

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

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

**OBJECTION TO DEFENDANTS’ MOTION FOR LEAVE TO FILE SUPPLEMENTAL
MEMORANDUM SUPPORTING THEIR MOTION FOR SUMMARY JUDGMENT II
BASED ON NON-COPYRIGHTABILITY**

NOW COME Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (collectively, “Timberpeg”), and respectfully object to Defendants’ Motion for Leave to File Supplemental Memorandum Supporting Their Motion for Summary Judgment II Based on Non-Copyrightability and state as follows:

INTRODUCTION

Defendants Vermont Timber Works, Inc. and Douglas Friant (collectively, “VTW”) seek leave to file a supplemental memorandum in support of their revived motion for summary judgment based on non-copyrightability, which they originally filed in November 2004 and which they renewed after the decision of the United States Court of Appeals for the First Circuit issued. VTW asserts that recent developments in the law relating to the application of the “element-sorting process” to copyrighted works protected under the Architectural Works Protection Act (“AWCPA”) compels the supplemental memorandum. As set forth below, VTW’s proposed supplemental memorandum adds nothing to support the premise of VTW’s

motion, which premise contradicts the statutory language of and decisional law construing the AWCPA, including the First Circuit's decision in this case. For these reasons the supplemental memorandum will not assist the Court, is unnecessary and VTW's motion should be denied.

STATUS OF THE PLEADINGS

VTW's initial memorandum in support of VTW's motion for summary judgment on copyrightability, filed in 2004, argued for the stripping away of individual, non-copyrightable features from Timberpeg's design and examining only those remaining features in assessing infringement. VTW's motion lacked citation to any case supporting this theory and pointed only to excerpts from the AWCPA, though omitting mention of those AWCPA provisions that directly undercut VTW's strained construction. VTW's Memorandum of 11/1/2004 at 4-9.

Timberpeg's objection pointed out to this Court that VTW's proposed AWCPA construction and application violated the AWCPA itself and had been thoroughly debunked by decisions that had already analyzed VTW's theory. Timberpeg further noted that the AWCPA extends copyright protection to the design of a building, in any tangible meaning of expression, and that the architectural work protected "includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." 17 U.S.C. § 102(a)(8); see Timberpeg Memorandum of 11/30/04 at 3-6. By the statutory language, an individual standard feature does not get copyright protection, but the aggregate arrangement of the individual features into a building design does.

Timberpeg backed this, correct, interpretation with decisional law squarely on point. See Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002); Arthur Rutenberg Homes v. Maloney, 891 F.Supp. 1560 (M.D. Fla. 1995). In each of those cases the courts rejected VTW's proposed analysis and acknowledged what the AWCPA language compels: that the arrangement

of features and composition of spaces is what the AWCPA protects, regardless of whether any of those features independently merit protection. Timberpeg Memorandum of 11/30/04 at 4.

VTW reiterated this disaggregation argument in its objection to Timberpeg's partial summary judgment motion. VTW's Objection to Timberpeg's Motion for Partial Summary Judgment dated 7/6/2007 at 9-11. Again, VTW provided no support for the position. See id. Timberpeg replied with reference to the statutory language and supporting decisional law. Timberpeg Reply Brief of 7/18/07 at 2-4.

At no time in all of this briefing has VTW ever attempted to explain why the Sturdza and Maloney decisions do not compel denial of VTW's motion. Now, for the first time, VTW purports to proffer other, "recent" legal authority in support of VTW's disaggregation rubric. A closer look at that authority, however, reveals that it does not support the construction of the AWCPA VTW seeks, and VTW continues to avoid the decisional law Timberpeg cites that is on point.

DISCUSSION

I. The Authority VTW Cites In The Supplemental Memorandum Does Not Support VTW's Disaggregation Theory

VTW relies principally on three decisions, one from within the First Circuit and two from without. First, VTW points to the First Circuit's decision in Johnson v. Gordon, 409 F.3d 12, 17 (1st Cir. 2005). VTW characterizes Johnson as adopting the "dissection" or "separation" test for evaluating substantial similarity – a test VTW asserts compels dismissal of Timberpeg's infringement claim under its "non-copyrightable" theory. Gordon, which involved analysis of a claim for copyright infringement of a pop song, does not mandate dismissal of Timberpeg's infringement claim and, indeed, the First Circuit *cited* to Gordon in reaching its decision in this case. T-Peg, Inc., 459 F.3d at 108. In the appeal, the First Circuit pointed out that Johnson

directs courts to analyze the protectible aspects of the work, and that the protectible work at issue in this action is the design of the house (as opposed to any or a series of individual features of that house). Id. Rather than compelling dismissal, Gordon, in conjunction with the AWCPA's articulation of architectural copyright protection, guided the First Circuit's finding that Timberpeg stated a viable claim for copyright infringement. Id.

