

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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| T-Peg, Inc. and Timberpeg East, Inc.          | ) |                |
|   | ) |                |
| Plaintiff,                                    | ) |                |
|   | ) |                |
| v.  | ) | No. C-03-462-M |
|   | ) |                |
| Vermont Timber Works, Inc. and Douglas Friant | ) |                |
|   | ) |                |
| Defendants.                                   | ) |                |
| _____   | ) |                |

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ 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**

NOW COME Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (collectively “Timberpeg”) and respectfully submit the following memorandum in opposition to Defendants’ Motion for Judgment on the Pleadings (Docket Entry 125).

**PRELIMINARY STATEMENT**

Defendants, Vermont Timber Works, Inc. and Douglas Friant (collectively “VTW”), purport to seek judgment on the pleadings as to claims of (i) infringement of Timberpeg’s “plans,” i.e., technical drawings, (ii) the Deposit Agreement, and (iii) designs/plans that predate the copyrighted architectural work at issue in this lawsuit. Though styled as a motion for judgment on the pleadings pursuant to Rule 12(c), VTW’s motion is really a combination motion to strike and motion *in limine*. The real intent of VTW’s motion is to strike large swaths of Timberpeg’s amended complaint in hopes of carving away important and damaging factual

elements of Timberpeg's legitimate infringement claim. VTW's motion is misconceived at best and its arguments fail to establish any basis for the relief it seeks.

### **ARGUMENT**

Although captioned a motion for judgment on the pleadings, the predominant relief VTW seeks is the striking of certain allegations from Timberpeg's amended complaint and the exclusion of certain evidence at trial. While VTW cites the standard governing Rule 12(c) motions, nowhere does VTW tie its arguments to that standard. Instead, VTW merely argues to strike certain allegations and to preclude certain evidence without offering this Court the standards governing those motions. This is likely because, under those standards, VTW cannot prevail.

At the outset, VTW's motion to strike is untimely and should be denied on that ground alone. Fedederal Rule of Civil Procedure 12(f) generally requires a motion to strike to be filed before answering a pleading or within 20 days after service of a pleading that requires no response. VTW answered Timberpeg's amended complaint more than two years ago (Docket Entry 59) and VTW fails to establish any reason why striking allegations of Timberpeg's amended complaint is now warranted.

Even assuming VTW's motion is timely, VTW bears a heavy burden in establishing entitlement to an order striking Timberpeg's allegations. To prevail on a motion to strike, which is the true nature of the instant motion, VTW must generally make two showings. First, VTW must demonstrate that the challenged allegations are clearly unrelated to Timberpeg's claims, see Porter v. Int'l Bus. Mach. Corp., 21 F.Supp.2d 829, 831 (N.D. Ill. 1998), and, second, that VTW will be prejudiced by permitting those allegations to remain in the pleading, see Tompkins v. R.J. Reynolds Tobacco Co., 92 F. Supp.2d 606, 619 (N.D.N.Y. 2000). To demonstrate prejudice,

VTW must show that the allegations it challenges confuse the issue, among other similar concerns. See Oneida Indian Nation of New York v. New York, 194 F.Supp.2d 104, 117 (N.D.N.Y. 2002).

As discussed below, Timberpeg has never pressed the “claims” described by VTW (thereby making its purported motion for judgment on the pleadings moot) and the allegations VTW would like to strike are plainly relevant to Timberpeg’s actual claims.

**A. Timberpeg’s Allegations of “Plans” Reference Timberpeg’s Claims For Infringement Of Its Architectural Work**

VTW asserts that by referring to the copyrighted architectural plans as “Plans” throughout its amended complaint, Timberpeg is somehow attempting to assert dual claims under 17 U.S.C § 102 for infringement of an “architectural work” and infringement of a “pictorial, graphic, or sculptural work.” Timberpeg has never sought an infringement claim on the status of its architectural plans as a “pictorial, graphic or sculptural work” under the Copyright Act nor do its allegations suggest anything of the sort.<sup>1</sup>

Architectural plans may qualify for copyright protection under two separate categories of 17 U.S.C. § 102. Architectural plans may be registered as a “pictorial, graphic or sculptural work,” which is defined in the Copyright Act to include “technical drawings, including architectural plans.” 17 U.S.C. § 101. Alternatively, architectural plans may be registered as an “architectural work,” which is separately defined in the Copyright Act as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.” Id. The distinction between the two categories of work is significant since, as well documented in this case already, copyright protection for an “architectural work” is superior to that afforded a “pictorial, graphic or sculptural work” under the Copyright Act. See 1

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<sup>1</sup> This is the type of issue which, in New Hampshire, would ordinarily be handled by a phone call between counsel rather than motion practice.

