

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

T-PEG, INC and )  
TIMBERPEG EAST, INC., )  
Plaintiffs, )  
 )  
vs. ) No. 03-CV-462-M  
 )  
STANLEY J. ISBITSKI and )  
VERMONT TIMBER WORKS, INC., )  
Defendants. )

DEFENDANT VERMONT TIMBER WORKS' ANSWER,  
AFFIRMATIVE DEFENSES, COUNTERCLAIM AND JURY DEMAND

Defendant Vermont Timber Works, Inc. ("VTW") answers the complaint of T-Peg, Inc. ("T-Peg") and Timberpeg, East, Inc. ("Timberpeg") as follows:

1. Insufficient knowledge to admit or deny.
2. Insufficient knowledge to admit or deny.
3. Insufficient knowledge to admit or deny.
4. Admitted.
5. Denied.
6. Denied.
7. Denied.
8. Denied.
9. Insufficient knowledge to admit or deny.
10. Insufficient knowledge to admit or deny.
11. Insufficient knowledge to admit or deny.
12. Insufficient knowledge to admit or deny.
13. Insufficient knowledge to admit or deny.

14. Insufficient knowledge to admit or deny.
15. Insufficient knowledge to admit or deny.
16. Insufficient knowledge to admit or deny.
17. Insufficient knowledge to admit or deny.
18. Insufficient knowledge to admit or deny.
19. Insufficient knowledge to admit or deny.
20. Denied.
21. Denied. Answering further, VTW designed and manufactured its own timber frame, which is a standard saltbox design, to fit Isbitski's requirements.
22. Admitted, that VTW constructed its own timber frame on Isbitski's property at 289 New Road, Salisbury, New Hampshire.
23. Denied.
24. Insufficient knowledge to admit or deny.
25. Denied. Although VTW had no contact with plaintiffs, T-Peg's copyright notice authorized any user to use the documents so long as it did not reproduce or copy the drawing.

Count I  
Copyright Infringement Against Isbitski

26. VTW incorporates its prior responses.
27. Insufficient knowledge to admit or deny. Answering further, the "Plans" are not attached or identified in the Complaint.
28. Insufficient knowledge to admit or deny. Answering further, the "Plans" are not attached or identified in the Complaint.
29. Insufficient knowledge to admit or deny.
30. Insufficient knowledge to admit or deny.

31. Insufficient knowledge to admit or deny.
32. Insufficient knowledge to admit or deny.
33. Insufficient knowledge to admit or deny.
34. Insufficient knowledge to admit or deny.
35. Insufficient knowledge to admit or deny.
36. Insufficient knowledge to admit or deny.

Count II  
Copyright Infringement Against VTW

37. VTW incorporates its prior responses.
38. Insufficient knowledge to admit or deny. Answering further, the Complaint fails to attach or identify the “Plans.” VTW did not view any plans on file with the Town of Salisbury.

39. Denied.
40. Denied.
41. Denied. Answering further, there is not now, nor has there ever been, a ‘house’ on Isbitski’s land.
42. Denied.
43. Denied.

Count III  
Breach Of Contract Against Isbitski

44. VTW incorporates its prior responses.
45. Insufficient knowledge to admit or deny.
46. Insufficient knowledge to admit or deny.

Count IV  
Unjust Enrichment Against Isbitski

- 47. VTW incorporates its prior responses.
- 48. Insufficient knowledge to admit or deny.
- 49. Insufficient knowledge to admit or deny.
- 50. Insufficient knowledge to admit or deny.
- 51. Insufficient knowledge to admit or deny.
- 52. Insufficient knowledge to admit or deny.

Count V  
Unjust Enrichment Against VTW

- 53. VTW incorporates its prior responses.
- 54. Denied.
- 55. Insufficient knowledge to admit or deny.
- 56. Denied.
- 57. Denied.

Count VI  
Unfair Competition Against VTW

- 58. VTW incorporates its prior responses.
- 59. Insufficient knowledge to admit or deny.
- 60. Insufficient knowledge to admit or deny.
- 61. Insufficient knowledge to admit or deny.
- 62. Denied.
- 63. Denied.
- 64. Denied.

Count VII  
New Hampshire Consumer Protection Act Against VTW

- 65. VTW incorporates its prior responses.
- 66. Denied.
- 67. Denied.

AFFIRMATIVE DEFENSES

For its affirmative defenses, VTW states:

- A. Failure to state a cause of action for which relief may be granted.
- B. VTW designed and constructed its timber frame independently of plaintiffs' work.
- C. The portion of plaintiffs' work that relates to the Isbitski frame is not copyrightable, because (a) it is simply a copy of a standard architectural form which has been in use in America for hundreds of years ("salt box" with a wing) and is not an original work of authorship, (b) the frame provided by VTW consists of individual standard features and/or functional elements whose design or placement is dictated by utilitarian concerns, (c) the plaintiffs' "work" is too preliminary and lacking detail to define an objective frame so as to guide construction and thus constitute an architectural work, (d) plaintiffs' "work" constitutes a mere idea, procedure, process, system, method of operation, concept, or principle, and (e) the structure erected on Isbitski's land is not even substantially similar to a "house" in that it has no rooms, windows, doors, partitions, plumbing, roofing, siding, trim, electrical work, floors or

exterior walls. It remains an architectural open book. It only has a foundation and a partial frame. The overall form of the building remains to be defined.

