

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.,	)	
Defendant.	)	

DEFENDANT’S OBJECTION TO  
MOTION TO FILE SUMMARY JUDGMENT SURREPLY MEMO

Defendant, Vermont Timber Works, Inc. (“VTW”), objects to plaintiffs’ motion to file a surreply memorandum, which (1) does not respond to any issues first raised by VTW’s reply memo, and (2) itself raises an entirely new legal claim – a new issue which would require an extensive response by VTW (and probably an entirely new complaint).

Summary Judgment Motion *Not* Based On “Copyrightability”

The motion recites (¶2) that VTW’s reply “raises new issues not raised in its principal motion,” but the only one identified is “whether Timberpeg could validly copyright the architectural work” at issue here. VTW does contest copyrightability in the case as a whole based of lack of original and creative content, but that is not a ground of the pending summary judgment motion.

Proposed Surreply Attempts To Raise New Cause  
Of Action, Which Would Raise Entirely New Issues

What plaintiffs actually are attempting to do is to completely change their cause of action. Apparently trying overcome the complete lack of any timberframe drawing in their registered plan – the five sheets dated 4/20/01 which were registered with the Copyright Office –

plaintiffs now seek to rely on the un-registered September 2001 plans. Thus they now claim (proposed Surreply Memo, ¶1), for the first time, that “the [un-registered] September 2001 plans are protected by the registration filed on the April 2001 plans.” There are several huge problems with this argument.

First, this case is based solely on the April 2001 “Registered Plans” filed with the U.S. Copyright Office as certificate of Registration No. Vau 510-781. Cplt., ¶¶16-17. This does not include the subsequent September 2001 plans. VTW submitted interrogatories and requests to admit early in the case to establish that the April 2001 plans are the sole registered plans at issue, has taken complete discovery based on the April 2001 plans alone, has engaged experts based on the April 2001 plans alone, and has based its entire defense on the April 2001 plans alone.

Second, even if the complaint had asserted a claim based on the September 2001 plans, the clear language of the Copyright Act would not have allowed it. Section 411 states:

[N]o action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title.

17 U.S.C. §411(b).

Third, the failure to register cannot be cured now. Under Section 412, statutory damages and attorneys fees are unavailable to a plaintiff where the registration occurs after infringement occurred. No other remedies are available because plaintiffs have no damages and VTW has no profits arising out of the supposed infringement.

Fourth, the two cases cited by plaintiffs do not support their contention (proposed Surreply Memo, ¶1) that an unregistered work “is protected by [an earlier registered work]”:

- Richmond Homes Management, Inc. v. Raintree, Inc., 862 F. Supp. 1517 (W.D.Va. 2003) involved two designs by a single plaintiff, the second of which was a

“derivative” of the first. But the case merely holds that a derivative design is separately copyrightable. Section 411, the registration requirement, was not implicated because the plaintiff there had registered the second design as well as the first. 862 F. Supp. at 1520-21.

- Imperial Homes Corp. v. Lamont, 458 F. 2d 895 (5<sup>th</sup> Cir. 1972), has nothing at all to do with the proposition for which plaintiffs cite it. It was decided under the Copyright Act of 1909, which had no section comparable to Section 411 of the 1976 Act and which did not even apply to architectural works. The registration there was made as a “drawing of plastic works of a scientific or technical character,” a category which does not exist under the current act. And the parties stipulated in that case that the design that was infringed “was the subject of a valid United States copyright.” 458 F. 2d at 897.

Fifth, if the September 2001 timber frame design comes into the case, it has already been established that it is not the same as the April 2001 plan. As admitted by plaintiffs’ Chief of Design (and only disclosed expert), the September 2001 plan constituted, as compared to the April 2001 plan, “a change, substantial change to the framing” (Page 88/Line 18-19), “definitely a change in the framing” (Page 90/Line 17-18) and “it’s a major change in the framing” (Page 91/Line 14). Vincent Deposition, MSJ Appx Ex. 12

Sixth, if the September 2001 timber frame design comes into the case, it has already been established that plaintiffs did not originate that design, but copied it from a drawing given to them by the customer out of the catalogue of a North Carolina company, Hearthstone. This is all demonstrated by plaintiffs’ own documents, which contain the Hearthstone picture and the following internal message:

Kathy. This [the Hearthstone brochure picture] is picture of Bent Style Timberframe that Stan Isbitski wants us to emulate for the main house. [from Lynn Cole, plaintiffs’ Customer Representative]

MSJ Appx., Ex. 8) Plaintiffs then forwarded the Hearthstone picture to their draftsman, whose September 2001 timber frame matched it. MSJ Appx, Ex. 9. This was also confirmed by the Timberpeg Customer Representative on the Isbitski job, Lynn Cole. Cole Dep., MSJ Appx, Ex. 14, at pp. 28-33.

Conclusion

Having been forced to concede that the copyrighted design does not contain a drawing of a timberframe, plaintiffs' requested Surreply Memo is an attempt to unofficially change their claim, long after the time for amendments has passed. The Court should deny the motion.

Date: October 26, 2004

VERMONT TIMBER WORKS, INC.  
Defendant,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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