

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 IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant") object to plaintiffs' Motion For Partial Summary Judgment (Document 124), and respectfully submit this memo in opposition.

PRELIMINARY STATEMENT

This is an action for copyright infringement, and the Court is by now well aware of the underlying facts. Several preliminary comments or clarifications are appropriate, however, to avoid false issues from reappearing in the case.

Only "architectural work," not "plans," at issue

First, despite two summary judgment rulings by this Court and one by the First Circuit, plaintiffs are still improperly characterizing their claims as "infringement arising out architectural plans" (Memo at 1); asserting that "Timberpeg alleges that [defendants] infringed the Timberpeg plans" (Memo at 1); and asserting that the issue is "whether the VTW timberframe and shop drawings are substantially similar to Timberpeg's architectural plans"

(Memo at 1). This Court has squarely ruled that plans could not have been infringed here (Document 90 at 14-15), and has reaffirmed that ruling (Document 98 at 3-4). The ruling was correct, was never appealed, and is now binding as “law of the case.”

Moreover, the only registration ever made was for an architectural work, not architectural plans. Am. Cplt. Ex. 1. There was no separate registration for the plans. Therefore plaintiffs are precluded from bringing any claim of infringement of the plans under 17 U.S.C. §411(a).

This is addressed in more detail in defendants’ Motion For Judgment On The Pleadings (Document 125, at pp 3-5).

T-Peg, Inc. and Timberpeg East, Inc. are separate entities

Second, the two defendants are, emphatically, not a single, commingled entity. As they have done with all their pleadings, plaintiffs attempt to disguise huge defects in each of their cases by creating a defined term “Timberpeg” to refer “collectively” to both plaintiffs. Plaintiffs are not a “collective” entity, and it would be improper to allow them to selectively assert ownership, actions and facts relating each other to attempt to make out a “collective” case.

For that reason, plaintiffs’ Statement Of Undisputed Facts is defective because it fails to indicate which facts apply to each specific plaintiff.

Moreover, it is abundantly clear that only T-Peg, Inc. is a copyright registrant. Ex. 1 to Am. Cplt. This has consequences for both plaintiffs, as discussed in more detail in Defendants’ Motion For Summary Judgment Based On Plaintiffs’ Lack Of Standing (Document 126).

Moreover, both plaintiffs are distinct from the third entity – non-party Timber Services, Inc. – which they attempt to implicitly commingle into the collective “Timberpeg.”

First Circuit Ruling Limited To Issues Appealed,
And Based On Assumptions Favoring Plaintiffs

Third, plaintiffs are moving for partial summary judgment here because, they say, “the First Circuit Court ultimately resolved [the issues of their motion] in Timberpeg’s favor. (Memo at 2). Then, they claim that “the First Circuit explicitly held¹ . . . that Timberpeg’s plans reflected an original work entitle to copyright protection.” (Memo at 7) This grossly misunderstands the context of a reversal of summary judgment and mis-quotes the First Circuit ruling.

It is, of course, legal bedrock that in granting summary judgment, the trial court (and also the appellate court) is required to “view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in that party’s favor,” as noted, with citations, both by this Court (Document 90, at 4) and by the First Circuit, 459 F. 3d 97 at 102 (1st Cir. 2006) (“taking all reasonable inferences in favor of Timberpeg, the party that opposed the entry of summary judgment”). Thus, plaintiffs cannot somehow bootstrap a summary judgment in their favor (where inferences must favor defendants) out of a vacation of summary judgment – a non-ruling, not a ruling – where the inferences went the other direction.

Moreover, a denial of summary judgment has no binding effect at all except as based on the facts presented in that motion itself. Indeed, the jury may well rule for defendants on this issue once the un-level summary judgment standards are eliminated, and at least in theory defendants could even file a new motion for summary judgment with additional evidence.

Moreover, summary judgment was granted, and considered on appeal, on only one discreet issue – whether there was substantial similarity between plaintiffs’ claimed

¹ While stating that the First Circuit so “held,” plaintiffs’ supporting quotation from the First Circuit indicates only that “we conclude that there are genuine issues of material fact” (Document 124 at 7-8).

“architectural work” and the frame constructed by defendants. As noted by the First Circuit, the issue on appeal was “whether there is a genuine issue of material fact as to substantial similarity.” 459 F. 3d at 11. Plaintiffs’ attempts to rely on “holdings” beyond that sole, narrow issue, and based on the limited facts presented in the motion, are improper.

