

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’ MEMO SUPPORTING THEIR
MOTION FOR JUDGMENT ON THE PLEADINGS AS TO
(1) INFRINGEMENT OF PLANS (AS OPPOSED TO “ARCHITECTURAL WORK”),
(2) ISBITSKI DEPOSIT AGREEMENT, AND
(3) PREVIOUS DESIGNS/PLANS

Defendant Vermont Timber Works, Inc. (“VTW”) moves under FRCP 12(c) for judgment on the pleadings in its favor and against plaintiffs, dismissing and striking (1) plaintiffs’ claims for infringement of plans (architectural drawings); (2) any claims based on or arising out of the Isbitski Deposit Agreement; and (3) any claims based on or arising out various previous plans and/or designs (that is, before the 04/20/01 registered “architectural work”).

Preliminary Statement

This motion arises because plaintiffs’ claims against Isbitski have been dismissed, making some of the allegations relating to Isbitski irrelevant and confusing; because plaintiffs have attempted to alter their claims in the course of proceedings in the case, thus creating confusion as to the actual claims at issue; and because certain claims have been eliminated or clarified through the two summary judgment rulings in this case, as modified by the First Circuit ruling.

Now that the court has reestablished a schedule, the court-encouraged mediation has occurred,¹ and important deadlines and trial are approaching, defendants seek to clarify these pleadings issues and dismiss inappropriate claims and allegations now.

Defendants submit this Memorandum In Support, Exhibits 1 - 3 and an authenticating affidavit, in support.

MEMORANDUM IN SUPPORT

This is plaintiffs' action against VTW and Friant alleging that they infringed plaintiffs' claimed copyright as set forth in Registration VAu 510-781 in the Copyright Office.

Of eight initial counts, only the following remain:

| <u>Count</u> | <u>Legal Theory</u> | <u>Defendant</u> |
|--------------|------------------------|------------------|
| II | Copyright Infringement | VTW |
| VIII | Copyright Infringement | Friant |

The operative complaint is the version as amended September 27, 2004 (attached to Document 27).

ARGUMENT

The Standard

“When deciding whether to grant a motion for judgment on the pleadings, under Fed. R. Civ. P. 12(c), the court accepts as true the well-pleaded factual allegations of the complaint, draws all reasonable inferences therefrom in the plaintiff's favor, and determines whether the complaint, so read, sets forth facts sufficient to justify recovery on any cognizable theory.” Baldi v. Amadon, 2003 DNH 099.

¹ The mediation occurred on May 8, 2007, with mediator follow up thereafter.

I. THE CLAIMS OF INFRINGEMENT OF PLAINTIFFS' PLANS SHOULD BE DISMISSED

The operative provisions of the Amended Complaint state as follows:

Count II – Against VTW

17. On May 18, 2001, Timberpeg registered the Plans [defined in Para. 16 as “revised plans” with changes requested by Isbitski] with the United States Copyright Office as an architectural work.

* * *

22. Upon information and belief, Vermont Timber used the Plans for the purpose of designing and manufacturing a timber frame

* * *

44. Vermont Timber improperly copied the Plans or caused them to be copied without Timberpeg’s authorization and, in fact, in violation of Timberpeg’s express prohibitions.

45. Vermont Timber improperly utilized the Plans or caused the Plans to be utilized in the manufacture of a timber frame and the assembly of that timber frame

Count VIII – Against Friant

77. Mr. Friant directed the infringing activity, the drafting of the VTW frame drawings

79. Mr. Friant knew or should have known that his frame drawings were based on Timberpeg’s copyrighted architectural plans.

Emphasis added.

In reality, as demonstrated by the actual registration and filing, the registration did not register “the plans” but registered an “architectural work.” Exhibit 1 to the Amended Complaint,

reproduced as Exhibit 1 to this motion.² The registration was made as to an “architectural work” both in Item 1 (where it was written out) as well as Item 2 (where the “architectural work” box was checked). Indeed, the instructions to the form make it clear that copyright claims as to “plans” are separate and distinct from claims as to “architectural works,” and that separate applications are required if both kinds of claim are asserted:

Architectural Works: . . . Request Circular 41 for more information.
Architectural works and technical drawings cannot be registered on the same application.

* * *

Any registration for the underlying architectural plans must be applied for on a separate Form VA, checking the box “Technical drawing.”

