

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)
T-Peg, Inc. and Timberpeg East, Inc.)
)
Plaintiffs,)
)
v.)
)
Vermont Timber Works, Inc.)
and Douglas Friant,)
)
Defendants.)
_____)

FEB 25 2005

No. C-03-462-M

PLAINTIFFS' MOTION FOR RECONSIDERATION
PURSUANT TO RULE 59 OF THE FEDERAL RULES OF
CIVIL PROCEDURE

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 reconsideration pursuant to Rule 59 of the Federal Rules of Civil Procedure of this Court's February 9 Order granting summary judgment in the defendants' favor. In support of this motion, Timberpeg states as follows:

1. In an order dated February 9, 2005 ("Order"), this Court granted summary judgment in favor of the defendants on all claims. Timberpeg now seeks reconsideration of the Order, as set forth below, on the basis of a central point of law this Court misapprehended as well as fundamental points of fact this Court overlooked.

I. This Court Misapprehended Applicable Copyright Law In Holding That A Building Cannot Be An Infringement Of An Architectural Work

2. This Court squarely rejected Timberpeg's principal legal contention that a

structure or building, such as a timberframe, can constitute an infringing copy of a copyrighted architectural work. See Order at 14-16. In arriving at this holding, this Court focused on pre-1990 copyright law and overlooked or misapprehended the shift in the law created by the Architectural Works Copyright Protection Act of 1990 (“AWCPA”). See Nimmer on Copyright § 2.20; 17 U.S.C. § 101. Rather than consider that a building can constitute an unlawful copy of an architectural work as the AWCPA defines that term, this Court concluded only that a building cannot constitute an infringing copy of architectural plans, the state of copyright law prior to 1990. In short, as a result of the AWCPA, infringement in the architectural realm is no longer limited to duplication of architectural plans. Instead, copyright law now protects architectural works, meaning designs of buildings, embodied in any tangible medium of expression. See 17 U.S.C. § 1; 17 U.S.C. §102 (a)(8).

3. In the Order, this Court relied chiefly on a provision in the leading copyright treatise, Nimmer on Copyright, § 2.08[D][2][a], which states that “a building is not a ‘copy’ of the underlying [architectural] plans, with the result that construction of the structure does not constitute infringement.” Order at 14 (quoting Nimmer on Copyright § 2.08[D][2][a]). The provision upon which this Court relied accurately recites the state of copyright law prior to 1990. As that same Nimmer section confirms, however, “[t]his discussion is primarily of relevance to the period prior to Dec. 1, 1990, on which date the Architectural Works Copyright Protection Act became effective.” Id. at n.169.1 (emphasis added). See also id. at § 2.20 (describing AWCPA and its effect on architectural works copyright protections). Later in his treatise, Nimmer describes in greater detail the post-AWCPA landscape, in express contrast to the pre-AWCPA state of

the law. See id. at § 220 and n.1 (contrasting post-AWCPA with § 2.08 concerning pre-AWCPA).

4. The AWCPA significantly expanded copyright protection available in the architectural realm by creating a new category called architectural works entitled to copyright protection. See 17 U.S.C. § 101. As a result, copyright protection now extends not just to architectural plans, but to architectural works, which the AWCPA defines broadly as:

“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 the spaces and elements in the design, but does not include individual standard features.”

17 U.S.C. § 101 (emphasis added); see also § 102(8) (confirming copyright protection to architectural works). In short, the AWCPA changed prior law by extending copyright protection beyond architectural plans themselves to the design of a building that the plans (or any other tangible medium of expression) reflect. See id. The AWCPA’s own legislative history confirms that, under this new scheme, a building can expressly constitute an infringing copy of an architectural work (as distinguished from architectural plans). See H.R. Rep. No. 101-735 at 19 (1990) (explaining purpose of AWCPA in part to prevent defendant with access to plans for unconstructed building to escape liability so long as the plans themselves were not copied).

5. The AWCPA provides that an architectural work is the design of a building in any “tangible medium of expression.” 17 U.S.C. §101. The only limitations are that the tangible expression must include “the overall form as well as the arrangement and composition of spaces and elements in the design but does not include the standard

features.” Id. Timberpeg’s central theory in this action is that the defendants’ timberframe in VTW’s shop drawings and as constructed onsite by VTW constitutes a tangible means of expression of Timberpeg’s architectural work, not merely Timberpeg’s architectural plans, because the timberframe expresses the overall form as well as the arrangement and composition of spaces and elements in Timberpeg’s copyrighted design.¹

6. The shift in copyright law undergirding Timberpeg’s theory has been recognized by Nimmer, other scholars, and courts to establish that a building can constitute an infringing copy of an architectural work. In a later discussion in his treatise, for example, Nimmer points out that as a result of the AWCPA “construction of a building can now give rise to a direct cause of action based on infringement of an ‘architectural work’ and recourse to purported infringement of plans is no longer necessary” 2 Nimmer on Copyright § 4.12[C] at 4-72; see also id. at § 2.20. As mentioned, the only limitations are the extent to which the particular expression of a given architectural work lacks overall form, including the arrangement and composition of spaces and elements in the design it expresses. See 17 U.S.C. § 101.