STATEMENT OF DISPUTED FACTS

There is at least a genuine dispute, so as to require decision through trial, as to the following facts material to plaintiffs’ motion²:

A. Concerning “Originality Of [Plaintiffs’] Architectural Work”

1. Whether either of the named plaintiffs in this case, *T-Peg, Inc.* and *Timberpeg East, Inc.* created, as an *original* design, the “architectural work” reflected in registration VAu 510-781. There are several sub-issues, and disputed or simply contrary evidence, as follows:

(a) Nothing in plaintiffs alleged “Undisputed Facts” states that either one of these entities did so.

(b) Plaintiffs use the fictional name “Timberpeg” to refer to themselves “collectively,” apparently hoping that vague references to “Timberpeg’s design” will suffice, but

² In addition, the following facts from plaintiffs’ Statement of Undisputed Facts are altogether irrelevant to the issues in the motion:

- All the allegations in Heading A, “Parties.”
- All the allegations in Heading B, “What Is A Timberframe”
- All the allegations in Heading C, “Architectural Plans And Shop Drawings”
- The first three paragraphs of Heading D, “Isbitski Residence Chronology,” which all relate to the 1999 plans which were abandoned, not the 2001 plans at issue here.
- All the allegations in Heading E, “The Procedural History,” which are based on the reversed presumptions in defendant’s motion for summary judgment and on limited issues presented to the court there.

that falls short of proof that either of these plaintiffs created a design, and for a reason which will be demonstrated below.

(c) The five sheets submitted to the Copyright Office for Registration VAu 51-781 all reflect that they were drawn by Joe Downey (Document 126, Ex. 5), who was not an employee of either plaintiff but of Timberpeg Services, Inc., which is not a party in this case.

(d) Moreover, plaintiffs' own witness, Vincent, conceded that the design work was performed by Downey, and that Downey was an employee of Timberpeg Services, Inc., not of either plaintiff. (Doc. 126, Ex. 6). Indeed, Vincent stated that he himself is an employee of Timberpeg Services, Inc., (Doc. 126, Ex. 6 at 7), that he has no authority to take actions on behalf of T-Peg or TEI (at 10), that Timberpeg Services has 13 people in the design department (at 14), that Joe Downey worked for Vincent at Timberpeg Services, Inc. (at 19), and that "Downey drafted the plans here" and was "an employee of Timberpeg Services, not Timberpeg East or T-Peg" (at 31-32).

(e) When pushed in discovery, plaintiffs had to admit that neither of them performed any design services. Thus, in their "Answer To Interrogatories" (Doc. 126, Ex. 2) and, thereafter, their "Supplemental Answers To Interrogatories" entered after defendant demanded a precise response by plaintiff (Doc. 126, Ex. 4), admitted the following:

Interrog. No. 10. Identify the total number of design hours (a) T-Peg and (b) TEI spent on the Isbitski project, and itemize that number by task performed.

Answer: Timberpeg spent approximately 108 hours of drafting time (Doc. 126, Ex. 2)

[Based on draft motion to compel,] Timberpeg will supplement to break down the hours between T-Peg and TEI. (Doc. 126, Ex. 3)

Supplemental Answer: T-Peg, Inc. did not directly perform any design time on the Isbitski project. Timberpeg East, Inc. does not keep a record

of design time spent by Timberpeg East employees. However, Timberpeg Services, Inc., which operates as the design department for Timberpeg East and T-Peg, Inc. on a work-for-hire basis spent approximately 108 hours of drafting time (Doc.. 126, Ex. 4)

2. There is no affirmative evidence, or even statement that the architectural work at issue “is the original, creative work” of each, or either, plaintiff. The closest plaintiffs come to an assertion that they “created” the architectural work at issue is their third paragraph on page 5 of their memo, based on the affidavit of Lynn Cole. That allegation is grossly defective, and fails to establish creation by either plaintiff as a matter of law, for at least the following reasons:

(a) It does not affirmatively state that either plaintiff created the design, but only that the “collective” “Timberpeg” did. There is no such entity.

(b) The affidavit of Cole relied on by plaintiffs does not refer to the April 21, 2001 plans but to the September 19, 2001 plans (Doc. 124, Ex. 12, ¶4), and the attachment to Cole’s affidavit is clearly the September 2001 plans, as shown by the plotting marks at the edges and the “revision date” (blow ups of those portions of the attachment are attached to this opposition memo as Exhibit 1).