Ex. 2.³

This is also clearly demonstrated by Circular 41:

Separate Registration for Plans

A claim to copyright in an architectural work is distinct from a claim in technical drawings of the work. If registration is sought for both an architectural work and technical drawings of the work, separate applications must be submitted.

Ex. 3 (emphasis added)

Here, no separate filing was made for the plans, and thus no claim was registered as to the underlying plans/drawings, which could have been registered as “architectural drawings”

² This was confusion which plaintiffs apparently used – and even may have changed the theory of their claims – in order to oppose the initial motion for summary judgment. Indeed, the Court’s initial summary judgment ruling, which was based on the allegations of the Complaint, was absolutely correct as applied to the above-quoted allegations of the complaint.

³ The dual registration process required to perfect both “drawings” and “architectural work” is illustrated in Beckwith Builders, Inc. V. Depietri, No. 2006 DNH 106 (McAuliffe, J.), at 3-4 and notes 1, 2 & 3, where two registrations were filed for variants of the schematic and technical drawings, and a wholly separate registration was filed for the “architectural work” embodied in them.

under Section 102(a)(8). Moreover, plaintiffs cannot save this defect as to the plans by registering it now, both because the registration must pre-date the initiation of suit and because the three-year statute of limitations has passed. 17 U.S.C. §§ 411(a) & 507(b).

Therefore, any claim that defendants infringed the Plans must fail as a matter of law, and all allegations of copying of the Plans, including Paragraphs 17, 22, 44, 45, 77 and 79, should be stricken.

Nor is it possible for a building to be a copy of underlying plans, and “construction of [a] structure does not constitute infringement.” Nimmer On Copyright §2.08[D][2][a] at 2-125. Robert R. Jones Assocs., Inc. v. Nino Homes, 858 F. 2d 274, 280 (6th Cir. 1988) (6th Cir. 1988) (“a person cannot, by copyrighting plans, prevent the building of a house similar to that taught by the copyrighted plans”).⁴

Therefore, the claims based on copyright of architectural drawings or “plans” must fail as a matter of law, and the Court should strike all aspects of the Amended Complaint alleging infringement of the plans, including Paragraphs 17, 22, 44, 45, 77 and 79.

II. THE CLAIMS OF INFRINGEMENT BASED ON THE ISBITSKI DESIGN DEPOSIT AGREEMENT SHOULD BE DISMISSED

The Amended Complaint is based in part on a 1999 “Design Deposit Agreement” between plaintiff Timberpeg East, Inc. and defendant Isbitski, who has been dismissed with

⁴ This point was determined by this Court in its initial summary judgment order of February 9, 2005 (Document 90 at 14-15) and was clarified and reiterated in its revised summary judgment order of April 6, 2006 (Document 98 at 3-4).

Plaintiffs appealed as applied to its claim of “architectural work,” but never appealed this determination as to the plans, nor did the First Circuit address it. It is now binding in this case as “law of the case.”

prejudice. The Design Deposit Agreement is attached to the Amended Complaint and incorporated by reference. The relevant portions of the Amended Complaint are as follows:

11. On or about November 1, 1999, Isbitski entered into a “Deposit Agreement for TIMBERPEG® Preliminary Plans and Drawings.”

12-14. [These paragraphs recite contents of the Deposit Agreement.]

15. In accordance with the Design Agreement, Timberpeg created an original set of architectural plans

[The Count against Isbitski].

40. By virtue of . . . the terms of the Design Agreement . . . Isbitski was not an innocent infringer of the copyright.

Emphasis added.

While it appears that the Design Agreement was pleaded only against Isbitski, apparently to demonstrate his “willfulness,” the counts against the current defendants (Counts II & VIII) at least perfunctorily “incorporate all” of the prior allegations. With Isbitski out of the case, however, these allegations should play no role against defendants, and should be stricken.

In addition, there is no allegation, and no evidence, that the Design Agreement was ever seen by defendants, and they are neither parties to it nor bound by it.

In addition, the Design Agreement by its terms, and by the obvious chronology of events, relates only to the earlier 1999 design, which all parties now agree was never registered and which plaintiffs concede is completely different from the 2001 architectural work at issue here. In the prior summary judgment motions plaintiffs tried repeatedly to confuse the 1999 unregistered design

and plans with the 2001 registered ones, but this Court did not accept that they were interchangeable (MSJ I, Document 90 at 6-7), and neither did the First Circuit.⁵

Therefore, any claim based on the 1999 Design Agreement with Isbitski must fail as a matter of law, and all allegations relating thereto, including Paragraphs 11-15 & 40 and their “incorporation by reference” into Counts II and VIII, should be stricken.

