

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

No. C-03-462-M

**RESPONSE TO DEFENDANTS' OBJECTION TO
PLAINTIFFS' EXPERT TESTIMONY**

NOW COME, the Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respond to the defendant's, Vermont Timber Works, Inc. ("VTW"), objection to Timberpeg's expert testimony, and state as follows:

Factual Background

1. This action involves, principally, Timberpeg's claim under the Copyright Act that a timberframe VTW drew, manufactured, and erected infringes upon Timberpeg's copyrighted architectural design. A meaningful comparison of VTW's timberframe and Timberpeg's architectural design necessarily involves issues relating to architectural and timberframe design and construction.

2. Timberpeg disclosed two in-house employees as experts. The first, Jonathan Vincent, is Timberpeg's chief of design. He is a Harvard, Princeton and University of Chicago educated, licensed architect with extensive professional experience

and accreditations. See Plaintiffs' Expert Disclosure, Tab A (attached hereto as Exhibit 1). The second, James Driesch, is Timberpeg's chief designer. Mr. Driesch has an associates degree in architecture and building engineering, and, since 1975, has been involved in architectural design at Timberpeg. See Plaintiffs' Expert Disclosure, Tab C.¹

3. Mr. Vincent and Mr. Driesch reviewed Timberpeg's copyrighted architectural plans and VTW's shop drawings for the infringing timberframe. Mr. Vincent and Mr. Driesch also visited the Isbitski house and examined, measured, and evaluated the structure and VTW's timberframe as erected. See Plaintiffs' Expert Disclosure Tab B. On the basis of that work, both Mr. Vincent and Mr. Driesch concluded that the overall design of the VTW timberframe is "virtually the same" as the Timberpeg design, that the VTW timberframe is based on the Timberpeg design, and that it would not be possible to design such a close match without access to and use of Timberpeg's copyrighted architectural plans. See id. Mr. Vincent prepared a report which explained in detail the basis for their opinions, including an explanation of architectural plans, timberframe shop drawings, and numerous details, such as overall dimensions, floor plan, locations of posts and girders, among others, that support their conclusion that the VTW timberframe is virtually the same as the Timberpeg architectural design. See id. Mr. Driesch reviewed that report prior to disclosure, and concurs in it. See id.

4. VTW now seeks principally to exclude the testimony of Mr. Vincent because, VTW contends, Mr. Vincent has no experience, training, or education concerning "substantial similarity" and copyright law. See Objection at 2. VTW seeks to

¹ Although it is not clear under Rule 26 whether these two employees had to be disclosed with reports, Timberpeg did so out of an abundance of caution. Even if their ability to testify as experts is subject to challenge, they could still testify about facts they perceived while performing their analysis.

exclude the testimony of Mr. Driesch for the same reasons, and, VTW contends, because Mr. Driesch does not hold any opinion at all and he did not submit a report separate from Mr. Vincent.

Argument

5. Rule 702 of the Federal Rules of Evidence provides that:

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

VTW does not argue that expert testimony on the similarities between VTW's timberframe and Timberpeg's architectural design would not assist the trier of fact, nor that Mr. Vincent's and Mr. Driesch's opinions are based on insufficient facts or data, the product of reliable methods and principles, nor the application of those methods and principles to the case. VTW's challenge centers on whether Mr. Vincent and Mr. Driesch are qualified by knowledge, skill, experience, training or education to testify as experts on "substantial similarity."

I. Jonathan Vincent

6. Mr. Vincent received a Master of Architecture degree from Princeton University in 1975. Since that time, Mr. Vincent has held a variety of architectural employment positions, including his current position with Timberpeg. Mr. Vincent is a registered architect in 10 states, including New Hampshire and Vermont, and is a member of the American Institute of Architects and the Timber Framers Guild among other professional organizations. Mr. Vincent possesses the education, skill, knowledge

and experience to explain architectural and design concepts and issues to the jury and to explain why, in his view, the VTW timberframe is virtually the same as Timberpeg's copyrighted architectural design.

7. VTW challenges Mr. Vincent's qualifications on the grounds that Mr. Vincent is neither an expert in copyright, nor an expert in the term "substantial similarity." See Objection at 3. VTW apparently takes the view that an expert must have a specialized expertise in the term "substantial similarity" or copyright law in order to be qualified to testify as an expert in a copyright case. VTW presents no authority for this proposition and Timberpeg is aware of none.