(c) Plaintiffs’ own documents and witnesses have made clear that the timber frame shown in those drawings were directly copied from Hearthstone Homes, a timber frame company in North Carolina. Thus, there are in plaintiffs’ own files (i) an August 9, 2001 fax message from Cole to the Timberpeg Services, Inc. representative *attaching a photo of the Hearthstone design, only with the Hearthstone logo redacted,*³ and stating “This is picture of Bent style timberframe that Stan Isbitski wants us to emulate” (Ex. 2, attached); the photo from the Hearthstone catalogue (Ex. 3, attached); and an August 31, 2001 note back from the

³ Plaintiffs now admit they “emulated” their September 2001 frame from the photo, but their document the Hearthstone logo. So that there is no mystery, Ex. 5, attached, is a copy of the same picture from the Hearthstone logo, and Ex. 6 is an affidavit authenticating it.

Timberpeg Services designer, Rivet, to Cole attaching Rivet's three-dimensional frame drawing which is copied exactly from the Hearthstone catalogue provided to him by Cole (Ex. 4, attached).

(d) Plaintiffs' witness, Cole, conceded that he had asked Timberpeg Services to "emulate" – that is, in plain English, copy – the Hearthstone frame design:

Stan [Isbitski] clipped a photo out of a magazine to give to me I would guess in 2001, possibly the first half of the year. . . .

Q. And your understanding is that Timberpeg never received rights to, any proprietary rights in that drawing, right, or picture?

A. I have no knowledge of it.

* * *

Q. I'm going to show you 083 [his fax sending the Hearthstone photo to Timberpeg Services, Inc.], is it a copy of a fax message you sent to Kathy Cantor?

A. Yes.

Q. And who is Kathy Cantor?

A. She was someone who worked at Timberpeg [Services, Inc.]

Q. It says, quote, Kathy, this is picture of bent style timber frame that Stan Isbitski wants us to emulate for the main house. . . . Can you now tell us that at the time you wrote this fax on August 9th, 2001, the timber frame plan for Stan Isbitski was not a bent style frame? . . .

A. On August 9th it was not, . . . it was drawn as a purlin frame.

* * *

Q. Showing you [the isometric, same document attached to Cole Affidavit in the instant motion for summary judgment], do you recall getting those back from [Timberpeg Services, Inc.]?

A. Yes.

* * *

Q. [D]id you do anything to check out whether the design in the photo was copyrighted?

A. No.

* * *

Q. Do you know where that photo came from?

A. I know it came from a magazine.

Cole Deposition excerpts, Ex. 6, pp. 28-29, 30-37, 43 & 46. Thus, it is abundantly clear that the design work was performed by Timberpeg Services, Inc., not by either plaintiff; that the frame version referenced in Cole's Affidavit was actually a blatant, knowing, and unauthorized copy of

the “bent” design of Hearthstone Homes; and that the frame⁴ was not original, creative work product of plaintiffs or even of Timberpeg Services, Inc.

(e) Cole’s current affidavit (Doc.124, Ex. 12), executed on July 1, 2007 for this motion, claims that he “created a new floorplan” is in conflict with his prior affidavit, executed September 16, 2004. Ex. 7 That affidavit stated, in a different version of its ¶4, as follows:

4. In early 2001, I met with Mr. Isbitski concerning his house plans. He was not satisfied with the 12/29/99 design, but unfortunately he wasn’t entirely clear about what he did want. After we tried unsuccessfully to modify these plans I offered to create a new design and floor plan based on my interpretation of Mr. Isbitski’s rough ideas and preferences. On or about April 20, 2001, Timberpeg [not further defined] completed a revised set preliminary architectural plans

Ex. 7 (emphasis added). Thus, Cole’s original affidavit indicated that the April 2001 plans were based on Isbitski’s ideas and preferences, not his own, that Cole had only “offered” to create a design, and that the plans were completed by (the still undefined) “Timberpeg,” meaning, presumably, Timberpeg Services, Inc., not either plaintiff. Moreover, Isbitski’s ideas, schemes, plans, designs, etc. from this time period – April 2001 – were not transferred to Timberpeg East under the Design Deposit Agreement (Am. Cplt. Ex. 1) because, as admitted by Cole, this was a new design, not just a modification of the earlier plans (the modification having been “unsuccessful”).