M. Nimmer & D. Nimmer, Nimmer on Copyright § 2.20, at 2-213 to 2-219 (2003) (explaining the greater protections afforded architectural plans as an architectural work).

VTW argues that Timberpeg's reference to "Plans" throughout its amended complaint has the singular meaning of "technical drawing," which is a term that appears under the definition for "pictorial, graphic or sculptural work." As noted above, however, "architectural plans" appears in the definitions for both "pictorial, graphic or sculptural work" and "architectural work." See 17 U.S.C. § 101. Therefore, contrary to VTW's assertions, Timberpeg's reference to "Plans" is appropriate shorthand for an architectural work. What is more, the amended complaint unequivocally identifies that Timberpeg is pursuing a claim for infringement of an architectural work, not a technical drawing. Paragraph 17 of the amended complaint, for example, plainly states: "On May 18, 2001, Timberpeg registered the Plans with the United States Copyright Office as an *architectural work*." (emphasis added). This is also the election Timberpeg made when it registered the architectural plans with the United States Copyright Office.<sup>2</sup>

Nowhere among the remaining allegations of the amended complaint does Timberpeg suggest that its "Plans" are a technical drawing or that it is pursuing a claim for infringement of a "pictorial, graphic or sculptural work." No confusion as to the nature of Timberpeg's infringement claim is created by the reference to "Plans" in the amended complaint and for VTW to claim otherwise is nonsense. As such, VTW is not entitled to an order striking paragraphs 17,

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<sup>2</sup> Timberpeg has been clear from the very beginning about the nature of its copyright claim. Indeed, even the initial demand letter Timberpeg sent to VTW identified Timberpeg's copyright claim as one for an architectural work pursuant to the Architectural Works Copyright Act of 1990.

22, 44, 45, 77 and 79 of Timberpeg's amended complaint, which are essential to the factual underpinnings of Timberpeg's legitimate claim for infringement of its architectural work.<sup>3</sup>

**B. Timberpeg's Allegations Concerning The Deposit Agreement And Prior Designs Are Relevant To Its Infringement Claim**

VTW next argues that Timberpeg has asserted claims relating to the Deposit Agreement signed by Mr. Isbitski and designs that preceded the April 2001 copyrighted architectural work at issue in this lawsuit. Again, Timberpeg has never pursued such claims against VTW and it is disingenuous for VTW to suggest otherwise. In the absence of such claims, a motion for judgment on the pleadings provides no relief. The allegations concerning the Deposit Agreement and prior plans, however, are relevant to Timberpeg's claims and are admissible at trial. As set forth below, therefore, VTW's disguised motion *in limine* or to strike lacks merit.

Contrary to VTW's argument, the allegations at issue are plainly relevant to copyright infringement liability in this action. The recitation of the history of Timberpeg's and VTW's relationship with Mr. Isbitski, including Mr. Isbitski's acceptance of the terms of Timberpeg's Deposit Agreement and the architectural plans Timberpeg produced over the course of its relationship with Mr. Isbitski, provides the trier of fact with a chronology of events that adds context to Timberpeg's infringement claim. The Deposit Agreement, for example, confirms Mr. Isbitski agreed that all iterations of architectural plans created by Timberpeg (not just the 1999 plans) were protected by copyright and that he understood his use of those plans was restricted. Whether VTW was ever aware of the Deposit Agreement between Timberpeg and Mr. Isbitski presents a factual dispute that still remains to be proven at trial. At a minimum, VTW's admission that it reviewed Timberpeg's 1999 plans supports an inference that it reviewed other Timberpeg documents, including the Deposit Agreement.

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<sup>3</sup> To the extent this shorthand creates any confusion, the remedy is to clarify the amended complaint rather than the draconian relief VTW seeks.