8. Rule 702 does not require an expert to have expertise on the ultimate, legal question in a given case. Instead, Rule 702 allows expert testimony if it would assist the trier of fact in understanding the evidence or to determine a fact in issue. See Fed. R. Evid. 702. Substantial similarity in the context of architectural works copyright cases is not an isolated concept. Substantial similarity is the product of a comparison of various gross features of two designs, including the likeness of layout or floorplan, see Arthur Rutenberg Homes, Inc. v. Maloney, 891 F. Supp. 1560, 1567 (M.D. Fla. 1995), the placement or number of rooms and similarity of room dimensions; see Arthur Rutenberg Corporation v. Parrino, 664 F. Supp. 479, 481 (M.D. Fla. 1987); Ronald Mayotte & Assoc. v. MGC Building Co., 885 F. Supp. 148, 153 (E.D. Mich. 1994) at 153; the placement of other features such as stairwells and windows; see id., among other aspects. These are exactly the elements of architectural design Mr. Vincent compares in his expert report. As a result, his analysis is within the realm of specialized architectural and design knowledge that would likely exceed the jury's own knowledge and education. Mr.

Vincent's lack of particularized education in the term "substantially similar" or in copyright law is irrelevant because that is neither the subject of nor a necessary predicate to his expert testimony. Mr. Vincent will assist the jury in identifying similarities; the jury will receive that evidence and determine whether VTW's frame and Timberpeg's architectural design are substantially similar. Mr. Vincent can explain to the jury the basis for his opinions, and the jury, on the basis of this Court's instructions, can assess whether it believes the VTW timberframe to be substantially similar to Timberpeg's copyrighted architectural design.

II. James Driesch

9. Mr. Driesch also possesses the requisite education, training, knowledge, and experience in the areas of architecture, architectural design, timberframing and timberframe drawing. Mr. Driesch has degrees in architecture and building engineering, and, for nearly 30 years, Mr. Driesch has been involved in architectural design. He has published various articles, and is an expert in timberframing. See Plaintiff's Expert Disclosure, Tab C.

10. For the same reasons as with respect to Mr. Vincent, Mr. Driesch's testimony will assist the jury in evaluating the elements of similarity of the two buildings, and Mr. Driesch's expertise in "substantial similarity" and copyright law has no bearing on his qualifications to testify as an expert concerning why he concludes that the VTW timberframe derives from and is virtually the same as Timberpeg's architectural design.

11. Mr. Driesch reviewed the same materials as Mr. Vincent, and examined the house with Mr. Vincent. Mr. Driesch reviewed the expert report prior to its finalization and disclosure, and concurred in it. He holds the same opinion as Mr.

Vincent, which is reflected in the last paragraph of the expert report. The fact that Mr. Driesch did not submit a separately signed expert report does not affect the analysis. Timberpeg provided the expert disclosure to VTW timely, and VTW deposed Mr. Vincent and Mr. Driesch. In short, VTW has had every opportunity to explore Mr. Driesch's opinions and perceptions, as reflected in the expert report in which he concurs.

12. As Mr. Vincent and Mr. Driesch possess the requisite skill, education, knowledge and experience to assist the jury in understanding the evidence concerning the elements of the jury's substantial similarity inquiry, VTW's challenge should be denied.

Respectfully submitted,

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

By their attorneys,

~~DEVINE, MILLIMET & BRANCH,~~
~~PROFESSIONAL ASSOCIATION~~

Dated: December 6, 2004

By: 

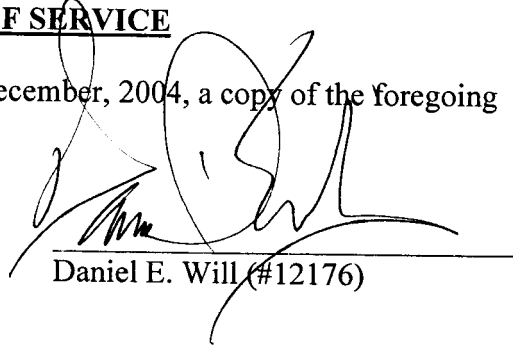
Daniel E. Will (#12176)
111 Amherst Street
P.O. Box 719
Manchester, NH 03105-0719
(603) 669-1000

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 6th day of December, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.


Daniel E. Will (#12176)