3. Plaintiffs fail to assert – and cannot assert – that any frame designed in the registered plans is the same frame design constructed by VTW. Cole’s affidavit is absolutely devoid of such a statement. Moreover, it is obvious that there is no frame design in the registered plans,

⁴ It is undisputed that VTW never constructed anything other than the frame, and that the VTW frame is a bent-frame design like the Hearthstone design, not a purlin-rafters frame like the first Timberpeg design. Thus, plaintiffs’ admissions that it arranged for the designers to copy someone else’s frame design shows their blatant disingenuousness and disregard for creative work of others.

and Cole admits (above) that “Timberpeg” had no bent frame design until it “emulated” Hearthstone.

4. There is substantial evidence, and admissions by plaintiffs, that some or all elements of the registered plans (a) are not original work of either plaintiff or even of the non-entity “Timberpeg,” (b) were licensed to Isbitski, (c) were not registered and/or plaintiffs do not claim copy-right, (d) were “standard features” not subject to copyright, (e) were derivative of other designs (making them non-copyrightable since no claim was asserted as to “derivative work,” and/or were mere “ideas” rather than copyrightable “expression.” This includes at least the following:

(a) License to use foundation plan. Against payment of \$1,500, plaintiffs provided Isbitski a Foundation Plan (Doc. 44, Ex. 27), which they did not copyright, and which they authorized him to use to construct the foundation on his project. Document 44, Ex. 26 & 27; Cole Dep. at 54-56, Doc. 44, Ex. 14.⁵

⁵ Cole testified as follows:

- Q. And at this point, you indicated to Jay Tucker [Isbitski’s agent] that Stan [Isbitski] was going to . . . do the foundation himself?
- A. Stan said he wanted to do it that way.
- Q. And that was fine with you, right?
- A. It is. . . .
- Q. [A]nd at that point, he was not obligated to go forward with the full Timberpeg package, right?
- A. No, at that point he was not. . . .
- Q. And you authorized him based on the plans, to go ahead and put in the foundation, right?
- A. I agreed to do the construction plans and to furnish him with a foundation plan for a timber frame.
- Q. And you agreed for him to put in a foundation?
- A. Right.

Lynn Cole Dep. at 54-56, Doc. 44, Ex. 14 (emphasis added).

(b) Placement over foundation. Plaintiffs concede that placing posts over the foundation, girders or other posts is a “standard feature” and “functional requirement.” Vincent Dep. II at 30-31, 33. (Doc. 44, Ex. 29)

(c) Two-Foot increments. Plaintiffs concede that designing in two-foot increments or intervals is “standard,” and that “it’s not anything you can copyright or trademark.” Vincent Dep. II at 32-33. (Doc. 44, Ex. 29)

(d) Eight- and Nine-Foot Plate Heights. Plaintiffs concede that 8 feet and 9 feet story heights (also called “plate height”) are “standard,” that plaintiffs did not originate them, and that they claim no copyright in it. Vincent Dep. II at 34-35. (Doc. 44, Ex. 29)

(e) No claim of originality in salt box and shed dormer. Plaintiffs concede that the salt box and shed dormer forms have existed in New England since the 1600s, that plaintiffs did not originate these, and that they do not claim copyright in them. Vincent Dep. I at 35-37, Doc. 44, Ex. 14.

(f) No claim of originality in 12/12 pitched roof. Plaintiffs concede that a 12/12 pitched roof is standard, not originated by them, and they do not claim copyright in it. Vincent Dep. I at 41-42 (Doc. 44, Ex. 14)

(g) No assertion of creative content in 40 feet by 44 feet dimension. Plaintiffs concede that they do not assert copyright in the dimensions alone of 40 feet by 44 feet (the dimensions in their plan) because those dimensions alone do not have “creative content. Vincent Dep. I at 42. (Doc. 44, Ex. 14)

(h) Evidence that overall form, footprint, dimensions based on other works/designs created by others, not by plaintiffs. There is other evidence that the registered architectural work is based on, or derivative of, several other works, including (i) a design by R.

