

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)
T-Peg, Inc. and Timberpeg East, Inc.)
)
Plaintiffs,)
)
v.)
)
Stanley J. Isbitski and Vermont Timber Works, Inc.)
)
Defendants.)
_____)

No. C-03-462-M

MOTION PURSUANT TO LOCAL RULE 7.2(e)(3)
FOR LEAVE TO FILE SURREPLY MEMORANDUM

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully move for leave to file a surreply memorandum to the reply of the defendant to Timberpeg’s objection to the defendant’s motion for summary judgment. In support of this motion, Timberpeg states as follows:

1. This action raises, principally, a claim of copyright infringement against the defendant Vermont Timber Works, Inc. (“VTW”). VTW has filed a motion for summary judgment, to which Timberpeg has objected and to which objection VTW has replied. In addition, Timberpeg has filed a cross motion for partial summary judgment to which VTW has not yet objected.

2. In its reply memorandum, VTW raises new issues not raised in its principal motion, including whether Timberpeg could validly copyright the architectural work reflected in the architectural plans that is the subject of this action.

3. In addition, VTW levels some serious charges at Timberpeg and its counsel. VTW accuses Timberpeg of bad faith, purposely misleading this Court, engaging in a preposterous and ludicrous manipulation of the Copyright Act, and completely falsifying some of the testimony in the record, among others. Timberpeg assumes that such charges are neither leveled without a serious belief in their truth, nor overlooked by this Court in evaluating Timberpeg's arguments and conduct.

4. Accordingly, Timberpeg seeks leave to file a brief surreply memorandum, as attached hereto as Exhibit A. The surreply is brief, and responds succinctly to some of the issues and harsh accusations in VTW's reply memorandum. Pursuant to LR 7.2(e), leave to file a surreply memorandum is within this Court's discretion, and Timberpeg requests that this Court exercise its discretion to entertain Timberpeg's brief surreply.

5. Counsel for VTW does not assent to the relief requested herein.

6. Due to the discretionary nature of the relief requested herein, no accompanying memorandum of law is necessary. See LR 7.2.

WHEREFORE, Timberpeg respectfully requests that this Court:

- A. Grant leave for Timberpeg to file a surreply as attached as Exhibit A; and
- B. Grant such further and other relief as this Court deems just, proper and equitable.

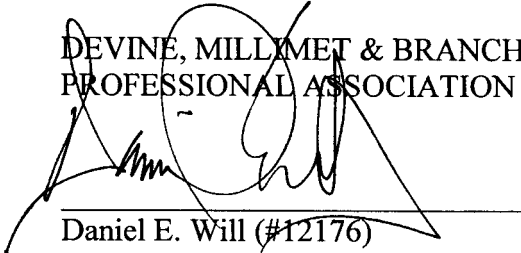
Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: October 12, 2004



Daniel E. Will (#12176)
111 Amherst Street
P.O. Box 719
Manchester, NH 03105-0719
(603) 669-1000

Of Counsel:

Stephen S. Woods, Esquire (#8240)
General Counsel for Plaintiffs
Timberpeg East, Inc.
c/o 68 Lyme Road
Hanover, NH 03755
(603) 643-6200

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.



Daniel E. Will (#12176)

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

T-Peg, Inc. and Timberpeg East, Inc.)	
)	
Plaintiff,)	
)	
v.)	No. C-03-462-M
)	
Stanley J. Isbitski and Vermont Timber Works, Inc.)	
)	
Defendants.)	
)	

PLAINTIFFS' SURREPLY MEMORANDUM

NOW COME, the Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully submit this Surreply Memorandum to the Reply of the defendant, Vermont Timber Works, Inc. (“VTW”), to Timberpeg’s Objection to VTW’s Motion for Summary Judgment, and state as follows:

1. VTW misquotes Timberpeg’s basis for its copyright action and misstates the law regarding copyright protection for derivative works. VTW states at Page 2 of its Reply: “Plaintiffs now concede that the [April 2001 plans] form the basis of this action.” At Page 5 of its Objection, however, Timberpeg clearly states that the “plans, and the architectural design they reflect, form the basis of this action” (emphasis added). To the extent Timberpeg’s September 2001 plans represent the same architectural design as embodied in the copyrighted April 2001 plans, the September 2001 plans are protected by the registration filed on the April 2001 plans. See Imperial Homes Corp. v. Lamont, 458 F.2d 895, 898 (5th Cir. 1972); Richmond Homes Management, Inc. v. Raintree, Inc., 862

F.Supp. 1517, 1525 (W.D. Va.1994) (“Where the same creator owns both the original and derivative copyrights, the only sound interpretation of the Copyright Act is that the derivative work carries forward all preexisting copyrights in the original work.”), rev’d on other grounds, 66 F. 3d 316 (4th Cir. 1995).