7. While this Court acknowledged the decision of the Ninth Circuit in Hunt v. Pasternak, 179 F.3d 683, 685 (9th Cir. 1999), this Court overlooked that the Hunt Court expressly recognized the shift in the law in the context of a prior decision to the contrary. The Hunt Court confirmed that the AWCPA extends protection to buildings as well as plans because the AWCPA provides protection to architectural works, meaning designs, and not just architectural plans. See id. The Hunt Court, however, is not alone. The

¹ As pointed out in its summary judgment papers, VTW erected its timberframe on the basis of a building permit obtained with Timberpeg’s copyrighted architectural plans.

United States District Court for the District of Massachusetts has also recognized that “[w]ith the passage of the [AWCPA], a copyright owner may claim infringement of both the architectural plans and the structure based on such plans,” again recognizing that copyright protection now exists for architectural works or designs embodied in any tangible means of expression, and not just in architectural plans. Yankee Candle Co. v. New England Candle Co., 14 F. Supp.2d 154, 158 (D. Mass. 1998). Similarly, the United States District Court for the Southern District of Indiana has concluded that “[h]ome designs and structures are protectible under the Copyright Act,” and that “copyright protection is extended to the plans for the design of a house as well as the house itself.” J.R. Lazaro Builders, Inc. v. R.E. Ripberger Builders, Inc., 883 F. Supp. 336, 339 (S.D. Ind. 1995); see also Richmond Homes Management, Inc. v. Raintree, Inc., 862 F.Supp. 1517, 1524-25 (W.D.Va. 1994)(explaining differences in copyright law effected by AWCPA). See generally Copyright Protection Of Architectural Works: My House Is My Castle But Can I Protect It From Infringement?, 8 No. 2 *Intell. Prop. L. Bull.* 1 (San Francisco School of Law, fall/winter 2003).

8. As mentioned, Timberpeg’s central theory in this action is that the timberframe, in the shop drawings and as constructed by the defendants is an infringing copy of the architectural work reflected in Timberpeg’s copyright architectural plans, as opposed to an infringing copy of the plans themselves. Timberpeg’s claim falls squarely within the protection established by the AWCPA. In focusing on a provision of the Nimmer treatise describing the state of the law prior to the 1990 enactment of the AWCPA, this Court overlooked or misapprehended that copyright protection in the architectural realm now extends beyond architectural plans to architectural works,

meaning designs, as the statute defines them. In light of the AWCPA, a building can now constitute an infringing copy of an architectural work.² Accordingly, Timberpeg respectfully requests that this Court reconsider the Order.³

II. This Court's Erroneous Interpretation Of The Scope Of Copyright Protection For Architectural Works Caused This Court To Err In Its Substantial Similarity Analysis And Overlook Facts In The Record Relevant To That Analysis

9. Consistent with this Court's prior analysis, which erroneously limited actionable infringement to the duplication of architectural plans as opposed to an architectural work, this Court omitted comparing the defendants' timberframe with Timberpeg's architectural work and instead considered substantial similarity only between Timberpeg's architectural plans and VTW's shop drawings. Comparing only the paper plans, this Court noted differences between them (such as a lack of a complete timberframe design in the Timberpeg plans) that make the plans themselves different, regardless of the architectural works the plans reflect. Virtually all of the decisional law upon which this Court relied, moreover, pre-dates 1990 and the enactment of the AWCPA. In light of the AWCPA, the substantial similarity inquiry depends on the extent to which an expression, in any tangible form, embodies a protected architectural work. With respect to VTW's shop drawings and the timberframe erected by VTW, the proper inquiry is whether the timberframe expresses Timberpeg's architectural work,

² In light of its determination that a building cannot constitute an infringing copy, this Court did not consider whether the timberframe of the defendants is substantially similar to the architectural work of the plaintiffs. As set forth in Timberpeg's memo, Timberpeg, through its expert, Jonathan Vincent, AIA, demonstrates sufficient similarities between Timberpeg's design and the VTW timberframe's overall form and composition and arrangement of spaces as constructed (see photos in Vincent Report) to create, at a minimum, a question of fact for trial on this point. See Timberpeg's Summary Judgment memo at 20-22; see also Timberpeg's Summary Judgment Appendix at Tab C (plaintiffs' expert disclosure).

³ For the same reasons, Timberpeg requests reconsideration with respect to Timberpeg's copyright claims against Mr. Friant individually.

meaning design, by reflecting the overall form as well as the arrangement and composition of spaces and elements in Timberpeg's design. See 17 U.S.C. § 101.