Lear of Long Island, New York, predating the registered work, which appears in plaintiffs' 1999 promotional brochure (Ex. 8), thus demonstrating "access" to it by plaintiffs; (ii) the unregistered architectural work contained in the 1999 Timberpeg drawings⁶; (iii) the "design" brought to them by Isbitski in 1999; (iv) the ideas, preferences, or design brought to them by Isbitski in early 2001 (See Cole Affidavit, Ex. 7, Para. 4); (v) Isbitski's earlier (late 1996 to 1998) design work with Yankee Barn, where Cole was a salesman and Isbitski a customer prior to Cole moving to Timberpeg East, Inc. where Cole "was handling intakes of prospects at the time and had a couple of conversations with Stan and turned them over to a Yankee Barn designer" (see Cole Dep., Doc. 44, Ex. 14 at 14-15); and (vi) the design created for Isbitski by his agent Old Hampshire Homes where, according to Cole, Isbitski had "yes, oh, definitely" "been through their design work with Old Hampshire Design" (Cole Dep. Doc. 44, Ex. 14 at 16). Isbitski's prior design work is also demonstrated by Hentschel's testimony that Isbitski announced he had designed the house with his wife who had passed away a year before their meeting in 1999. Hentschel Aff., submitted with Document 44, Ex. 16 ¶4, and Hentschel Dep. at 63, submitted by plaintiffs with Document 56, Ex. B.

(i) Ideas versus expression. The particular dimensions and overall form as requested by Isbitski constituted "ideas," which are not copyrightable, as opposed to "expression," which is.

⁶ Plaintiffs have claimed, on various occasions, that the registered work is a "modification" of the 1999 unregistered work. In order to have protection as a derivative work, however, the registration would have had to claim derivative work status, setting forth what was in the original and what was added, and protection would extend only to the new or added material. See instructions to Copyright Office Form VA, Document 126, Ex. 11.

B. Concerning “VTW’s Access To The Work”

It is disputed whether defendants had “access” to the registered, April 2001 plans, and plaintiffs’ evidence of access is in any event illusory and fails to demonstrate entitlement to a ruling in its favor on this issue:

1. There is no evidence that the plans on file with the Town of Salisbury were on file prior to VTW’s creation and erection of its frame. Plaintiffs assert (Memo at 13), without support, that VTW prepared its plans “after Isbitski made them publicly available by filing them with the Salisbury building department” (emphasis in plaintiffs’ memo). But that is contrary to the only evidence on the subject, Cole’s Affidavit (Ex. G, Paras 5 & 6), which indicates he never visited the Town until after he drove by the property and “noticed that a timberframe had been erected.”

2. Plaintiffs note (Memo at 5, 13) that in 2000 Isbitski shared the 1999 plans with VTW. While that much is not disputed, those plans are irrelevant since they are not the subject of the suit, and since Cole even testifies that the 2001 registered plans constitute a entirely “new” design. So access to the 1999 plans does not constitute access to the plans at issue here.

3. Plaintiffs rely on the Welch letter, their Exhibit I, to show access, but the Welch letter also makes clear it is referring only to the 1999 plans. It states: “[Isbitski] represented to my client that he paid for and owned a set of plans, which he provided to my client that were drawn by Timberpeg.” However, the following sentences exactly track the information from the initial client meeting in December 2000, and therefore can only refer to the 1999 plans, since the April 2001 plans obviously had not yet even been created. Thus, the Welch letter cannot be used to demonstrate “access” to the April 2001 registered plans.

ARGUMENT

The Standard

Summary judgment is only appropriate when the record reveals “no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c), but in determining the facts the Court is required to “tak[e] all reasonable inferences in favor of [defendants], the party that opposed the entry of summary judgment.” T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F. 3d 97, 102 (1st Cir. 2006).

I. NEITHER PLAINTIFF HAS DEMONSTRATED “NO GENUINE ISSUE” THAT IT IS THE CREATOR OF AN ORIGINAL “ARCHITECTURAL WORK”

Once the irrelevant fact statements are removed, and the contrary evidence is considered, it is clear that the issue whether either plaintiff is the creator of the alleged “architectural work” embodied in the registered plans is highly contested.

No evidence or testimony affirmatively states that either T-Peg, Inc. or Timberpeg East, Inc., is the author of the architectural work embodied in the April 2001 registered plans. Disputed Facts A(1)(a) and (b), A(2) and A(3).

The five sheets submitted to the Copyright Office all reflect they were drafted by Joe Downey, an employee of Timberpeg Services, Inc. (not a party in the case). Disputed Fact A(1)(c).

