

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

T-Peg, Inc. and Timberpeg East, Inc.)	
)	
Plaintiffs,)	
)	
v.)	No. C-03-462-M
)	
Stanley J. Isbitski and Vermont Timber Works, Inc.)	
)	
Defendants.)	

**OBJECTION TO DEFENDANT VERMONT TIMBER WORKS’
MOTION TO SUPPLEMENT OBJECTION TO PLAINTIFF’S MOTION FOR
PARTIAL SUMMARY JUDGMENT UNTIL NOVEMBER 12, 2004**

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 the defendant’s, Vermont Timber Works, Inc. (“VTW”), Motion to Supplement Objection To Plaintiff’s Motion For Partial Summary Judgment Until November 12, 2004. In support of its objection, Timberpeg states as follows:

1. Defendant VTW’s Motion To Supplement Objection relies on multiple mistaken premises concerning Timberpeg’s Cross Motion for Partial Summary Judgment, and mischaracterizes the factual chronology underlying these pleadings, set forth in correspondence VTW attaches to its own motion. The crux of VTW’s motion is that VTW needs to disclose its expert before objecting to Timberpeg’s cross motion, and that Timberpeg has refused in bad faith to grant an extension of time to object. As set forth below, neither contention is true.

Timberpeg's Motion For Summary Judgment

2. VTW bases its motion upon the assertion that Timberpeg moved for summary judgment on the issue of substantial similarity between Timberpeg's architectural work and VTW's timberframe, an issue, VTW contends, on which expert support is necessary. That assertion mistakes Timberpeg's partial cross motion for summary judgment. VTW quotes from Paragraph 2 of Timberpeg's Objection And Cross Motion but completely ignores the plain language of Paragraph 3: "The undisputed facts in the record establish that VTW directly copied Timberpeg's protected work, or, at a minimum, had access to that work. Timberpeg moves for partial summary judgment in its favor that VTW directly copied Timberpeg's protected work, or, alternatively, that VTW had access to that work" (emphasis added). Objection at 1.

Thus, Timberpeg cross moved for partial summary judgment on only two alternative elements of its copyright claim: direct copying and access. The former relies, principally, upon admissions by VTW's successive counsel that VTW copied the Timberpeg plans. The latter relies upon undisputed facts that support the legal proposition that access to infringed plans can be inferred under certain circumstances. Neither argument requires proof of substantial similarity.

3. Timberpeg's Memorandum Of Law is consistent with Timberpeg's request for partial summary judgment on direct copying and access. Section 2.a. of Timberpeg's Memorandum Of Law discusses direct evidence of copying without any reference to substantial similarity. Likewise, Section 2.b. discusses the issue of access, also without any reference to substantial similarity. Section 2.b. concludes, "Accidental

infringement, however, does not shield VTW from liability, or summary judgment in Timberpeg's favor on access" (emphasis added).

4. In VTW's own motion for summary judgment, VTW argued that VTW's timberframe was not substantially similar to Timberpeg's copyrighted architectural work. Timberpeg filed a single memorandum of law in support of Timberpeg's objection to VTW's motion for summary judgment and Timberpeg's partial cross motion for summary judgment. To the extent, therefore, that Timberpeg's pleadings discuss substantial similarity, they do so only by way of opposition to that portion of VTW's motion concerning substantial similarity. VTW raised the issue, which required Timberpeg's response, and Timberpeg responded, in part, with the report of Jonathan Vincent, Timberpeg's expert witness. As Timberpeg has not independently moved for summary judgment in its favor as to substantial similarity, VTW's contentions to the contrary are unfounded.¹

No Basis For Sanctions

5. Finally, VTW's allegation that Timberpeg acted in bad faith when Timberpeg refused to assent to VTW's request for an extension of time to file VTW's Objection mischaracterizes the factual circumstances of this case, including as memorialized in correspondence attached to VTW's motion.

