

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

**MOTION IN LIMINE TO EXCLUDE
EVIDENCE, TESTIMONY, AND ARGUMENT
CONCERNING DEFENDANTS' LACK OF PROFITS
FROM THE PREPARATION OF SHOP DRAWINGS
OF THEIR TIMBERFRAME**

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and move in limine to exclude evidence, testimony, and argument concerning the defendants' lack of profits from the preparation of shop drawings of their timberframe. In support of this motion, Timberpeg states as follows:

Background

1. This action involves, principally, a claim of copyright infringement by Timberpeg that VTW unlawfully used Timberpeg's copyrighted architectural plans in the drawing and erection of a timber frame for Stanley J. Isbitski. Pared to its essence, Timberpeg contends that a timberframe that the defendants manufactured and erected copied an original architectural work reflected in Timberpeg's copyrighted architectural plans. In discovery, the defendants have advanced an argument that they enjoyed no

profits from drafting, i.e., the preparation of shop drawings which show their timberframe. See Potvin Report, attached hereto as Exhibit A. Notably, the defendants do not claim that they made no profit on the Isbitski job as a whole, and, to the contrary, have produced an internal accounting document that reflects a profit from the Isbitski project. Timberpeg now moves in limine to exclude evidence of the defendants' lack of profits from the drafting of shop drawings.

Argument

2. Rule 401 of the Federal Rules of Evidence defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evidence that the defendants made no profits from the drafting of the shop drawings falls short of Rule 401’s standard for relevance. Timberpeg neither limits its claim of infringement to the defendants’ preparation of shop drawings nor limits Timberpeg’s damages to profits the defendants made from the preparation of the shop drawings. Instead, Timberpeg alleges that the timberframe the defendants manufactured and erected infringed upon Timberpeg’s copyright, and, under applicable copyright law, Timberpeg is entitled to disgorgement of the defendants’ gross profits “derived from the infringement,” i.e., the sale of the timberframe. 17 U.S.C. § 504(b). Whether the defendants profited from the drafting of the shop drawings does not tend to make the fact of the defendants’ profits from the Isbitski project more or less probable. Indeed, the defendants’ own internal accounting document confirms that the defendants did profit from the Isbitski project.

3. Rule 402 of the Federal Rules of Evidence provides that evidence which is not relevant is not admissible. As evidence of the defendants' profits or lack of profits from the preparation of shop drawings is not relevant, such evidence should not be admitted.

4. Rule 403 of the Federal Rules of Evidence allows otherwise relevant evidence to be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Assuming evidence that the defendants made no profits from the drafting of their shop drawings could be characterized as relevant, its attenuated probative value is far outweighed by the danger it will cause unfair prejudice, confuse the issues and mislead the jury. Such evidence will unfairly prejudice Timberpeg because it will create the risk of confusion as to what damages Timberpeg seeks and what damages are available to Timberpeg. Such evidence will tend to mislead the jury into thinking that the defendants enjoyed no profits from the infringement, when even the defendants do not dispute that they profited from the Isbitski project. In short, any evidence as to profits from drafting will tend to reduce the overall damages picture in the jury's mind. Given the lack of direct relevance to any issue in this action, such evidence should be excluded.

5. For all of the above reasons, Timberpeg respectfully requests that this Court exclude any evidence or argument that the defendants made no profits from the preparation of their shop drawings.

6. Given the dispositive nature of this motion, no concurrence is necessary. See LR 7.1.

7. Given the authorities and argument cited herein, no accompanying memorandum of law is necessary. See L.R. 7.1.

WHEREFORE, Timberpeg respectfully requests that this Court:

A. Exclude evidence and argument concerning the defendants' lack of profits from the drafting of the shop drawings; and

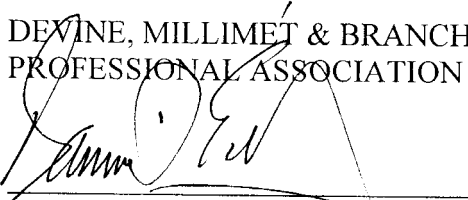
B. Grant such further and other relief as this Court deems just, proper, and equitable.

Respectfully submitted,

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

By their attorneys,

DEXVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION



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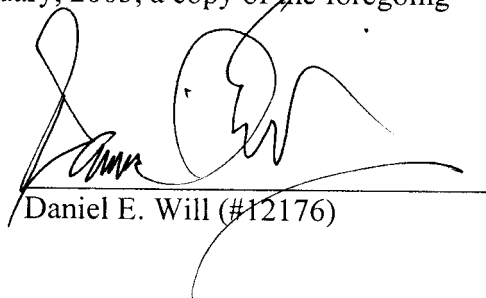
Dated: January 31, 2005

Of Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2005, a copy of the foregoing
was forwarded to W.E. Whittington, Esquire.



Daniel E. Will (#12176)