

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

No. C-03-462-M

**PLAINTIFFS' MOTION FOR LIMITED
EXTENSION OF DISCOVERY PERIOD
UNTIL FEBRUARY 18, 2005**

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully move for a limited extension of the discovery period until February 18, the date of the final pretrial conference in this action. In support of this motion, Timberpeg states as follows:

Introduction

1. Timberpeg seeks a limited extension to complete discovery, including a potential deposition, with respect to one third party witness, the Murus Company ("Murus"). Timberpeg received documents from Murus pursuant to a subpoena on May 18, 2004. On January 11, however, Timberpeg received from Murus' counsel an additional series of documents, the existence of which Timberpeg was previously unaware. In light of the additional documents, Murus may have information relevant to Timberpeg's claims, and Timberpeg may need to conduct one deposition with respect to

that information. Timberpeg's request for an extension is due to circumstances beyond its control and the interests of justice require that Timberpeg have an opportunity, if necessary, to conduct a deposition in light of the newly discovered documentary evidence.

Background

2. This action raises, principally, a claim of copyright infringement against the defendants Vermont Timber Works, Inc. and Douglas Friant (collectively "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.

3. As part of the discovery in this action, Timberpeg sent a subpoena to Murus, a company located in Pennsylvania. A copy of the subpoena is attached hereto as Exhibit A. Murus manufactures panels for timberframe houses, which, in layman's terms, are what cover the outside of a timberframe and support the exterior siding. Murus supplied the panels for the Isbitski house, and Timberpeg sought documents from Murus so as to understand what information Murus utilized in manufacturing the panels, from where Murus obtained that information, and with whom Murus communicated in that process.

4. After some direct contact with Timberpeg, Murus directed Timberpeg to its counsel. Through counsel, Murus agreed to produce documents responsive to the subpoena, and, in fact, did so on May 18, 2004.

5. Discovery in this action is scheduled to close on January 14, 2005. On January 10, in the course of discussions between Murus' and Timberpeg's counsel, counsel for Murus unexpectedly disclosed the existence of an additional series of documents responsive to the subpoena which Murus had not produced and which Timberpeg had not known existed. Murus produced these documents on the afternoon of January 11. The documents included a series of notes and emails between Murus and defendant Vermont Timber Works, Inc. ("VTW") among other categories. Timberpeg produced the additional Murus documents to VTW promptly on January 12.

6. These new documents give rise to the possibility of communications and information transfer between Murus and VTW that Murus' prior production did not reveal, and that Timberpeg may need to depose a Murus representative. Timberpeg's efforts to make that determination have been hindered, in part, due to Murus' counsel's unavailability during the week of January 10 due to west coast business travel. Had Timberpeg known of these documents in May, when Murus produced according to the subpoena, Timberpeg would have had sufficient time to determine its course of action within the discovery period.

7. Timberpeg expects to know within the next one to two weeks whether it requires an additional deposition. In the event a deposition is necessary, Timberpeg seeks a limited extension of the discovery period to complete that deposition, until February 18, 2005, the date of the final pretrial conference in this action. If the deposition is necessary, Timberpeg will endeavor to conduct it by videoconference so as to least inconvenience counsel for VTW and avoid the necessity of travel to Pennsylvania.

Argument

8. For good cause shown, a court may grant a motion to modify or enlarge a deadline in a scheduling order. See Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002); Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001). “The primary measure of Rule 16’s good cause standard is the moving party’s diligence in attempting to meet the case management order’s requirements.”). DANA, 249 F.3d at 809.

9. In this action, Timberpeg exercised diligence in attempting to meet the scheduling order’s requirements. Timberpeg sought through subpoena, and received, Murus’ documents well before the close of discovery and, at the time, did not believe a deposition necessary based upon the documents Murus produced. It was not until January 11, four days prior to the close of discovery, that Timberpeg received the additional Murus documents, the existence of which Timberpeg had not previously been aware. Through no fault of its own, Timberpeg was unable to (a) determine whether a deposition was necessary, (b) schedule that deposition with counsel for VTW, and (c) conduct that deposition all prior to the January 14 close of discovery deadline. As Timberpeg has indicated, a deposition may not be necessary. Timberpeg simply seeks an extension of the discovery period so that it can evaluate that contingency and schedule the deposition, if necessary, at a time mutually convenient to all involved.

10. The discovery could bear upon one of the central issues in this litigation. VTW has consistently asserted that it never saw nor possessed Timberpeg’s copyrighted architectural plans at issue in this action. VTW’s possession of and/or access to the plans is one of the substantive elements of copyright infringement Timberpeg must prove to

establish liability against VTW. Murus, in making panels, worked with Mr. Isbitski and VTW, and the newly produced documents reflect communications between Murus and VTW. Murus, therefore, may have information that bears on VTW's access to or possession of Timberpeg's copyrighted architectural plans.

11. The limited extension Timberpeg seeks will not cause any prejudice to VTW. At most, the extension will result in one discrete deposition, which, if necessary, Timberpeg will endeavor to arrange via videoconference so as to avoid travel to Pennsylvania. Though discovery closes on January 14, the final pretrial conference is not scheduled to occur until February 14, and trial will not commence until March 1. The limited extension Timberpeg seeks will not impact any of those dates, nor result in discovery continuing up to the eve of trial. Timberpeg expects that any remaining discovery, a single deposition, could be completed by the final pretrial conference.

12. The extension requested herein will not result in the continuance of any hearing, conference or trial in this action. See LR 7.2(a).

13. Counsel for VTW was contacted, does not assent to the relief requested herein. See LR 7.1(c).

14. Due to the authority and argument cited herein, no accompanying memorandum of law is necessary. See LR 7.1(a)(2).

WHEREFORE, Timberpeg respectfully requests that this Court:

A. Extend the discovery period until February 18, 2005 for the limited purpose of completing discovery related to Murus, including, if necessary, one deposition of a Murus representative; and

B. Grant such further and other relief as this Court deems just, equitable and proper.

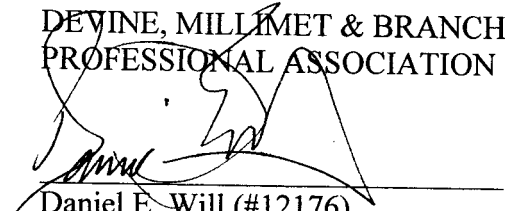
Respectfully submitted,

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

By their attorneys,,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: January 14, 2005



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2005, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.



Daniel E. Will (#12176)