¹ Timberpeg contends that Timberpeg's copyrighted architectural work as embodied in Timberpeg's 2001 copyrighted plans was infringed by VTW's creation of shop drawings and a timber frame. As recently stated in Timberpeg's Memorandum of Law, "The core issue in this action and VTW's motion raise, concerns whether a timber frame, and shop drawings reflecting the frame, can constitute copying of an architectural work — the design of a building — for copyright infringement purposes" (emphasis added). Memorandum at 11. VTW's allegation that Timberpeg's case is based upon some infringement of "two discreet components — overall dimensions and post locations — of one section of Plaintiffs' house design" is without basis and does not accurately describe Timberpeg's claim.

6. For VTW to now contend that it is at a disadvantage because VTW could not disclose experts prior to its objection deadline does not square with the sequence of events to date. Timberpeg produced its expert disclosure of Vincent and Driesch on July 30, 2004 — more than two weeks before VTW’s Motion For Summary Judgment. VTW’s notice of expert depositions (which occurred without any advance discussion with counsel) did not issue until (1) more than eight weeks after Timberpeg’s expert disclosure, (2) more than four weeks after VTW’s own Motion For Summary Judgment in which VTW put substantial similarity at issue, and (3) less than 20 days before VTW’s Objection To Timberpeg’s Cross Motion was due. On October 1st, VTW issued its Notice of Depositions for October 15th before making any attempt to arrange available dates with Timberpeg. Timberpeg quickly alerted VTW to the fact that Timberpeg’s counsel was not available on October 15th. VTW made no mention of any need for expedited depositions, nor suggested any dates prior to October 15th. Instead, VTW agreed to schedule the expert depositions on October 22nd and those depositions have now in fact taken place.

7. Moreover, Timberpeg never refused VTW an extension of time for VTW to oppose Timberpeg’s partial cross motion for summary judgment. As VTW’s Exhibits (Exhibits 4 and 5) demonstrate, VTW sent Timberpeg an email on Sunday, October 17th demanding an extension of time that VTW alleged was necessary due to Timberpeg’s conduct. VTW demanded a near immediate response. In its response, Timberpeg did not refuse the extension; Timberpeg did deny the assertion that Timberpeg’s conduct had somehow placed VTW in need of the extension. See VTW Motion, Ex. 5 (email from Daniel E. Will, Esquire to Ned Whittington, Esquire dated October 18, 2004).

Timberpeg concluded by saying: “All of this is to say that your bases for an extension request don’t make sense. Given your increasingly strident positions, I would appreciate further correspondence from you on the need for an extension before we provide a response to your request.” VTW’s sole response was the immediate motion that claims Timberpeg refused to grant the extension in bad faith.

8. If anything, the current exercise reveals that a careful and accurate reading of Timberpeg’s pleadings would have avoided VTW’s motion for an extension of time, and a careful review of Timberpeg’s correspondence would have avoided an unnecessary allegation of bad faith and claim for sanctions. VTW’s request for additional time to object is not justified, nor has Timberpeg engaged in any sanctionable conduct. For these reasons, VTW’s Motion To Supplement Objection To Plaintiffs’ Motion For Partial Summary Judgment Until November 12, 2004, including the request for sanctions and attorney’s fees, should be denied.

WHEREFORE, Timberpeg respectfully requests that this Court:

- A. Deny the Defendant’s Motion to Supplement Objection To Plaintiff’s Motion For Partial Summary Judgment Until November 12, 2004;
- B. Deny the Defendant’s request for sanctions; and
- C. Grant such further and other relief as this Court deems just, equitable and proper.

Respectfully submitted,

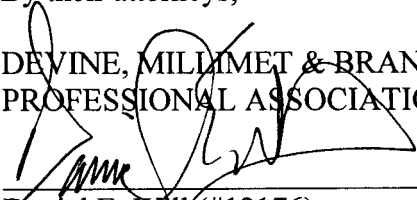
T-PEG, INC. AND TIMBERPEG
EAST, INC.

By their attorneys, –

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: November 4, 2004

By:


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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.


Daniel E. Wilk (#12176)

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