VTW's admission that it reviewed the 1999 plans also supports an inference that VTW reviewed subsequent copyrighted plans. The First Circuit has made clear that VTW's various counsels' letters admitting VTW's review of the Timberpeg plans may be evidence of direct copying. T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 111 (1st Cir. 2006). That VTW reviewed the 1999 plans is further evidence of direct copying: VTW knew Mr. Isbitski was continuing to work with Timberpeg and a jury could certainly infer that VTW, despite its protestations to the contrary, reviewed and utilized all Timberpeg plans.<sup>4</sup> This is particularly the case given the multitude of similarities between VTW's frame and Timberpeg's architectural work identified by the First Circuit. See T-Peg, Inc., 459 F.3d at 112-15.

Similarly, should this Court deny Timberpeg's motion for summary judgment as to access, the 1999 plans are relevant because they demonstrate that VTW and Timberpeg had simultaneous dealings with Mr. Isbitski, which supports Timberpeg's indirect copying theory. Access generally must be established circumstantially or inferentially, and the various sets of Timberpeg plans comprise part of Timberpeg's circumstantial proof of access.<sup>5</sup> It bears emphasis that it is undisputed that VTW reviewed the 1999 plans. That fact supports an inference that VTW had access to subsequent sets of plans, including the copyrighted set. The September 2001 plans, which mirror the copyrighted set but also contain the so-called bent frame system, also support that inferential proof, because it was only after Timberpeg produced the September set of plans that VTW prepared shop drawings of its timberframe.<sup>6</sup>

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<sup>4</sup> That VTW knew Mr. Isbitski was working with Timberpeg and VTW simultaneously is also inferred from handwritten notes of Kimberly Hentschel, a former VTW employee, taken during a conversation with Mr. Isbitski, which states "Us or Timberpeg." Transcript of Deposition of Kimberly Hentschel on 11/5/04 at 95-97, attached hereto as Exhibit A.

<sup>5</sup> Timberpeg respectfully refers this Court to Timberpeg's Memorandum in support of its Motion for Partial Summary Judgment filed June 3, 2007 for discussion and authority concerning access.

<sup>6</sup> The September 2001 plans are also relevant to copyright liability because it is well established that copyright protection extends to derivative works. As one court has stated the proposition, "[w]here the same creator owns both the original and derivative copyright, the only sound interpretation of the Copyright Act is that the derivative

Finally, VTW's review of the 1999 plans supports Timberpeg's claim for willful infringement. Even if VTW never reviewed subsequent plans, VTW, having reviewed the 1999 plans, deliberately turned a blind eye to the existence of subsequent plans by allowing Mr. Isbitski to convey instructions over the telephone about the placement of beams that included detail down to fractions of inches, resulting in a strikingly similar design. Those facts, in other words, easily support an inference of willful conduct.

As VTW cannot demonstrate that the allegations it seeks to strike are not relevant to Timberpeg's claims, VTW also cannot establish any prejudice it will suffer as a result of the allegations it seeks to strike and/or exclude from evidence. VTW asserts only that Timberpeg is attempting to mislead the Court, which, as set forth above, is not the case. While VTW no doubt wishes the evidence did not exist, as the evidence reveals conduct VTW wants to keep from the jury, VTW cannot possibly contend that the allegations are irrelevant to Timberpeg's claims.

Having failed to establish that the allegations VTW seeks to strike are irrelevant to any claims, or that VTW will suffer any prejudice by those allegations remaining in this action, VTW is not entitled to an order striking paragraphs 11 through 15 and 40 of Timberpeg's amended complaint or excluding related evidence at trial.

### CONCLUSION

For the foregoing reasons, Timberpeg respectfully requests that this Honorable Court deny VTW's Motion For Judgment on the Pleadings.

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work carries forward all preexisting copyrights in the original work." Richmond Homes Management, Inc. v. Raintree, Inc., 862 F. Supp. 1517, 1525 (W.D. Va. 1994), rev'd on other grounds, 66 F.3d 316 (4<sup>th</sup> Cir. 1995); see also Imperial Homes Corp. v. Lamont, 458 F.2d. 895, 898 (5<sup>th</sup> Cir. 1972).

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: July 16, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, July 16, 2007, a copy of the foregoing was transmitted to W.E. Whittington, Esquire in accordance with the Court's Administrative Procedures of Electronic Filing.

/s/ Jonathan M. Shirley