2. VTW’s third numbered response regarding access refers to Timberpeg’s Objection out of order and accuses Timberpeg of making an “irrelevant and purposely misleading” argument. Read in proper order, Timberpeg’s Objection demonstrates VTW’s access to Timberpeg’s copyrighted plans. Notably, VTW provides no explanation (other than calling Timberpeg’s argument “preposterous”) for VTW’s admission in VTW’s Motion To Dismiss that “Timberpeg specifically authorized the copying.” The underlying factual predicate for this statement is nothing less than VTW’s acknowledgement that it had the very thing (the copyrighted plans) that Timberpeg was alleging VTW had copied. VTW offers no alternative reading of this admission against interest, nor apparently could it given the very context of the statement within VTW’s Motion To Dismiss.

3. Further, VTW’s argument that its attorneys’ statements are “completely consistent” with VTW having received Timberpeg’s 1999 plans, see Defendant’s Reply at 3, is inconsistent with a plain reading of the letters themselves (e.g., “Vermont Timber Works, Inc. contracted with Mr. Isbitski to design a house framed to accommodate floor plans of his house.” & “Mr. Isbitski asked my client to design a frame to fit a portion of the floor plans of his house,” see Timberpeg’s Summary Judgment Appendix at Tabs G and H). Given (a) VTW’s acknowledgement that the copyrighted plans represented a new design as compared to the December 1999 plans; (b) the December 1999 plans

represented what Isbitski “did not want” (emphasis in original); and (c) Mr. Friant’s deposition testimony that Isbitski did not like the design of the 1999 plans, VTW’s counsel could only have been describing subsequent plans, which are copyright protected.

4. VTW’s fourth numbered argument regarding access also relies on a misunderstanding of both the definition of “copy” and copyright case law (as previously discussed) and the case law definition of access as fully briefed in Timberpeg’s Objection at Pages 16 through 20. VTW’s reliance on Yankee Candle Company, Inc. v. New England Candle Company, 14 F.Supp. 2nd 154 (D. Mass. 1998), is misplaced; Yankee Candle simply stands for the proposition that a store front within a mall does not reflect a sufficient building design as to merit architectural works’ protection. Timberpeg contends in this action that VTW’s frame copied Timberpeg’s architectural work.

5. VTW accuses Timberpeg of “complete falsification” regarding Timberpeg’s reference to Friant’s deposition testimony. Contrary to VTW’s allegation, a review of Friant’s deposition transcript reveals Friant’s confirmation of the identical distance between referenced points on the Timberpeg copyrighted plans and VTW’s shop drawings. Mr. Friant acknowledged as much on Page 139 of his deposition: “I will go as far as saying this. The frame over here is 44' X 29', okay? The small section of this plan that you’re showing me has roughly the same dimension, but it does not characterize a footprint of this plan. It just doesn’t.” While the deposition transcript accurately relates Friant’s discomfort with answering Timberpeg’s questions and Friant’s attempts to argue the implications of his answers, the transcript does show his acknowledgement of

multiple identical dimensions between Timberpeg's copyrighted plans and VTW's shop drawings.

6. VTW's reliance on the decisions Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002) and Boisson v. Banion, Ltd., 273 F.3d 262 (2d Cir. 2001) overlooks the fact that in each case the respective court appeals reversed the lower court's finding of no substantial similarity between the works at issue. The Sturdza decision, which involved infringement of architectural works, is instructive. The Plaintiff in Sturdza alleged that the Defendant had infringed her design of an embassy for the United Arab Emirates, see 281 F.3d at 1291. The United States Court of Appeals for the D.C. Circuit agreed with the District Court that there were certain elements of each design (domes, wind towers, parapets, arches, and decorative patterns) that by themselves were not protectible expression. Nonetheless, the court reasoned that even unprotectible elements must be considered in an overall analysis:

Considering the works as a whole is particularly important because protectible expression may arise through the ways in which artists combine even unprotectible elements. For example, while color is not protectible, the manner in which an artist "select[s], coordinate[s], and arrange[s]" color may be.

Id at 1296. (Citation omitted). For example, the court found that each of the designs used wind towers of essentially the same height and width so as to create "extremely similar building contours." As a result, "[t]he size, shape, and placement of [the defendants'] wind towers, parapets, and pointed domes, when viewed from the front, give [the defendants'] building a contour virtually identical to [the plaintiffs']". Id at 1299. Reviewing then the "overall look and feel" of the two Embassy designs at issue, the court concluded that the defendants' design was "sufficiently similar with respect to both

individual elements and overall look and feel for a reasonable jury to conclude that the two are substantially similar.” Id.

