

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.,)	
Defendant.)	

DEFENDANT’S MOTION TO SUPPLEMENT OBJECTION TO PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT UNTIL NOVEMBER 12, 2004

Defendant, Vermont Timber Works, Inc. (“VTW”), requests that the Court allow it to supplement its objection to plaintiffs motion for partial summary judgment until November 12 based on plaintiffs’ not making its expert witnesses available for deposition as noticed. In support, VTW states the following:

This is plaintiffs’ case alleging that VTW timber frame “infringed” two discreet components – overall dimensions and post locations – of one section of plaintiffs’ house design. Plaintiffs prosecute this case even though they concede their drawings did not include a timber frame at all.

Plaintiffs have filed a motion for partial summary judgment, apparently asking the Court to determine, as a matter of law, that VTW’s timber frame is “substantially similar” to plaintiffs’ registered drawings – which show the outline of an entire house but do not include any timber frame drawing at all.

To preserve its rights, VTW is filing a skeletal objection simultaneously with this pleading, but requests additional time to supplement its objection after deposing plaintiffs’ experts, on whose testimony their motion relies, and giving VTW’s own expert an opportunity to reflect on and respond to that testimony.

VTW noticed the expert depositions in timely fashion (Ex. 1), and the delay in deposing them was entirely at plaintiffs' request (Ex. 2 & 3). Nonetheless, plaintiffs refused to assent to an extension so that VTW can respond in light of their expert testimony. (Ex. 4 & 5)

Remarkably, plaintiffs now contend that “[other evidence], not our experts, provides the factual basis for my cross motion, which has nothing to do with the substantial similarity element.” (Ex. 5)

- As to the actual basis for their motion, the motion itself states that “a plaintiff may prove copying through direct evidence of copying, or circumstantially by proving that the defendant had access to the protected work and that the two works are substantially similar.” (Ex. 6)

- As to their claimed support for the motion, plaintiffs' factual section “F” dealing with “similarity,” at pp. 6-7 of their brief, lists their expert's (Vincent) report six times, in support of every single factual assertion in the section. (Ex. 7)

Plaintiffs' contentions appear to be in bad faith.

A fair opportunity to respond requires that VTW have the opportunity to depose the expert testimony upon which the motion is based, before responding. See FRCP 56(f). It is particularly appropriate here, where VTW noticed the depositions earlier but plaintiffs refused to make the deponents available until later.

Counsel certifies that he conferred with plaintiffs' counsel and sought assent in the relief requested in good faith, which was rejected. (Ex. 4 & 5). No separate memorandum is submitted because the motion is straightforward.

Plaintiffs' claims as to the basis and support for their motion appears to be in bad faith, as is their refusal to assent to the relief requested here. Accordingly, VTW moves for sanctions, including denial of the motion for partial summary judgment and an award of its attorneys fees and expenses in preparing this motion.

As plaintiffs' refusal to assent appears to be without basis, VTW respectfully requests that it be awarded its legal fees and expenses incurred in bringing this motion.

Date: October 19, 2004

VERMONT TIMBER WORKS, INC.
Defendant,

By: W. E. Whittington
Its Attorney

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Ex. 1 – Notice of Depositions	10/01/04
Ex. 2 – Daniel Will letter dated October 4, 2004	10/04/04
Ex. 3 – W. E. Whittington letter dated October 13, 2004	10/13/04
Ex. 4 – W. E. Whittington E-mail dated October 17, 2004	10/17/04
Ex. 5 – D. Will E-mail dated October 18, 2004	10/18/04
Ex. 6 – Plaintiff's Objection to Defendant VTW' Motion For Summary Judgment And Cross Motion For Partial Summary – 1 st page	09/17/04
Ex. 7 – Plaintiff's Memorandum of Law in Support of Plaintiff's Objection to Motion for Summary Judgment and Cross Motion for Partial Summary Judgment, pp. 6-7	09/17/04

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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