

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)
T-Peg, Inc. and Timberpeg East, Inc.)
)
Plaintiffs,)
)
v.)
)
Stanley J. Isbitski and Vermont Timber Works, Inc.)
)
Defendants.)
_____)

No. C-03-462-M

OBJECTION TO MOTION TO STRIKE

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully object to Defendant’s Motion To Strike. In support of their objection, Timberpeg states as follows:

Background

1. This action raises, principally, a claim of copyright infringement against the defendant Vermont Timber Works, Inc. (“VTW”), arising out of Timberpeg’s allegation that VTW unlawfully copied its copyrighted architectural plans in the drawing and erection of a timberframe.

2. As part of Timberpeg’s objection to VTW’s motion for summary judgment and Timberpeg’s memorandum in support of its cross motion for summary judgment, Timberpeg submitted an affidavit of Lynn Cole, one of Timberpeg’s regional managers. Lynn Cole worked with Mr. Isbitski and designed the house Timberpeg’s architectural plans reflect, which can be found in Timberpeg’s Summary Judgment

Appendix at Tab D. Mr. Cole's affidavit includes a recitation of his dealings with Mr. Isbitski and the various iterations of architectural plans Timberpeg prepared throughout those dealings. Those architectural plans include the first set, prepared in 1999, which, VTW admits, Mr. Isbitski showed to a VTW employee and draftsman, a second set prepared in April 2001 and copyrighted, which reflect changes in the design Mr. Isbitski requested of Timberpeg after his meeting with the VTW employee and draftsman, and a third set prepared in September 2001, which mirror the April copyrighted set, but include a so-called bent frame design.

3. VTW takes great issue with Timberpeg's reference to the 1999 and September 2001 plans, going as far as to contend that Timberpeg has done so "merely in an improper attempt to mislead the court." Defendant's Motion To Strike at 2. As set forth below, the defendant states no basis on which this Court should strike any portions of Mr. Cole's affidavits or the architectural plans attached thereto. Accordingly, Timberpeg respectfully requests that this Court deny the motion to strike.

Argument

4. VTW bears the burden of establishing entitlement to an order striking portions of Mr. Cole's affidavit and attachments. See All America Ins. Co. v. Broeren Russo Const., Inc., 112 F. Supp.2d 723, 729 (C.D. Ill. 2000). To meet that burden, VTW must, generally, make two showings. First, VTW must demonstrate that the challenged allegations are clearly unrelated to Timberpeg's claims, see Porter v. International Bus. Machs. Corp., 21 F. Supp.2d 829, 831 (N.D. Ill. 1998), and, second, that VTW will be prejudiced by permitting those allegations to remain in the pleading, see Tompkins v. R.J. Reynolds Tobacco Co., 92 F. Supp.2d 606, 619 (N.D.N.Y. 2000). To demonstrate

prejudice, VTW must show that the allegations it challenges confuse the issues, among other similar concerns. See Oneida Indian Nation of New York v. New York, 194 F. Supp.2d 104, 117 (N.D.N.Y. 2002).

5. VTW cannot demonstrate that the allegations it challenges are clearly unrelated to Timberpeg's claims. As a general matter, the recitation of the history of Timberpeg's and VTW's relationship with Mr. Isbitski, including architectural plans Timberpeg produced over the course of that relationship, provides the trier of fact with a history and chronology that provides context for the claims asserted.

6. In addition, the various sets of plans in this action bear directly on a central element of the copyright claim Timberpeg must prove, namely, that VTW had access to the copyrighted plans. Should this Court determine that Timberpeg's direct evidence of copying – VTW's various counsels' letters admitting same – does not establish, beyond a genuine issue of material fact, that VTW copied the plans, Timberpeg may prove copying by proving that VTW had access to the plans and that the plans and VTW's drawings are substantially similar. Access generally must be established circumstantially or inferentially, and the various sets of Timberpeg plans comprise part of Timberpeg's circumstantial proof of access.¹

7. In that regard, it is undisputed that VTW reviewed the 1999 plans. That fact supports an inference that VTW had access to subsequent sets of plans, including the copyrighted set. The September 2001 plans, which mirror the copyrighted set but also contain the so-called bent frame system, also support that inferential proof, because it

¹ Timberpeg respectfully refers this Court to its Memorandum in support of its objection to VTW's motion for summary judgment at pages 16-19, for discussion and authority concerning access.

was only after Timberpeg produced the September set of plans that VTW prepared shop drawings of its timberframe.

8. Separate from access, moreover, the September plans are relevant to copyright liability because it is well established that copyright protection extends to derivative works. As one court has stated the proposition, “[w]here the same creator owns both the original and derivative copyright, the only sound interpretation of the Copyright act is that the derivative work carries forward all preexisting copyrights in the original work.” Richmond Homes Management, Inc. v. Raintree, Inc., 862 F. Supp. 1517, 1525 (W.D. Va. 1994), rev’d on other grounds, 66 F.3d 316 (4th Cir. 1995); see also Imperial Homes Corp. v. Lamont, 458 F.2d. 895, 898 (5th Cir. 1972).

9. For the same reasons, VTW cannot establish any prejudice it will suffer as a result of the allegations it seeks to strike. VTW asserts only that Timberpeg is attempting to mislead the Court. The relevance of the challenged allegations to the claims in this action, however, forecloses VTW’s argument. The additional sets of plans and allegations surrounding those plans (a) provide context for this dispute; and (b) are directly relevant to at least one, central element of Timberpeg’s claims. The allegations VTW seeks to strike will not confuse any issue, but will help to prove VTW’s liability.

10. Having failed to establish that the allegations VTW seeks to strike are irrelevant to any claims, or that VTW will suffer any prejudice by those allegations remaining in this action, VTW fails to meet its burden on its motion to strike.

11. Due to the argument and authority cited herein, no accompanying memorandum is necessary.

WHEREFORE, Timberpeg respectfully requests that this Court:

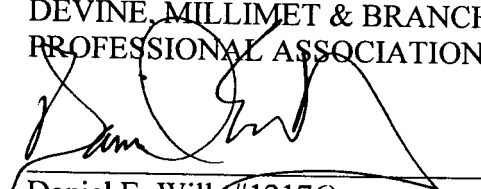
- A. Deny the Defendant's Motion To Strike; and
- B. Grant such further and other relief as this Court deems just, proper and equitable.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION



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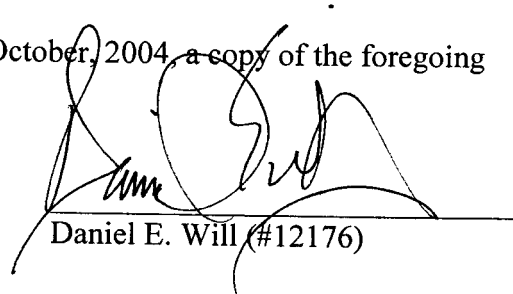
Dated: October 12, 2004

Of Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.



Daniel E. Will (#12176)