

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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|-----------------------------|-------------------|
| T-PEG, INC and |) |
| TIMBERPEG EAST, INC., |) |
| Plaintiffs, |) |
| |) |
| vs. |) No. 03-CV-462-M |
| |) |
| VERMONT TIMBER WORKS, INC., |) |
| and DOUGLAS FRIANT, |) |
| Defendants. |) |

DEFENDANTS’ REPLY MEMO SUPPORTING
THEIR MOTION FOR SUMMARY JUDGMENT BASED ON
PLAINTIFFS’ LACK OF STANDING

This case has proceeded through extensive interrogatories, requests to admit, depositions, and motions based on plaintiffs’ Complaint and Amended Complaint, and documents filed with the U.S. Copyright Office. Defendants have relied on the information provided in preparing their defense. Now that discovery is concluded and a summary judgment motion is on the table, plaintiffs attempt to completely revise their theories and positions, and now rely on entirely new documents and even undated, unsigned drafts of a purported document which no one even authenticates:

- Until now, plaintiffs have contended that the “architectural work” at issue is that embodied in the five pages of architectural plans dated 4/20/01 and submitted with the copyright registration. Now they claim it is the alleged “architectural work” embodied in a 3/26/01 floorplan hand-sketched by Lynn Cole (and never registered with the Copyright Office).
- Until now, plaintiffs have contended that the “architectural work” was created by non-party Timberpeg Design Services, Inc. as a “work-for-hire” for T-Peg, Inc. Now they claim it was authored by Lynn Cole on behalf of Timberpeg East, Inc. and that a generic “co-ownership” interest of “any copyrightable material” had been previously conveyed by Timberpeg East to T-Peg, Inc. (But no such authorship, joint authorship, or “co-ownership” of the alleged work are set forth in the copyright registration.)

- Until now, plaintiffs have argued that the unsigned, undated, unauthenticated purported “contract” supports their contention that T-Peg assigned a non-exclusive license to Timberpeg East. Now that it has become clear that a non-exclusive license does not give standing, they contend that the document was a transfer of “co-ownership” from Timberpeg East to T-Peg, Inc.

As shown below, plaintiffs’ objection and affidavits attempt to completely revise the facts from their earlier positions, are inconsistent with their Copyright Office filing and discovery responses in this case, and completely ignore the Section 411 requirement that “no action for infringement . . . shall be instituted until registration of the copyright claim has been made in accordance with this title.”

1. No Registration By Timberpeg East, Inc.

Nothing in plaintiffs’ opposition or attachments shows a registration by TEI.

Registration by the plaintiff is an absolute, jurisdictional prerequisite to the enforcement of the copyright. 17 U.S.C. §411(a). See also, M.G.B. Homes v. Ameron Hones, 903 F. 2d 1486, 1488 (11th Cir. 1990) (“registration requirement is a jurisdictional prerequisite to an infringement suit”); Morgan, Inc. v. White Rock Distilleries, Inc., 230 F. Supp. 2d 104, 107 (D. Me. 2002) (same).

Plaintiffs have tried for four years to mask this defect by creative pleading, such as “collective” definitions which mysteriously combine any entity which includes “Timberpeg” in its name, whether the entity is a party to the suit, a registrant of the copyright, or not. This is very similar to the Morgan case, where the court noted that

The amended complaint later refers to Morgan, Inc. and Morgan Howarth collectively as “Morgan.” This amalgamated reference is the

predicate for Plaintiffs' ambiguous allegation that "Morgan owns a valid copyright in each of the photographs."¹

230 F. Supp. At 107.

TEI has not registered any copyright, either as author or claimant. It has no standing to sue, and there is no subject matter jurisdiction over its claims. Its claims must be dismissed.

2. Plaintiffs' New Position – That Lynn Cole Of TEI Authored The Work – Is Contrary To Plaintiff's Affidavits/Admissions In The Case

Plaintiffs' opposition memo (at 5-7) contains an entirely new position – that TEI's Lynn Cole was the author of the architectural work as a work-for-hire for TEI. Plaintiffs' newly-asserted contention is trumped by its prior pleadings, interrogatory responses and admissions;² and does not defeat the motion for summary judgment, for several reasons.

First, the Court should not accept the new contention that Lynn Cole was the author because it is entirely at odds with plaintiffs' prior interrogatory responses – on which

¹ This is directly comparable to the "amalgamated" ownership allegation in the Amended Complaint here, which is Paragraph 34: "By virtue of its registration of the Plans with the United States Copyright Office, Timberpeg [defined in Para. 2 as "T-Peg, Inc. and Timberpeg East, Inc. collectively and individually"] is the owner of the copyright for the Plans" The registration (Document 126, Ex. 2) is solely in the name of T-Peg, Inc., both as "Author" and "Claimant."