III. ANY CLAIMS OF INFRINGEMENT BASED ON DESIGNS PRE-DATING THE 2001 DESIGN SHOULD BE DISMISSED

The Complaint and Amended Complaint do not directly accuse defendants of infringement of the 1999 plans or design, but make various allegations about those 1999 plans. E.g., Am. Cplt. at Paragraph 11.

Moreover, in opposition to the original motion for summary judgment, plaintiffs sought to rely substantially on those 1999 unregistered plans. E.g., Document 24 at pp. 4-5. Defendants filed a motion to strike that argument (Document 29), but it became moot when the initial summary judgment was granted.

On appeal, plaintiffs argued again based on the 1999 unregistered plans. The First Circuit squarely rejected any relevance of those plans, stating:

⁵ The First Circuit stated:

Timberpeg created a first set of preliminary plans on December 29, 1999 and gave them to Isbitski. . . . [T]hese plans were never registered with the Copyright Office.

Timberpeg completed a new design for Isbitski on April 20, 2001 “based on its interpretation of Mr. Isbitski’s rough ideas and preferences.” . . . Timberpeg registered these plans with the Copyright Office on May 18, 2001. . . . It is only this second, registered set of preliminary plans that is at issue here.

T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F. 3d 97 (1st Cir. 2006) at 103-04 (emphasis added).

Timberpeg created a first set of preliminary plans on December 29, 1999 and gave them to Isbitski. . . . [T]hese plans were never registered with the Copyright Office.

Timberpeg completed a new design for Isbitski on April 20, 2001 “based on its interpretation of Mr. Isbitski’s rough ideas and preferences.” . . . Timberpeg registered these plans with the Copyright Office on May 18, 2001. . . . It is only this second, registered set of preliminary plans that is at issue here.

T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F. 3d 97 (1st Cir. 2006) at 103-04 (emphasis added).

In addition, it is undisputed that at his initial meeting with defendants in January 2000 Isbitski brought the 1999 Timberpeg plans with him. Defendants did not look at them, but do not deny that Isbitski had them when he came to defendants’ office. Since these 1999 plans are not at issue, they are not relevant, and plaintiffs’ attempt to introduce them into evidence, or the fact that Isbitski brought them to the initial meeting, would be improper, confusing and potentially extremely prejudicial to defendants. They should be excluded from evidence.

In addition, defendants do not want to lose more time and expense disproving the relevance of these 1999 plans and documents. Therefore, they request that the Court rule that these plans and design are not at issue, that the Court strike Paragraph 11 of the Amended Complaint, and that the Court find these plans and design, as well as the fact that Isbitski brought them with him when he first visited defendants in early 2000, inadmissible as evidence in the case.

CONCLUSION

For the above reason, defendants respectfully request that the Court

- (1) Enter an order finding that the claims based on copyright of architectural drawings must fail as a matter of law, and strike all aspects of the Amended

Complaint alleging infringement of the plans, including Paragraphs 17, 22, 44, 45, 77 and 79.

- (2) Enter an order finding that any claim based on the 1999 Design Agreement with Isbitski fails against these defendants as a matter of law, and strike all allegations relating thereto, including Paragraphs 11-15 & 40.
- (3) Enter an order finding that the 1999 plans and design – and any plans or design pre-dating the April 2001 plans – are not at issue; striking Paragraph 11 of the Amended Complaint; and finding these plans and design, and testimony that Isbitski brought them to defendants, inadmissible as evidence in the case

Date: June 26, 2007

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

/s/ W. E. Whittington
W.E. Whittington

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

Exhibits

| | | |
|-------|----------------------------------------------------|----------------|
| Ex. 1 | Certificate of Registration of “Architectural Work | 05/18/01 |
| Ex. 2 | U.S. Copyright Office – Instructions for Form VA | rev. June 1999 |
| Ex. 3 | U.S. Copyright Circular | rev. June 1999 |

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2007, I served the foregoing pleading on the following counsel of record, by causing it to be filed electronically via the CM/ECF filing system or mailed by first-class United States Mail, postage pre-paid, or in such other manner as may be indicated:

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

/s/ W. E. Whittington
W.E. Whittington