

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

FILED
10/04/03

_____)
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 FOR
JUDGMENT ON THE PLEADINGS**

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 For Judgment On The Pleadings. In support of this 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 used Timberpeg’s copyrighted architectural plans in the drawing and erection of a timberframe. In addition to copyright infringement, Timberpeg has also asserted claims for unjust enrichment, unfair competition and violation of the New Hampshire Consumer Protection Act, RSA 358-A.

2. The parties have submitted extensive summary judgment pleadings to this Court which lay out many of the salient facts. In brief, Timberpeg’s central claim is that

VTW utilized Timberpeg's copyrighted architectural plans to draw a timberframe for a customer, Stanley J. Isbitski, with whom both entities were simultaneously dealing.

Timberpeg claims that the timberframe VTW drew and erected is substantially similar to the architectural work embodied in Timberpeg's copyrighted architectural plans and constitutes an unlawful copy of that architectural work.

3. The immediate motion appears to stem from Timberpeg's decision, under the copyright statute, to elect to forgo damages based on Timberpeg's lost profits and seek either the disgorgement of VTW's profits from the infringing timberframe or statutory damages under the Copyright Act, as well as attorneys fees.¹ See 17 U.S.C. § 504. In its Rule 12(c) Motion, VTW interprets this election as a waiver of all damages, and, asks this Court to dismiss the claims against VTW on those grounds. As set forth below, VTW's motion is unfounded and overlooks both the damages scheme set forth in the Copyright Act and the realm of damages available to Timberpeg, apart from lost profits, as remedies for the various pendent claims Timberpeg has asserted. Accordingly, Timberpeg requests that the motion be denied.

Argument

4. The standard governing a motion pursuant to Rule 12(c) of the Federal Rules of Civil Procedure differs little from that governing a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure: all well pleaded allegations are assumed true and all reasonable inferences therefrom are drawn in favor of the plaintiff. See King v. American Airlines, Inc., 284 F.3d 352, 356 (2d Cir. 2002). A Rule 12(c)

¹ After Timberpeg informed VTW that it would not seek its lost profits but would focus only on statutory damages and/or disgorgement of VTW's profits, VTW filed a motion to compel discovery relating to Timberpeg's lost profits. Timberpeg has informed VTW that, should VTW's efforts result in an order compelling Timberpeg to produce that discovery, Timberpeg reserves the right to seek Timberpeg's lost profits.

judgment will be granted if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law. See New Zealand Lamb Co., Inc. v. United States, 40 F.3d 377, 380 (Fed. Cir. 1994).

5. Taken in order of argument, VTW's Rule 12(c) motion contends that Timberpeg's pendent claims – unfair competition, unjust enrichment and violation of the Consumer Protection Act – must be dismissed because Timberpeg has withdrawn a “claim for damages.” See Motion at 2-3. VTW also argues that the damages portion of the copyright infringement claim should be dismissed or stricken, again, due to “the withdrawal of plaintiffs [sic] claim to damages.” Id. at 3. VTW's cursory arguments rest on inaccurate factual and legal premises, namely that Timberpeg has withdrawn its claims for damages (as opposed to just lost profits) and that, in the absence of a claim for lost profits, Timberpeg's claims cannot stand.

6. Innaccurate Factual Premise: VTW presents this Court with two letters from counsel for Timberpeg by way of support for VTW's assertion that Timberpeg has waived Timberpeg's damages claims in this action. A more deliberate reading of that correspondence, however, reveals VTW's assertions as to Timberpeg's position to be unfounded. Timberpeg does not waive damages generally; the letter attached as Exhibit A to VTW's motion expressly confirms that Timberpeg elects not to “seek any damages arising out of its lost profits, and will seek disgorgement of Vermont Timber Works' profits and statutory damages, along with interest and attorneys fees.” (Emphasis added). To the extent VTW's motion rests on its factual contention that Timberworks has waived damages claims generally, that premise is incorrect and the motion should be denied.

7. Inaccurate Legal Premise: To the extent VTW contends that Timberpeg cannot pursue remedies that do not consist of its lost profits under the Copyright Act or Timberpeg's pendent claims, VTW states an inaccurate legal premise. Timberpeg will address each of the claims in the order presented by VTW:

- Unfair Competition: VTW contends that Count VI (unfair competition) should be dismissed because Timberpeg has withdrawn claims for damages. Timberpeg has not withdrawn claims for damages. Assuming VTW means Timberpeg has withdrawn a claim for Timberpeg's lost profits, Timberpeg may nonetheless seek disgorgement of VTW's profits as a remedy. See, e.g., 5 McCarthy on Trademarks and Unfair Competition § 30:62.