Plaintiffs’ witness, Vincent, testified that the design work was done by Timberpeg Services, Inc., not either plaintiff. Disputed Fact A(1)(d).

Plaintiffs' own interrogatory responses indicate that the entire design time of 108 hours was spent by Timberpeg Services, Inc., not by either plaintiff, and plaintiffs' responses failed to demonstrate any design time by either of them. Disputed Fact A(1)(e).

The affidavit plaintiffs rely on to demonstrate original authorship, the Cole Affidavit, clearly refers to September 2001 plans, not the registered April 2001 plans. Disputed Fact A(1)(b).

The witness plaintiffs rely on to demonstrate original authorship, Cole, has testified that the frame design in his affidavit was blatantly copied, or "emulated," from a design and photo of another company, Hearthstone Homes. Therefore it cannot be an original design authored by plaintiffs. Disputed Fact A(1)(c) and (d).

There is substantial evidence and, in many particulars, admissions from plaintiffs, that some or all elements of the registered plans (a) are not original work, (b) were licensed to Isbitski, (c) were not registered and/or plaintiff do not claim copyright as to them, (d) were "standard features" not subject to copyright, and/or (e) were derivative of other designs for which they hold no copyright, and/or (f) were mere ideas, not expressions. Disputed Fact 4. These include:

- License to use the foundation plan.
- Placement of posts over foundation as "standard feature" and "functional requirement."
- Two-Foot Increments, 8- and 9- foot plate heights as "standard" and "not anything you can copyright."
- Admission of no claim of originality or copyright in salt box and shed dormer forms.

- No claim of originality in 12/12 pitched roof.
- No assertion of creative content in 40 feet by 44 feet dimension.
- Evidence that the overall form, footprint, and dimensions were based on other works or designs created by others, not plaintiffs.
- Evidence that the only matter attempted to be protected were “ideas” not “expression.”

Disputed Fact 4.

II. PLAINTIFFS HAVE NOT DEMONSTRATED ACCESS BY DEFENDANTS TO THE REGISTERED WORK AS A MATTER OF LAW

Plaintiffs’ motion concludes by asking for judgment “on its claim that VTW had access to Timberpeg’s protected work.” Plaintiffs have totally failed to demonstrate that as an undisputed fact.

Plaintiffs’ claim that the plans were on public file with the Town of Salisbury “prior to” VTW’s design work is not supported by their evidence, which clearly shows only that they were on file after the VTW frame was erected. Disputed Fact B(1).

Plaintiffs’ claim that Isbitski shared the 1999 plans with defendants is irrelevant, as those plans are not at issue here. Disputed Fact B(2).

Plaintiffs’ claim that Attorney Welch admitted that defendants saw the plans is also irrelevant, as it clearly refers to the 1999 plans, not the plans at issue here. Disputed Fact B(3).

Moreover, the fact that both parties are dealing with a mutual third party only permits, but does not require, an inference of an opportunity to review the plans. The language used by plaintiffs themselves (Memo at 12) and based on Nimmer is:

An opportunity to review the plans may be inferred . . . when the plaintiff and defendant were both dealing with a mutual third party over the same period of time.

Under the circumstances here, where there is no evidence at all that defendants ever saw the registered plans, whether defendants had “an opportunity to review the plans” remains disputed and a jury question.⁷

CONCLUSION

For the above reason, defendants respectfully request that the Court deny both aspects of plaintiffs motion for partial summary judgment.

Date: July 6, 2007

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

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

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⁷ Even where the “access” inference is made, that still does not require a finding of copying but, if “substantial similarity” is also shown, allows but does not require such a finding to be made. In other words, this remains a jury issue.

Exhibits

Ex. 1	Blow up of plotting and revision dates in <u>plaintiffs'</u> Ex. 11	September 2001
Ex. 2	Cole fax covering Hearthstone Homes photo	08/09/01
Ex. 3	Hearthstone photo	pre-2001
Ex. 4	Timberpeg Services, Inc. frame based on Hearthstone Homes design	08/31/07
Ex. 5	Page from Hearthstone Homes catalogue showing logo	
Ex. 6	Cole Deposition excerpts, pp. 1, 28-46	03/31/04
Ex. 7	Cole Affidavit I	09/16/04
Ex. 8	Cover and excerpts from "Artisan" magazine, with R. Lear design	2000

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 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:

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