D. To the extent the Isbitski building embodied or embodies a copyrighted architectural work of plaintiffs, any design, fabrication or construction by VTW relating to the building was in accordance with proper consent of Isbitski under 17 U.S.C. Section 120(b).

E. The copyright notice did not assert any protection in the now-claimed “architectural work,” nor did it advise that the Plans constituted an “architectural work,” but claimed only a right against reproduction or copying of the drawings.

F. Timberpeg did not properly assert any copyright.

G. Timberpeg did not own any copyright.

H. T-Peg did not own copyright in the asserted work.

I. The New Hampshire law claims are preempted by the U.S. Constitution and the Copyright Act.

J. VTW’s conduct was not subject to New Hampshire law.

K. VTW incorporates by reference all the defenses set forth in its Motion To Dismiss.

L. Plaintiffs licensed, authorized or waived the use of its plans through its copyright notice which restricted only the unauthorized reproduction or copying of the drawings.

M. VTW reserves the right to plead additional affirmative defenses at such times as it discovers them.

COUNTERCLAIM

For its counterclaims against plaintiffs, VTW states:

Jurisdiction and V

1. Plaintiffs have submitted to this Court's Complaint.
2. This Court has supplemental jurisdiction Section 1367, since it also has assumed jurisdiction over Sections 1331, federal question, and 1332, diversity of citizenship.
3. A substantial part of the events and omissions occurred in this district. Venue in this district is therefore proper.

Count I  
Abuse of Process

4. Plaintiffs have caused judicial process to be initiated against VTW in this case, and have compelled VTW to respond to their claims.
5. Plaintiffs caused judicial process to be initiated without cause, and with the improper purpose of extorting a settlement from VTW where VTW has no liability. The plaintiffs repeatedly sent VTW threatening letters alleging damages in excess of \$100,000 while actually incurring no real damages caused by VTW.
6. Among other things, plaintiffs have falsely, without an evidentiary basis, and/or without investigating the facts, made false and incorrect allegations, including the following:
  - (a) That VTW used plaintiffs' Plans for the purpose of designing and manufacturing a timber frame pursuant to the Plan's "requirements and parameters." (Cplt. ¶21)
  - (b) That the VTW timber frame as manufactured and constructed by VTW physically embodies the size, shape, architectural spaces, floor plan, and overall design of the

Plans in a manner that is substantially similar to, if not virtually identical to, the architectural work embodied in the plaintiffs' Plans. (Cplt. ¶23)

(c) That plaintiffs' materials constituted an "architectural work" as defined in 17 U.S.C. Section 101. (Cplt. ¶27)

(d) That the Isbitski House is substantially similar to the purported architectural work embodied in plaintiffs' Plans. (Cplt. ¶ 33)

(e) That VTW improperly copied plaintiffs' Plans or caused them to be copied. (Cplt. ¶ 39)

(f) That VTW improperly utilized plaintiffs' Plans or caused the Plans to be utilized in the manufacture of a timber frame and the assembly of the timber frame for the Isbitski House. (Cplt. ¶40)

(g) That the Isbitski House is substantially similar to the architectural work embodied in plaintiffs' Plans. (Cplt. ¶ 41)

(h) That plaintiffs have been damaged and continues to incur damage by VTW's actions. (Cplt. ¶43)

(i) That VTW traced, digitized, copied or otherwise utilized plaintiffs' plans. (Cplt. ¶54)

(j) That VTW saved cost in its manufacture of construction materials for the Isbitski House and thereby was able to offer a lower price for materials than plaintiffs. (Cplt. ¶54)

(k) That VTW obtained a benefit by copying or utilizing plaintiffs' plans. (Cplt. ¶56)

(l) That VTW competed unfairly with plaintiffs. (Cplt. ¶64)

(m) That VTW engaged in unfair or deceptive conduct toward plaintiffs.

(Cplt. ¶66)

7. Prior to initiating process against VTW, plaintiffs visited the Isbitski property and viewed the Isbitski plans on file with the Town of Salisbury, and were well aware that no “house” exists on the Isbitski property, and that the VTW timber frame constructed on the property is different from the frame preliminarily described in plaintiff’s materials on file with the Town.

8. At all times, plaintiffs have been well aware that their purported “plans” were in fact only preliminary drawings, that their isometric drawings of a timber frame were merely created to give their customer an impression of the general way a frame might look, and that their drawings or “plans” in no way are sufficient or detailed enough to describe a particular timber frame or to enable a frame to be built in a fixed, objective manner.

9. VTW has suffered damage as a result of plaintiffs’ wrongful actions.

Count II  
Wanton, Malicious And/Or Oppressive Conduct

10. VTW incorporates by reference Paragraphs 1-9 above.

11. Plaintiffs’ conduct was wanton, malicious, oppressive and/or with reckless indifference of VTW’s rights, entitling VTW to enhanced compensatory damages.

WHEREFORE, VTW requests that the Court enter judgment in its favor against plaintiffs on both plaintiffs’ and VTW’s claims, and awarding VTW:

- A. Its damages.
- B. Enhanced compensatory damages.
- C. Interest.
- D. Attorneys’ fees.

E. Costs.

F. Such other relief as the Court may find appropriate.

Date: January 22, 2004

VERMONT TIMBER WORKS, INC.  
Defendant,

By: W. E. Whittington  
Its Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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