

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.,)	
And DOUGLAS FRIANT,)	
Defendants.)	

DEFENDANTS' OBJECTION TO
MOTION FOR RECONSIDERATION

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant"), object to plaintiffs' motion for reconsideration.

Defendants agree that the Court misapprehended a minor point of preliminary dictum – which should be corrected – but that point in no way undermines the ruling on the merits.

I. A Building *Can* Be A Copy Of An Architectural Work

The Court stated "as a preliminary matter" at pp. 14-16, that a building cannot be a copy of an architectural work. Solely as to this comment – which is not necessary to the ruling – defendants agree with plaintiffs that the comment relies on pre-1990 law and is incorrect as to the current case, which is based on a post-1990 design.¹

Defendants agree with plaintiffs that the 1990 Architectural Works Copyright Protection Act changed the law to add a new category of protected material, "architectural works" (§102(a)(8)), in addition to the already existing "architectural plans" which are a subcategory of

¹ Indeed, defendants never argued for the preliminary finding made by the Court.

“pictorial, graphic, and sculptural works” (see §102(a)(5) and the definition of “pictorial, graphic, and sculptural works” in §101).

The Nimmer passage quoted by the Court at page 14 does appear to refer to pre-AWCPA law (which Nimmer includes because it still governs pre-1990 works).

The Hunt v. Pasternak case, 179 F. 3d 683 (9th Cir. 1999) quoted at page 15 of the ruling, was amended a few months later, 192 F. 3d 877, 878 (1999) to correct the same oversight the Court apparently made here.

To summarize, the Copyright Act now protects both “architectural plans” (§102(a)(5) and definitional section) and “architectural works” (§102(a)(8). Plaintiffs in this case mix their theories, alleging in Paragraph 39 of the Complaint that VTW “improperly copied the Plans,” while alleging in Paragraph 41 of the Complaint that “the Isbitski House . . . is substantially similar to the architectural work embodied in the Plans.” Infringement by the VTW plans is impossible based on the Court’s analysis; infringement by construction of a substantially similar building would be theoretically possible under the 1990 amendments, but did not occur here, as discussed below.

II. On The Undisputed Facts Of This Case, The VTW Frame Is Not A Copy Of Plaintiffs’ Architectural Work

Plaintiffs’ operative allegation – Paragraph 41 of the Complaint – is ridiculous in light of the undisputed evidence here. It is undisputed that the “House” as constructed by VTW was not a “house” at all but merely the frame component which VTW was subcontracted to fabricate and erect. It is undisputed that VTW did not perform the functions prior to erection of the frame – the site work and the laying of the foundation. Nor did it perform the functions subsequent to the erection of the frame, such as placing the panels, walls, door cut-outs, window cut-outs or roof

panels. Nor did it do anything at all on the other sections of the house which were to be stick-built. So while plaintiffs may be correct that they owned the architectural work which was the design of the entire house, it is simply ludicrous for them to argue that VTW's frame was substantially similar to plaintiffs' design of an entire house especially when plaintiffs made no frame drawing at all.

Plaintiffs want the Court to assume a hypothetical arrangement of the overall form of the house by VTW – including the placement of walls defining rooms and spaces, and the locations of windows, doors and fixtures as completed after the fact by third parties – from VTW's mere design and erection of the naked frame for a portion of the building. Such a leap is impossible to make. The overall architectural work as built was not even defined at the point VTW left the project, as demonstrated by plaintiffs' subsequent license agreement with the bank which foreclosed on the property:

Bank is under no obligation to use the Timberpeg Plans to complete construction of the house – i.e., Bank may complete construction of the House in any manner, including a manner unrelated to the Timberpeg Plans.

Ex. 21, Para. 3. Indeed, even if the house had been ultimately completed in a way which matched or was substantially similar to plaintiffs' design, it would have been with plaintiffs' express permission under that license agreement. Id.

Thus, the VTW frame could not be a copy of plaintiffs' architectural design for the full house (but excepting the timber frame), on the undisputed facts here.

The follow up questions are (1) whether a subcontracted component of an architectural work is entitled to protection at all, and (2) if so, whether the VTW frame is “substantially similar” to the frame component of plaintiffs' design. The Court did not address the first of these,

which would be an alternative basis for ruling in VTW’s favor, but squarely (and correctly) resolved the latter in VTW’s favor. These questions will be addressed in the next two headings.