10. The expert report of Jonathan Vincent, Plaintiffs’ Summary Judgment Appendix at Tab C, contains an analysis consistent with the court’s analysis in Sturdza. VTW’s allegations that the footprint, dimensions, and post locations are the only “common elements” forming the basis of Timberpeg’s infringement analysis seeks to apply the same analysis rejected in Sturdza. Vincent’s expert report demonstrates the similarity of the overall dimensions, kitchen bump-out, stair location and design, loft size and location, height of walls, room locations, and accommodation for exterior windows and doors. See Vincent report. While any one of these elements may not be individually copyrightable, consistent with Sturdza, it is the creative combination of these elements that makes up Timberpeg’s copyrighted architectural work and it is the fact that VTW’s timber frame embodies a substantially similar expression that constitutes infringement. Uncited by VTW is a statement by the Sturdza court that “because substantial similarity is customarily an extremely close question of fact, summary judgment has traditionally been frowned upon in copyright litigation.” Sturdza, 281 F.3d at 1299. (Quotation and citation omitted).

11. VTW requests that the Court take judicial notice of a 350-year-old home in Newcastle, New Hampshire, with a footprint of 40' x 44' (The timber framed portion of the Timberpeg copyrighted plans is 28' x 44', see Tab 1 of VTW’s MSJ Appendix). VTW asks this Court to determine that Timberpeg could not have independently created its architectural work. One of the very cases of which VTW relies however, directly refutes such lack of “originality” arguments. In Boisson, the defendant attempted to

defend his allegedly infringing quilt designs by pointing to antique quilt designs that predated the Plaintiffs' designs. See 273 F. 3d at 270. The Boisson court rejected the defendant's argument: "Absent evidence of copying, an author is entitled to copyright protection from independently produced original work despite its identical nature to a prior work, because it is independent creation, and not novelty that is required." Id. See also Concrete Machinery Co., v. Classic Lawn Ornaments, Inc. 843 F.2d 600, 610 (1st Cir. 1988) ("[T]he common practice of defendants at trial in pointing out a similar work created in antiquity, or at least prior to the defendant's creation is of no assistance unless the trier of fact believes that the defendant copied such (public domain) works' and not those of the plaintiff" (Citation omitted)). Here, VTW offers no evidence that anyone at Timberpeg ever saw or was even aware of this 350-year-old home in Newcastle, New Hampshire. VTW fails to even muster a question of fact as to whether Timberpeg independently created its architectural design.

12. Finally, Timberpeg East has standing to sue as a copyright co-owner and co-claimant in Timberpeg's copyrighted plans pursuant to the Contract attached as Exhibit A1 in Plaintiffs' Summary Judgment Appendix. VTW quotes from Paragraph 2 of the Contract between T-Peg and Timberpeg East, but ignores Paragraph 1 in which Timberpeg East "conveys and assigns to T-Peg, Inc. co-ownership and co-claimant rights to any and all copyrightable/copyrighted material produced or acquired by Timberpeg East" (i.e. Timberpeg East retains co-ownership and co-claimant rights). As a result, Timberpeg East has co-ownership rights in Timberpeg's copyrighted plans and has standing to maintain this lawsuit.

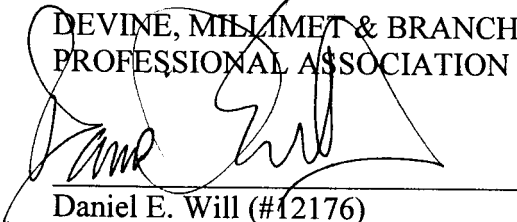
Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: October 12, 2004



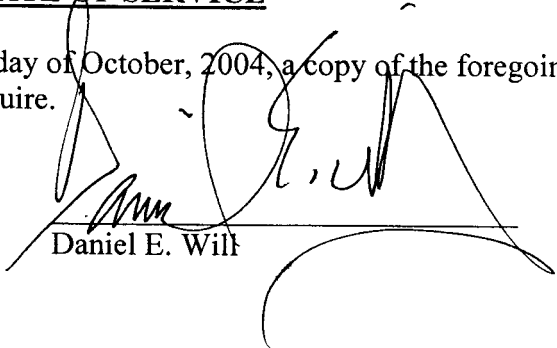
Daniel E. Will (#12176)
111 Amherst Street
P.O. Box 719
Manchester, NH 03105-0719
(603) 669-1000

Of Counsel:

Stephen S. Woods, Esquire (#8240)
General Counsel for Plaintiffs
Timberpeg East, Inc.
c/o 68 Lyme Road
Hanover, NH 03755
(603) 643-6200

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.



Daniel E. Will