

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 SUPPLEMENT TO PRELIMINARY OBJECTION TO
MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, Vermont Timber Works, Inc. (“VTW”), submits this supplement to its Preliminary Objection to Motion For Partial Summary Judgment (Document 37).¹

Plaintiffs’ Expert Now Admits Major Differences Between VTW’s Frame
And Plaintiffs’ Alleged “Design” On *Virtually Every Significant Element*

Plaintiffs claim that there is “substantial similarity” based principally on the testimony of their “expert” – Jonathan Vincent, their own Chief of Design. (Memo. Of Law, Document 24, at 6-7).

VTW has already briefed the point that there cannot be “substantial similarity” between plaintiffs’ work – which they admit does not even contain a drawing of the timber frame – and VTW’s, which contains only the timber frame.

Vincent’s opinion is contained at Tab C of plaintiffs’ Summary Judgment Appendix, and his deposition on that opinion is contained as Exhibit 29 of VTW’s MSJ Appendix II.

¹ VTW filed its Preliminary Objection on October 20, 2004 but also moved (Document 38) for leave to supplement that Objection until November 12 in order to depose and respond to plaintiffs’ expert witness. VTW had noticed the deposition earlier but plaintiffs had not made the expert available.

Vincent's testimony is based on his claim that the VTW drawings "match almost exactly" the plaintiffs' design and "the only differences" are (1) the VTW kitchen bump out being two feet wider, (2) some post locations being modified to match this, (3) there is an additional post near the stair and (4) the sizes are sometimes larger. Vincent Opinion, 2d Page; Vincent Dep. at 22-23).

At deposition Vincent was asked to compare the two, item-by-item, and found virtually every aspect of VTW's frame to be different from plaintiffs' "design," completely undermining his opinion:

1. On a post-by-post basis, Vincent concedes that 25 of the 27 posts in the VTW frame design are different in location, size, orientation or other feature from the posts in plaintiffs' own drawing. Vincent Dep. II at 57-69, Ex. 29. This is summarized, with deposition page references, in a chart (Ex. 30 in MSJ Appx. II).

2. VTW's plans show every single joint in the frame, whereas plaintiffs' do not have any joinery (the "joinery" is the method by which timbers are held together, such as mortise and tenon) shown on the plans. Vincent Dep. II at 74, Ex. 29.

3. The wood types were different (different woods have different weight bearing capacities, making that a design feature). Vincent Dep. II at 37-39, Ex. 29.

4. The VTW frame design does not show windows, whereas plaintiffs do. Vincent Dep. II at 39-40.

5. The VTW frame design does not show partitions or walls (except for one claimed partition), whereas plaintiffs' do. Vincent Dep. II at 40-41.

6. The VTW frame design does not show doors, whereas plaintiffs' do. Vincent Dep. II at 41.

7. The VTW frame design does not show exterior surfaces (except for “Stresskin panels” which Vincent admits are a “standard element”), whereas plaintiffs’ do. Vincent Dep. II at 41-42.

8. The main girders and joists holding up the plaintiffs’ plan are completely different from VTW’s structural plan. Plaintiffs indicate two “main girders” and joists, whereas VTW has a completely different number, with completely different spacing. Vincent Dep. II at 78-79.

9. Vincent also admits that plaintiffs’ plan “doesn’t tell us at all what the sizes [of the joists] are.” Vincent Dep. II at 79-80.

10. VTW uses a “bent” style of framing, which requires a crane for erection, whereas plaintiff uses a non-“bent,” which is “a different style of framing,” and which typically does not require a crane for assembly. Vincent Dep. II at 80-81

11. VTW uses a different bracing concept than plaintiffs. Vincent Dep. II at 81-82.

12. VTW and plaintiff use a completely different roof framing system (a highly visible component of a timber frame), with plaintiffs using eleven common rafters plus two gable ends and no ridge beam, also known as “common rafters,” whereas VTW “doesn’t have common rafter at all . . . because it uses bents instead.” Vincent Dep. II at 85.

In addition, Vincent admitted that the few elements which may be similar are standard features, not original with plaintiffs, and not copyrightable:

13. Vincent concedes that placing posts over the foundation, girders or other posts is a “standard feature” and “functional requirement.” Vincent Dep. II at 30-31, 33. (Ex. 29)

14. Vincent concedes that designing in two-foot increments or intervals is “standard,” and that “it’s not anything you can copyright or trademark.” Vincent Dep. II at 32-33. (Ex. 29)

15. Vincent concedes that 8 feet and 9 feet story heights (also called “plate height”) are “standard,” that plaintiffs did not originate them, and that plaintiffs claim no copyright in it. Vincent Dep. II at 34-35. (Ex. 29)

16. Vincent concedes that the salt box and shed dormer forms have existed in New England since the 1600s, that plaintiffs did not originate these, and that plaintiffs do not claim copyright in them. Vincent Dep. I at 35-37, Ex. 14.

17. Vincent concedes that a 12/12 pitched roof is standard, not originated by plaintiffs, and plaintiffs do not claim copyright in it. Vincent Dep. I at 41-42 (Ex. 14)

18. Vincent concedes that plaintiffs do not assert copyright in the dimensions alone of 40 feet by 44 feet (the dimensions in their plan) because those dimensions alone do not have “creative content.” Vincent Dep. I at 42. (Ex. 14)

VTW’s Expert Also Demonstrates That The Two Designs Are Not “Substantially Similar”

VTW has also submitted an expert report, of Phil Phillips of Phil Phillips Timber Frame Joinery, submitted as Ex. 34 in VTW’s MSJ Appx II.

Mr. Phillips opines that the two “are not substantially similar,” explaining as follows:

The preliminary drawings by Timber Peg labeled TIM 454-458, are not substantially similar to Vermont Timber Works frame design.

Comparing these two designs, I note that the roofing systems are completely different, one from another. The Timber Peg design uses a plate and common rafters design, while the Vermont Timber Works frame employs a major rafter and purlin design. In addition, there are differences in most of the twenty-seven posts between the two designs. There are also other differences such as knee brace locations. In addition the Timber Peg design has no indication as to the particular joinery to be used, while the Vermont Timber Works plans show this in complete detail.

Conclusion

In light of the above, it cannot be seriously maintained that “there is no dispute” the VTW frame is “substantially similar” to plaintiffs’ preliminary drawings. Plaintiffs’ motion for summary judgment on this point should be denied.

Date: November 4, 2004

VERMONT TIMBER WORKS, INC.
Defendant,

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Its Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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November 4, 2004

James R. Starr, Clerk
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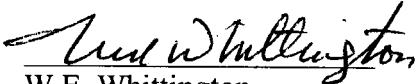
Re: T-Peg, Inc. v. Isbitski, et al., No. 03-CV-462-M

Dear Jim:

Please find enclosed for filing Defendant's Supplement to Preliminary Objection to Motion for Partial Summary Judgment.

Thank you for your assistance.

Sincerely,



W.E. Whittington

W.E. Whittington

WEW/ffw

Enclosure

cc: Daniel E. Will, Esq.
Stephen S. Woods, Esq.
Doug Friant