As the Court is well aware, defendants have throughout this case demanded information and discovery based on each separate plaintiff, and plaintiffs have studiously avoided providing it.

² Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c); DeNovellis v. Shalala, 124 F. 3d 298, 305 (1st Cir. 1997). In addition, summary judgment must be granted if the nonmoving party "rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Id.

defendants relied – and therefore lacks any credibility. Plaintiffs’ interrogatory responses failed to disclose any design time by Lynn Cole or TEI, and contended that Timberpeg Services, Inc. did the design work on a “work-for-hire basis” for T-Peg, Inc.:

Interrog 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.

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, four (4) hours of engineering time, six (6) hours of design checking, three (3) hours on design details, and nine (9) hours on conventional framing drafting time on the Isbitski project.

Memo Supporting MSJ, Doc. 126-4, at 2 (emphasis added).³

Second, the claim of Lynn Cole authorship is entirely at odds with plaintiffs’ prior position in opposing the prior motion for summary judgment, Document 24. Defendant VTW raised the lack of standing issue as to TEI in their initial motion for summary judgment, Document 23, at pp. 17-18 (the issue was never ruled on). Plaintiffs’ opposition, Document 24, at pp. 22-24, contained no hint of its current position that Lynn Cole authored the architectural work, and that the “architectural work” at issue here is that embodied in the March 2001 Cole sketches.⁴

³ Of course, as demonstrated in defendants’ primary memo in support at 7-8, it was not possible for Timberpeg Services, Inc. to operate on a work-for-hire basis.

⁴ The next heading of this reply memo (at 7-8) will demonstrate how fundamentally this new assertion alters the case, and how the new argument is completely unsupported.

Third, the Cole Affidavit (version 3) on which defendants now rely is entirely different from his prior affidavit (version 1), completely undercutting its credibility.

Cole Aff. I, Para 3 (Document 24, Ex. E):

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 completed a revised set of preliminary architectural plans for Mr. Isbitski, and delivered them to him for his further review comment.

Cole Aff. III, Para 3 (Document 135-4):

I met with Mr. Isbitski in early 2001. Mr. Isbitski was dissatisfied with the 1999 plans. We discussed what he did not like about the plans and he asked me to revise the plans. I ended up drafting entirely new plans by hand in order to satisfy Mr. Isbitski. Mr. Isbitski liked this plan and I worked with him to refine it. A copy of my hand-drawn plans is attached as Exhibit 1.

Cole's first affidavit was executed September 16, 2004, when plaintiffs were still trying to serve Isbitski and it appeared he would eventually be a witness to testify as to his own role in the plans.

Cole's current (third) affidavit was executed July 25, 2007, when it was long apparent that no one will locate Isbitski and he will not be a witness.

Moreover, the notion that Cole created "entirely new plans," on his own, which Isbitski simply "liked," is not only inconsistent with his 2004 affidavit but entirely inconsistent with Cole's own description of a hands-on Isbitski, whose involvement in designing this project went all the way back to 1996-98 – pre-Timberpeg – when Cole was a timber frame salesman for Yankee Barn and Isbitski was a Yankee Barn customer, and thereafter to Old Hampshire Designs where Isbitski went next, before going to Timberpeg. As testified by Cole,

I first met him [in '96, '97 maybe '98 at the latest] when I worked at Yankee Barn. . . . I 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. . . .

Q. Do you recall what he was considering building at Yankee Barn?

A. A timber frame home. . . .

Q. Your next contact with him was at Timberpeg East?

A. Yes.

Q. Did he come to you directly, or did you have contact with him through Old Hampshire Designs?

A. [H]e came in, I believe it was arranged through Old Hampshire Designs, I can't specifically recall.

Q. You're not able to say if he'd already been through their design work with Old Hampshire Design?

A. I know he had, yes, oh, definitely.

Cole Dep., Document 23, Ex. 14 at pp. 14-16. Cole also testified about Isbitski clipping a photo “because he wanted to show me how he wanted the timber frame posts at the stair locations to be.” Id. a 28 (emphasis added). Clearly this was not an idea which originated with Cole.⁵

The earlier affidavit constitutes an admission by Cole and plaintiffs that the floorplan, which Cole now claims he [Cole] then sketched,⁶ was indeed the design of Isbitski, not of Cole.

Fourth, Cole's rough, hand sketches which plaintiffs now contend represent his authorship – even if they were Cole's own and not Isbitski's – were mere “concept” or “idea,” not copyrightable “expression.” These facts are squarely on point with M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F. 2d 1486 (11th Cir. 1990), where the plaintiff's builder's president “produced . . . a thumbnail sketch of the floor plan he desired for the “Islander II” and then had a

⁵ Moreover, if Cole was the originator, why did he send the diagram to Timberpeg Design Services with the request that Timberpeg Services “emulate the design”? Document 23, Ex. 8. If he were the creator, he would have just instructed his own draftsman at TEI to do it.