- Consumer Protection Act: VTW contends that Count VII (violation of the New Hampshire Consumer Protection Act) should be dismissed because Timberpeg has withdrawn its claim for damages. Timberpeg has not withdrawn claims for damages. Assuming VTW means Timberpeg has withdrawn a claim for lost profits, Timberpeg may nonetheless seek damages under the Consumer Protection Act. The statute, which creates a private right of action under the act, expressly provides that (1) "if the court finds for the plaintiff, recovery shall be the amount of actual damages or \$1,000, whichever is greater;" (2) that if the court "finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times such amount;" and, (3) in addition, that "a prevailing plaintiff shall be awarded costs of the suit and reasonable attorneys fees, as determined by the court." RSA 358-A:10, I. This Court has recognized disgorgement of profits as an appropriate equitable remedy for violations. See, e.g.,

Curtis Mfg. Co. v. Plasti-Clip Corp., 933 F. Supp. 94, 104 (D.N.H. 1995). Not only may Timberpeg seek disgorgement of VTW's profits as a remedy, but the statute also allows Timberpeg to simply receive statutory damages, either doubled or trebled as appropriate, and an award of attorneys fees. Timberpeg need not seek its own lost profits as its remedy under the Consumer Protection Act.

- Unjust Enrichment: VTW contends that Count V, (unjust enrichment) "cannot stand" due to Timberpeg's withdrawal of its damages claims. Timberpeg has not withdrawn claims for damages. Assuming VTW means Timberpeg's withdrawal of Timberpeg's claim for lost profits, disgorgement of VTW's profits remains an appropriate remedy for Timberpeg under its unjust enrichment claim. In New Hampshire, "[t]he doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity." Martin v. Phillips, 122 N.H. 34, 37 (1982) (citation and quotation omitted). The remedy is payment to the plaintiff of the value of what the defendant has wrongfully received. See Plastic-Clip, 933 F.Supp. at 104. One measure of the value to the defendant is the extent of profit or gain to the defendant, or, stated alternatively, the defendant's profits. See id. Timberpeg need not seek its own lost profits as its remedy for unjust enrichment.

- Copyright Act: Finally, VTW contends that the damages portion of Count II (copyright infringement) should be stricken due to Timberpeg's withdrawal of its claim for damages. Timberpeg has not withdrawn claims for damages. Assuming VTW means Timberpeg's withdrawal of its claim for lost profits, the Copyright Act allows Timberpeg the election of a variety of remedies, ranging from lost profits to disgorgement of VTW's profits, to statutory damages, as well as attorneys fees. See 17

U.S.C. § 504. Timberpeg fully intends to seek disgorgement of VTW's profits or statutory damages, and need not make that election at this time. See id. ("Copyright owner may elect at any time before final judgment...."). Timberpeg has simply elected not to seek lost profits, an election well within Timberpeg's prerogative under the act. See Business Trends Analysts Inc. v. Freedonia Group, Inc., 700 F.Supp. 1213, 1237 (S.D.N.Y. 1988), aff'd, 887 F.2d 399 (2d Cir. 1989) (allowing disgorgement of defendant's profits despite lack of proof of actual damages); Harris v. Emus Records Corp., 734 F.2d 1329, 1335 (9th Cir. 1984) (approving election of statutory damages without proof of actual damages).

8. Due to the argument and authority cited herein, no accompanying memorandum of law 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,

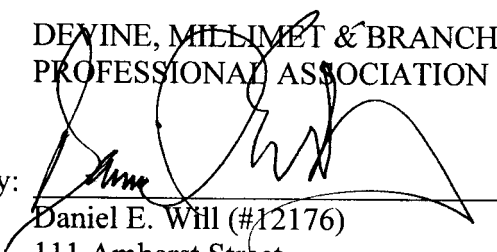
T-PEG, INC. AND TIMBERPEG
EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: October 29, 2004

By:


Daniel E. Will (#12176)
111 Amherst Street
P.O. Box 719
Manchester, NH 03105-0719
(603) 669-1000

Of Counsel:

Stephen S. Woods, Esquire (#8240)
General Counsel for Plaintiffs
Timberpeg East, Inc.
c/o 68 Lyme Road
Hanover, NH 03755
(603) 643-6200

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2004, a copy of the foregoing
was forwarded to W.E. Whittington, Esquire.


Daniel E. Will (#12176)