Second, VTW cites two decisions which it contends have "settled" copyright law with regard to application of the "elements sorting process" to architectural works. Both decisions, however, involve nearly identical fact patterns and stand for the unremarkable proposition that originality means creative input by the author. The cases do not state the proposition that the standard features of an architectural work must be disaggregated from that work in the infringement analysis. The first, Trek Leasing, Inc. v. United States, 66 Fed. Cl. 8 (Fed. Ct. Claims 2005), involved an infringement claim arising out of a copyrighted architectural plan that the plaintiff conceded was not original, but was instead comprised of elements required by standard plans furnished by the United States Postal Service as well as the BIA Pueblo Revival style. Id. at 7. The Trek Court observed that the work at issue lacked originality because the requirements of the postal service, not the creative input of the author, drove the design. Despite that, the Court did not hold that the design could not be copyrighted. Id. at 12. The second, Tiseo Architects v. B&B Pools Service, 495 F.3d 344 (6th Cir. 2007), involved an infringement claim arising out of a copyrighted site plan in which the design elements were dictated by zoning regulations and layout requirements imposed by the customer. Id. at 347. As in Trek, the copyrighted plan in Tiseo Architects involved a composition and arrangement of spaces driven by elements other than the creative input of the author.¹ Id.

¹ The decision in Tiseo Architects does not indicate whether the plans at issue were registered as an architectural work under 17 U.S.C. § 102(a)(8).

Neither Trek nor Tiseo Architects supports VTW's disaggregation theory. To the contrary, each decision examines the originality requirement for copyright protection, and requires creative input from the author in order to find originality. In this action, by contrast, the First Circuit recognized the originality of Timberpeg's design, stating:

As issue here is a particular combination of elements in Timberpeg's architectural work: a portion of a home featuring a timberframe with a backwards-L-shaped footprint, with a particular arrangement of posts, with certain dimensions and a bump-out along the western wall, featuring a central switchback staircase, with a lofted second floor of a certain floor area and in a certain location, with a certain roof pitch with certain dimensions, and certain wall heights.

T-Peg, Inc., 459 F.3d at 114. Unlike Trek and Tiseo Architects, the composition and arrangement of design elements in the plans were entirely the original work of Timberpeg.²

Timberpeg's plans are therefore entitled to full copyright protection as an original work. Trek and Tiseo Architects are not relevant to that analysis.

II. The First Circuit Has Already Identified Sufficient Originality In Timberpeg's Design

In addition to ignoring the Sturdza and Maloney decisions which reject VTW's theory, VTW also ignores the First Circuit Order which resolves the very issue VTW raises.³

The First Circuit ruled on appeal that VTW's frame and shop drawings are sufficiently similar to Timberpeg's plans so as, at a minimum, to allow the substantial similarity inquiry to go to a jury. T-Peg, Inc. et al. v. Vermont Timer Works, Inc. et al., 459 F.3d 97, 116 (1st Cir. 2006). The First Circuit based that decision on the undisputed facts about the Timberpeg design each side advanced in the context of governing law. As the First Circuit pointed out, the Copyright Act defines architectural works as:

² See Affidavit of Lynn Cole submitted in support of Timberpeg's Objection to VTW's Motion for Summary Judgment Based on Plaintiffs' Lack of Standing.

³ The originality inquiry appears to fall within the larger substantial similarity inquiry, in that substantial similarity focuses on the protectible aspects of the work. See, e.g., Sturdza, 281 F.3d at 1297.

the design of a building as embodied in any tangible medium of expression, including a building, architectural plans or drawings. *The work includes the overall form as well as the arrangement and composition of spaces and elements in the design*, but does not include individual standard features.

17 U.S.C. § 102(a)(8) (emphasis added). In delineating the scope of the protection afforded architectural works under the Copyright Act, the legislative history for the AWCPA notes:

[t]he phrase `arrangement and composition of spaces and elements' recognizes that: (1) creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectible whole; (2) an architect may incorporate new, protectible design elements into otherwise standard, unprotectible building features; and (3) interior architecture may be protected.

T-Peg, Inc., 459 F.3d at 110 (citing H.R. Rep. No. 101-735, *reprinted in* 1990 U.S.C.C.A.N. at 6949). As for individual features, while they may not be individually copyrightable, the combination of such standard features provides the focal point for the copyrightability of architectural works. Id. Contrary to VTW's arguments, "there is no separability test for architectural works." T-Peg, Inc., 459 F.3d at 110. As such, utilitarian features are not separated from an architectural work in order to determine those elements protected by copyright. Id. at 110.

When Timberpeg's plans were viewed through the lens of the AWCPA, the First Circuit found that Timberpeg's copyright claim was based "on a combination of elements, which, taken together, are protectible under the definition of an architectural work in 17 U.S.C. § 101." Id. at 115. The Court further concluded that VTW's frame and shop drawings were sufficiently similar to Timberpeg's plans with regard to the "overall form" of the building as well as the "arrangement and composition of spaces" to allow Timberpeg's claim to proceed. Id. at 116. The Court concluded that "the combination of elements here go beyond an idea into the realm of expression." Id. at 32-3 n. 8. Thus, the First Circuit rejected VTW's notion that that non-

original and standard design features must be separated out of Timberpeg's plans before undertaking the substantial similarity analysis.

CONCLUSION

For the foregoing reasons, Timberpeg respectfully requests that this Honorable Court deny both VTW's Motion for Summary Judgment II on "Non-Copyrightability" and its motion for leave to file a supplemental memorandum.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: March 21, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this day, March 21, 2008, 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