposition testimony, as follows:

Q. And as of this date [September 25, 2002], you understand that Stan [Isbitski] is leaving you . . . ?

A. Right. . . .

Q. [Y]ou indicated to Jay Tucker that Stan was going to . . . do the foundation himself?

A. [Yes]

Q. And at that point, he was not obligated to go forward with the full Timberpeg package, right?

A. No, at that point he was not.

* * *

Q. And you authorized him based on the plans, to go ahead and put in the foundation, right?

A. [Non-responsive answer]

Q. And you agreed for him to put in a foundation?

A. Right.

(Cole Dep. at 54-56, Ex. 4 to this pleading)

4. Based on the other evidence already in, and the anticipated testimony of Lynn Cole, the document is relevant to defendants' argument that the foundation plan and its footprint was used by Isbitski with permission. Defendants should be able to show the exhibit to the jury during opening statement.

5. The undersigned has sought assent to this motion from plaintiffs and plaintiffs do not assent. Plaintiffs have not stated the basis of their objection.

6. No separate memo in support is submitted as the issue is straightforward.

Date: September 16, 2009

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

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

W. E. Whittington (Bar No. 6916)
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Attachments

Ex. 1 – DX “L,” Foundation Plan	09/05/01 & 09/18/01
Ex. 2 – DX “K,” Timberpeg fax that it would send Foundation Plan	08/06/01
Ex. 3 – DX “J,” Timberpeg order to “send 2 Foundation Plans to customer	09/19/01
Ex. 4 – Excerpt from Lynn Cole Dep. pp 54-56	03/31/04

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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.

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/s/ W. E. Whittington
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