III. A Mere Component Of A Building Is Not Entitled To Protection

The correct answer to the first question is that the “architectural work” protected under the AWCPA applies not to individual standard features – components – but to “buildings.” Section 101, definition of “architectural work.” Nimmer notes that while the term “building” is not defined in the Act, the proposed protection for “other three-dimensional structures” was deleted from the bill as enacted. Nimmer On Copyright §2.20. Similarly, the Copyright Office regulations provide that “structure other than buildings” “cannot be registered.” 37 C.F.R. §202.11(d). Thus, there is no copyright protection at all for a design – such as a mere timber frame – which is not a “design of a building.”²

This was squarely decided in Yankee Candle Co., Inc. v. New England Candle Co., 14 F. Supp. 154, 159 (D. Mass 1998) (summary judgment against plaintiff, which sought to copyright a “structure-within-a-structure,” a candle store within a larger mall), and Ale House Management, Inc. v. Raleigh Ale House, Inc., 205 F. 3d 137, 143 (4th Cir. 2000) (island or peninsula-shaped bar) within larger structure not entitled to copyright protection. See fuller discussion at pp. 16-17 of VTW’s original memo supporting summary judgment (Document 23).

The Court could substitute this analysis for its “preliminary matter” discussed at pp. 14-16 of its ruling, or could simply leave it out altogether. The holding (pp. 17-21) also is adequate on its own with a minor modification suggested below.

² Moreover, plaintiffs admit that their Registered Design did not contain timber frame drawings, and that Timberpeg never did create frame drawings for the Isbitski project. [Vincent Dep. 98-99, Ex. 12]

IV. The Court's Holding – That VTW's Work Lacks Probative Similarity To Plaintiffs' Second Set Of Plans – Is Sound

The Court's principal ruling, on page 17, is that "the allegedly infringing work, VTW's shop drawings, lack probative similarity to [plaintiffs'] second set of preliminary plans." This ruling is sound, and is not dependent in any way on the Court's comments on the "preliminary matter."

To be technically complete, this statement should be broadened slightly. The "allegedly infringing work[s]" are not just the VTW's shop drawings but also VTW's frame as constructed.

But there is no dispute that VTW constructed what it drew:

- As stated by Friant (Ex. 17, ¶12), "In June of 2002, we shipped and erected Isbitski's frame in Salisbury, NH. The timber frame VTW constructed for Stan in [2002]³ was the design I created as set forth above [i.e., the VTW 3/25/02 design which the Court has found *not* substantially similar to the Timberpeg work].
- The photos taken by plaintiffs (Ex 3) also confirm that the frame as erected matches the VTW design.
- In their Memorandum opposing summary judgment, plaintiffs directly indicate that the VTW drawing and frame are the same: "The frame VTW drew and manufactured" (Document 25, at 6)
- Plaintiffs' designer, Chad Rivet, conceded that the as-built VTW frame was "substantially different" from the plaintiffs' claimed design. (Ex. 13 at 16-17)⁴

³ The affidavit has a typographic error and refers to "2003." All the documentary references in the case make clear that "2002" was intended.

⁴ The testimony was as follows:

- Q. To the homeowner standing inside a timber frame, the one shown in TIM 023 [photograph of as-built VTW frame] and then the one shown in drawing eight [the Timberpeg design], those would look substantially different, right?
- A. Yes, there's less rafters.
- Q. And aesthetically, for the art of it, it would look quite different to the homeowner, right:
- A. For the ceiling, roof, for the roof system it would be different.

- Plaintiffs' expert witness corroborated Rivet's testimony by admitting that "the framing would be different, definitely." Ex. 12 at 106.⁵

So the finding that the VTW shop drawings lack probative similarity to the Timberpeg preliminary design necessarily means that the identical VTW frame as constructed lacks probative similarity to the Timberpeg preliminary design.

The Court can correct this simply by adding the words "and frame" wherever it refers to the VTW drawings in pp. 17-21 of the Order.

V. The Summary Judgment As To Counts V, VI and VII Is Valid

Needless to state, the summary judgment as to the state law claims, Counts V, VI and VII, has not been challenged, and is valid.

Conclusion

For the above reason, VTW respectfully suggests that the February 9, 2005 Order be modified as follows:

- That the discussion on pp. 14-16 as to the "preliminary matter" either be deleted, or amended to indicate that copyright protection only extends to buildings, not to components such as the timber frame component here, and that in any event plaintiffs admit that they never even designed a timber frame.

⁵ The testimony was as follows:

- Q. They're aesthetically quite different, right?
- A. I was taught in design to never use the word, aesthetic, so I try not to, it means different things to different people.
- Q. What about the word, artistic?
- A. Another form of the same word.
- Q. Doesn't have meaning to you?
- A. The framing would be different, definitely.

Ex. 12 at 106 (emphasis added).

- That the holding on p. 16 and following be broadened to indicate that neither VTW's plans nor frame are substantially similar to plaintiffs' Registered Design.

In addition, there are numerous other, alternative grounds for summary judgment to be granted to VTW, which were addressed in its two summary judgment motions and motion for judgment on the pleadings which the Court did not reach in light of its ruling.

Date: March 10, 2005

VERMONT TIMBER WORKS, INC.
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Defendants,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2005, I served the foregoing pleading on the following counsel of record, by first class mail:

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