⁶ As conceded by plaintiffs, Opposition at 5, “one who has slavishly or mechanically copied from others may not claim to be an author.” Citing Nimmer.

The Supreme Court itself has emphasized this point: “The selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. . . .an author who claims infringement must prove the existence of intellectual production, of thought, and conception.”

third party independent contractor create the architectural plans based on them. The Court found that this contribution, plus approval authority once the plans had been rendered, did not make him a “creator” of the copyrighted work, but that these were “ideas, conveyed to the author of the copyrighted work,” and were “uncopyrightable.” 903 F. 2d at 1493.

Indeed, plaintiffs must have been aware of this initially, as their Amended Complaint identified the “architectural work” they lay claim to as “the Plans,” defined in Paras. 16 and 17 as the plans filed with the Copyright Office, not the Cole sketches. Thus, for example, Para. 32 of the Amended Complaint alleges that “the Plans [not the Cole sketches] are an “architectural work,” and Paras. 38 and 46 allege that “the Isbitski House is substantially similar to the architectural work embodied in the Plans [not the Cole sketches].” The Complaint and Amended Complaint are entirely based on “the Plans” and do not mention the Cole hand sketches at all, let alone allege that the sketches embody the architectural work they now claim to have authored. Nor were the Cole sketches filed with the copyright application, as would be required, of course, if they were the claimed expression of the architectural work.

3. An Attempted New Theory Based On The Cole Sketches Is Unsupportable, And If It Is Allowed Defendants Should Have The Opportunity To Take Discovery About It

Unlike the plans registered by T-Peg with the Copyright Office, the Cole sketches do contain some information about a timber frame. But it is information which definitively demonstrates that the VTW frame is completely different. To clarify the information, defendants reattach pages 4, 10 and 11 of the Cole’s sketches, in highlighted and clean versions, as Exhibit 8 (these were in Document 135-4 of plaintiffs’ submission).

Cole’s sketches attached to his current affidavit, Version 3, all contain the code “P20K-L-44’ 12/12,” which was de-coded by plaintiffs’ chief of design, Vincent, in his deposition:

Q. Can you tell us what that [P20K8L] means?

A. Our terminology, that means a purlin frame 20 feet with an eight foot knee w and a loft brace and eight foot shed extension.

Vincent Dep., Document 23, Ex. 12 at 87. (emphasis added). A “purlin frame” is entirely different from the “bent style” frame designed and erected by VTW, as admitted both by plaintiffs’ Cole (Document 23, Ex. 14, at 33-37 and 39-40) and Vincent (Document 23, Ex. 13, at 90-106, especially p. 90 “This is a, definitely a change in the framing” and 106 “The framing would be different, definitely”).

Moreover, defendants have discovered designs remarkably similar to the sketches allegedly originated by Cole in the Yankee Barn catalogues, Ex. 9 attached, and believe it entirely likely that the dimensions and/or shapes used by Cole actually originated with Yankee Barn. The originality of the Cole sketches was not pursued in discovery because defendants understood the “work” in question to be that contained in the registered plans.

If plaintiffs are now permitted to proceed on the alleged “architectural work” embodied in the unregistered Cole sketches, this adds an entire new dimension because there are timberframe sketches included (albeit entirely different from the VTW frame), and defendants believes the plans originated, at least in part, at Yankee Barn. Therefore the Court should reopen discovery for the sole purpose of allowing defendants to take discovery on these issues as well as the details of how the sketches were created.

4. The Facts And Law Do Not Support A “Joint Work” Theory

Plaintiffs now contend (Opp. Memo at 7-10) that T-Peg, Inc. is a co-owner of an “undivided share” in the copyright created and owned by Timberpeg East based on an alleged “agreement that existed before Cole designed the plans [apparently meaning “sketches”].”

Plaintiffs start (Memo at 7) with a completely incorrect definition of the term “joint work,” which they assert can be based on a “transfer[], assign[ment] or convey[ance].”

But as noted in plaintiffs’ footnote 2, this contention at odds with the Copyright Act, which defines “joint work” as “a work [1] prepared by two or more authors with the [2] intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. §101. They quote Nimmer, who is certainly the preeminent U. S. copyright authority, but they fail to note the distinction between Nimmer’s explication of the law and his views of what it ought to be. As quoted by plaintiff, Nimmer was expressing his view, a view which has not been accepted by any of the numerous courts considering the issue. Thus, it is uniformly held that the mere “assignment” of an interest does not make the assignee a “joint author” with authorship rights, but that each of the “joint authors” must have contributed original, copyrightable material and that they must have intended their works to be integrated into a unitary whole. See, e.g., Thomson v. Larson, 147 F. 3d 195, 200 (2d Cir. 1998) (“collaboration alone is not sufficient to establish joint authorship. Rather, the contribution of each author must be independently copyrightable[;] this is the position taken by the case law and endorsed by the agency administering the Copyright Act.”); Seshadri v. Kasraian, 130 F.3d 798, 803 (7th Cir.1997) (same); Childress v. Taylor, 945 F. 2d 500, 507 (2d Cir. 1991) (same, string-citing numerous additional authorities).