10. In its analysis, this Court focused on differences between the two sets of drawings themselves, such as the lack of a frame drawing in one, the lack of elevations drawings in the other, and minute differences in the orientation of the posts between the two, and, ultimately, the fact that “the two sets of plans are fundamentally different kinds of drawings.” See Order at 17-19. Accordingly, this Court overlooked evidence that the VTW shop drawings and erected timberframe reflect the overall form as well as the arrangement and composition of spaces and elements in the Timberpeg design. See 17 U.S.C. § 101. This Court overlooked, for example, the undisputed facts concerning the similarity between the floorplan and layout in the VTW shop drawings to Timberpeg's design, the same plate heights, roof pitches, building dimensions, and stair location, among others. See Timberpeg's Summary Judgment Memo at 20-22; Timberpeg's Summary Judgment Appendix at Tab C (plaintiffs' expert report). The orientation of certain posts (e.g. six inches by eight inches versus eight inches by six inches), for example, does not bear on the substantial similarity inquiry if such minute differences do not affect the similarities between the overall form as well as the arrangement and compositions of spaces and elements of the two designs.

11. In light of the AWCPA, the substantial similarity inquiry turns on similarities that concern the overall form as well as the arrangement and composition of spaces and elements in the design between the two works, regardless of the medium in which the works are expressed. See 17 U.S.C. § 101. In its objection to the defendants' motion for summary judgment, Timberpeg proffered undisputed evidence that the overall

form as well as the arrangement and composition of spaces in the architectural work depicted in the VTW shop drawings (as well as in the timberframe itself) copy those in Timberpeg's copyrighted architectural work. See Timberpeg's Memo at 21-2; Timberpeg's Summary Judgment Appendix at Tab C. In determining that the VTW shop drawings were not substantially similar, this Court overlooked that evidence and focused solely on the drawings themselves.

12. In short, as a result of the AWCPA, the fact that two sets of drawings are different is not dispositive of the substantial similarity inquiry. Instead, substantial similarity depends upon the extent to which the copy – in this case VTW's shop drawings and constructed timberframe – constitutes an embodiment of Timberpeg's architectural work, meaning design, due to the similarities of the overall form, arrangement, and composition of spaces and elements in the design between the two.⁴

III. This Court Overlooked Or Misapprehended Timberpeg's Partial Motion For Summary Judgment As To Copying

13. On page 16 of the Order, this Court states that “there is no direct evidence of copying. . . .” That statement, however, makes no mention nor offers any accompanying analysis of the undisputed direct and circumstantial evidence of copying Timberpeg presented in its partial cross motion for summary judgment. In that regard, this Court overlooked correspondence from the defendants' prior counsel admitting copying at least of Timberpeg's floor plans (within Timberpeg's architectural plans), as well as the binding nature of those admissions upon the defendants. See Timberpeg's Summary Judgment memo at 15-16 and appendix citations; see also Richmond Homes, 862 F.Supp. at 1527 (noting that infringement can be established on the basis of

⁴ For these same reasons Timberpeg requests reconsideration with respect to Timberpeg's copyright claims against Mr. Friant individually.

infringing either the floorplans or the exterior or both). In correspondence on behalf of VTW, VTW's prior counsel admits to direct copying. See Timberpeg's Memo at 15-16. In its motion to dismiss, moreover, VTW's current counsel contended that Timberpeg authorized the copying. See Defendant Vermont Timberworks' Motion to Dismiss at 6 (emphasis added). Even if this Court disagrees that this evidence confirms direct copying, at a minimum this evidence creates a genuine issue of material fact as to whether the defendants directly copied Timberpeg's copyrighted architectural plans. This Court overlooked Timberpeg's argument and the record evidence establishing direct evidence of copying, and, therefore, neither analyzed nor ruled on Timberpeg's partial cross motion as to direct copying.⁵

Conclusion

14. The enactment of the AWCPA in 1990 expanded copyright protection beyond mere architectural plans to architectural works, meaning building designs, regardless of their medium of expression. As a result, and as applicable in this action, the fact that an architectural work is unconstructed and embodied only in architectural plans does not mean that a structure cannot infringe. The focus is now on architectural works rather than duplication of architectural plans. This Court misapprehended the state of copyright law in holding to the contrary, and, as a result, overlooked factual evidence in the record creating, at a minimum, a question of fact as to copying and substantial similarity.

⁵ For these same reasons Timberpeg requests reconsideration with respect to Timberpeg's copyright claims against Mr. Friant individually.

WHEREFORE, Timberpeg respectfully requests that this Court:

- A. Reconsider the Order;
- B. Deny Summary Judgment to all defendants on Timberpeg's copyright claims;
- C. Grant Timberpeg Summary Judgment as to copying or, alternatively, access with respect to all defendants; and
- D. Grant such other and further relief as this Court deems just, equitable and proper.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
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Dated: February 23, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2005, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.


Daniel E. Will

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