

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.,)	
And DOUGLAS FRIANT,)	
Defendants.)	

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE
(1) EVIDENCE OF NON-REGISTERED PLANS AND
(2) TESTIMONY RELATING TO NON-REGISTERED PLANS

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant"), move in limine to exclude evidence of plaintiffs' "other plans" – those not included the copyrighted documents at issue in this case – on grounds of relevancy and confusion.

In support of this motion, defendants state:

This is plaintiffs' case alleging infringement of copyrighted architectural plans which were dated April 2001 and registered with the Copyright Office on May 8, 2001.

While the Complaint does not attach the plans alleged to have been infringed, it identifies them (¶16) as the plans registered with the Copyright Office on May 8, 2001. In discovery, plaintiffs produced five pages (Ex. 1) they claim to have registered (TIM 454 - TIM 458) and admitted that these five pages constitute the only Isbitski design they ever registered with the Copyright Office. (Req. to Admit Nos. 1 & 2, Ex. 2)

The Non-Registered Plans

Plaintiffs have produced other plans and drawings for Isbitski which were not registered with the Copyright Office, and in summary judgment oppositions have referred to them, improperly, as if they were the plans at issue. Those plans include the following:

- A set of plans dated December, 1999.
- A set of plans dated September 2001.
- Some additional sheets dated April 2002 (the same date as the registered plans), but which were not registered with the Copyright Office.

There is no evidence whatsoever that defendants ever saw any of the above documents other than the December 1999 plans.¹

The infringement claim here is necessarily limited to plaintiffs' plans which were registered with the Copyright Office. That is because 11 U.S.C. §411 explicitly provides that "no action for infringement of the copyright in any work shall be instituted" until the work has been registered.

The non-registered plans are not relevant to any issue in the case, and should be excluded under FRE 402.

In addition, even if the non-registered plans were marginally relevant to some issue, they should still be excluded under FRE 403 on the ground they would likely confuse the jury.

Indeed, plaintiffs sought to create this very confusion in their Opposition (Document 24, at pp. 4-5) to defendants' Motion for Summary Judgment (which is still pending).

¹ Defendants have acknowledged that Isbitski showed them some Timberpeg plans at a December 2000 meeting as an example of what he did not want. Defendants did not use them and do not know what plans they were. Unless plaintiffs overwrote some plans or otherwise destroyed plans, it may be assumed that what Isbitski brought was the December 1999 plans. In any event, it could not have been the April 2001 plans, were obviously were not yet in existence in December 2000.

Testimony Relating To The December 1999 Plans

Defendants have acknowledged that, on his initial visit in December 2000, Isbitski brought his Timberpeg plans as an example of what he did not want. Defendants were courteous but did not use these plans at all and do not even know what plans they were. As stated by defendants' sales person who met with Isbitski, Kim Hentschel:

At this initial meeting he brought a Hearthstone photo² and another page from the Hearthstone catalogue, which showed the way he wanted the timberframe, and had me copy the picture of the Hearthstone drawing. In that initial meeting he also showed me a set of Timberpeg drawings. He said he was very frustrated because Timberpeg wouldn't give him the frame design he wanted, and wasn't spending enough with him to understand what he wanted. He said he did not want to use this Timberpeg design. These plans were dated prior to the time of our meeting. I believe he took his Timberpeg drawings with him at the end of this meeting, although it is possible he may have left them with me for a couple of days. I did not use them as he indicated the Timberpeg concept was not what he wanted. He did not like the Timberpeg design, and he also liked the fact that VTW's beams were hand-crafted, using traditional joinery, with mortise, tenons, and hardwood pegs, dovetailed joists, and finished, whereas Timberpeg's were machine cut. He also liked the fact that we had our in-house assembly and erection crew. The same crew responsible for the shop fabrication of his frame, would be the same crew sent to the site for the assembly and the erection of his frame. He stated that Timberpeg did not have an in-house crew, and that a crew of sub-contractors would be needed in order to raise his frame if he chose to use Timberpeg.

(Ex. 3) This testimony was mirrored by defendant's draftsmen, Doug Friant. (Ex. 4)

Unless plaintiffs overwrote or destroyed some plans, it may be assumed that what Isbitski brought was the December 1999 plans. In any event, these could not possibly have been the Timberpeg April 2001 plans, were obviously were not yet in existence in December 2000.

² The "Hearthstone photo" was not a Timberpeg design but a photo from the unrelated Hearthstone company in North Carolina. Isbitski independently gave the Hearthstone photo to both Timberpeg and VTW, and it appears in the document files of both.

The above testimony relating to these December 1999 Plans is not relevant to any issue in the case, and should be excluded under FRE 402.

In addition, even if the non-registered plans were marginally relevant to some issue, they should still be excluded under FRE 403 on the ground they could confuse the jury into thinking that defendants saw the (April 2001) Plans at issue in this case. Indeed, plaintiffs sought to create this very confusion in their Opposition (Document 24, at pp. 4-5) to defendants' Motion for Summary Judgment (which is still pending).

Date: January 29, 2005

VERMONT TIMBER WORKS, INC.
and DOUGLAS FRIANT,
Defendants,

By: W. E. Whittington
Their Attorney

W. E. Whittington (Bar No. 6916)
Whittington Law Associates, PLLC
35 South Main Street
Hanover, NH 03755
(603) 643-2755

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2005, I served the foregoing pleading on the following counsel of record, by first class mail:

Daniel E. Will, Esq.
Devine, Millimet & Branch, P.A.
111 Amherst Street
Manchester, NH 03105

Stephen S. Woods, Esq.
Traditional Management Company
68 Lyme Road
Hanover, NH 03755

W. E. Whittington
W.E. Whittington