Here, there is no suggestion that T-Peg, Inc. performed any design role. No independently copyrightable contribution is mentioned. The supplemental interrogatory response flatly admits that “T-Peg, Inc. did not directly perform any design time on the Isbitski project.” Thus it could not have been a “joint work.”

Plaintiffs' new "joint work" contention is also contradictory to their registration statement, Document 125, Ex. 1 & 2, which lists only a single author, T-Peg, as a "work for hire." In this regard, the Copyright Office's instructions for the form (Ex. 2) are also instructive; they state:

Space 2: Author(s)

After reading these instructions, decide who are the "authors" of this work for copyright purposes. Then, unless the work is a "collective work," give the requested information about every "author" who contributed any appreciable amount of copyrightable matter to this version of the work. If you need further space, request Continuation Sheets.

Emphasis added.

It is clear from the undisputed evidence that this was not a "joint work" authored jointly by T-Peg, Inc. and Timberpeg East, Inc.⁷

5. The Purported "Contract" Is Unauthenticated And Should Not Be Considered

In order to articulate their "joint work" theory, plaintiffs rely (Memo at 9) on what they claim is a "long-standing agreement whereby Timberpeg East conveys 'co-ownership and co-claimant rights' to T-Peg." However, this overstates the evidence by artful citation to an unauthenticated document.

The document in question is Ex. 1 to the Neroni Affidavit, a document which states "Contract" at the top but which is undated and unsigned. In point of fact, it is wholly unauthenticated, too. Neroni nowhere identifies this contract as an actual contract, does not state

⁷ Moreover, if plaintiffs had raised these assertions in their Complaint, Amended Complaint, other pleadings and discovery responses, defendants would have taken entirely different discovery and would have raised a series of different defenses relating to joint work requirements.

when it was created (he obviously has no idea), and does not affirmatively state that it was actually executed, in this or any other form. It is entirely possible the document was a draft, or that it was created after the relevant events here.

Moreover, it is too late in the day for plaintiffs to take this position. If they had asserted their “joint work”/assignment theory while discovery was still open, defendants definitely would have addressed these issues.

And, of course, the self-serving statement that “T-Peg and Timberpeg East have operated consistent with the terms of their agreement [assuming that the document was in fact an agreement] for the past 20 years” is ridiculous. They have never registered this, or any other work, as a “joint work.” And if the document gave T-Peg the authority to register the copyright “in the name of T-Peg, Inc. and Timberpeg East, Inc.,” why didn’t T-Peg do so? The Copyright Office register does not reflect any work registered jointly in the name of T-Peg and Timberpeg East.

6. Plaintiffs’ Downey Authorship Scenario Is Absurd

Finally, plaintiffs’ spin an alternative theory (Memo at 10) which is as tortured as it is ridiculous.

Plaintiffs state that authorship by Downey of Timberpeg Services, Inc. is defendants’ argument. This is absurd. As shown in defendants’ principal memo (at 4), this concept did not originate with defendants but with plaintiffs themselves and their witness, Jonathan Vincent.

Plaintiffs next argue that the Downey work “would have vested automatically in Timberpeg Services, Inc.” [a non-party]. That is unavailing, however, because there is no registration by Timberpeg Services or assertion of authorship by Timberpeg Services.

Plaintiffs next argue that the Timberpeg Services copyright was then “transferred in full from Timberpeg Services to Timberpeg East” under “the agreement between TDS and Timberpeg East.” This has several flaws. TDS was not even in existence after 2000, when the work here was created. There is no “assumption” agreement whereby Timberpeg Services Inc. received copyrights from TDS. And none of these supposed, hypothetical arrangements is revealed in the registration filing.

Conclusion

What has happened here is that plaintiffs set out their case and their facts in their Complaint and Amended Complaint, but the discovery and the Copyright Office registrations and filings did not bear out their claims. Now, with a summary judgment on the table, plaintiffs have attempted to recast their claims and the accompanying facts. The pleadings, Copyright Office filings, interrogatory responses, depositions and documents do not support the new theory. The shoe does not fit.

The motion for summary judgment should be granted.

Date: August 13, 2007

VERMONT TIMBER WORKS, INC.
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Defendants,

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 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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