Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Jul 30 2009, 9:19 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

KEVIN D. CROUSE
Jasper, Indiana

ATTORNEYS FOR APPELLEE:

KATHLEEN M. ANDERSON
CARRIE MARIE RAVER
Barnes & Thornburg LLP
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEVIN D. CROUSE, Appellant-Plaintiff,	)	
vs.	)	No. 19A01-0810-CV-471
REPUBLIC SERVICES OF INDIANA, LIMITED PARTNERSHIP; REPUBLIC SERVICES OF INDIANA TRANSPORTATION, LLC; REPUBLIC SERVICES, INC.; JAMAX CORPORATION; and, All Affiliated Companies, Appellees-Defendants.	)	

APPEAL FROM THE DUBOIS CIRCUIT COURT
The Honorable Dean A. Sobecki, Special Judge
Cause No. 19C01-0509-PL-0316

July 30, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kevin Crouse ("Crouse") appeals the Dubois Circuit Court's grant of summary judgment in favor of Republic Services of Indiana, LP ("Republic LP"), Republic Services of Indiana Transportation, LLC ("Republic LLC"), Republic Services, Inc. ("Republic Inc."), and Jamax Corporation ("Jamax"), (collectively known as "Republic") on Crouse's complaint arising out of a sale of assets and an employment termination. Upon appeal, Crouse argues that the trial court erred when it granted summary judgment in favor of Republic Services.[1] We affirm.

Facts and Procedural History

In the fall of 2002, Crouse and Republic LP negotiated the sale of Crouse Disposal and Crouse Disposal LLC (collectively "the Crouse Companies"). During the negotiation process, the parties discussed the possibility of Crouse's continued employment with Republic LP; however, neither the fact of employment nor terms of employment were completely negotiated. In early winter of 2002, Crouse agreed to the sale for a price of $1,808,565.00, with a royalty of $0.50 per ton of waste accepted for processing at Crouse's transfer station.

On January 16, 2003, Onyx Blackfoot Landfill, Inc. ("Onyx") sent a letter to Crouse asserting a right of first refusal to match any offers made to Crouse related to the sale of the Crouse Companies. In 2002, Crouse had signed a promissory note to pay Onyx $43,846.91 and granted Onyx a right of first refusal to match any offer Crouse received in connection with a sale of Crouse Disposal. Despite his prior agreement to do so, Crouse had not notified Onyx of the sale of the Crouse Companies. Onyx discussed

[1] Because we conclude that the trial court properly granted Republic Services's summary judgment motion, we do not address the issue of whether the named Defendants are proper parties to the lawsuit.

exercising its right of first refusal but did not explicitly state that it would match Republic's offer. Crouse ultimately chose to accept Republic's offer.

On March 14, 2003, Crouse and Republic LP executed an Asset Purchase Agreement ("the Agreement") in which Republic LP agreed to purchase Crouse Companies. Pursuant to the Agreement, Republic LP would receive a solid waste collection, hauling, disposal, and recycling business and transfer station from Crouse. Crouse would receive $1,808,565.00 with a royalty of $0.50 per ton of waste accepted for processing at the Crouse transfer station for a period of ten years. The Agreement contained no provisions related to Crouse's actual or potential employment by Republic LP or any of its associated companies.

On March 17, 2003, Crouse signed an application for employment with Republic LLC. He also signed an "Introductory Employment Period Acknowledgement Form," a "Policy Acknowledgement" of the Drug and Alcohol Free Workplace Policy, and the "Employee Consent Form." He also signed the "Electronic Communication System Use & Confidentiality Agreement." Crouse worked at Republic LLC from March 17, 2003 until September 9, 2003. During this time, Crouse was not working pursuant to a written employment agreement. On September 9, 2003, Republic LLC terminated Crouse's employment because of performance issues.

On September 8, 2005, Crouse filed a complaint against Republic alleging wrongful discharge, constructive fraud, and slander. On October 3, 2005, Republic filed its answer. On November 14, 2006, Republic filed its motion for summary judgment. On December 18, 2006, Crouse filed his response to the motion for summary judgment,

designation of evidence in support thereof, and brief in support of his response. On November 19, 2007, a hearing was held on Republic's motion for summary judgment. On September 3, 2008, the trial court granted Republic's motion for summary judgment as to all of Crouse's claims. Crouse now appeals.

Standard of Review

Summary judgment is appropriate only where the designated evidence reveals no genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. Garneau v. Bush, 838 N.E.2d 1134, 1140 (Ind. Ct. App. 2005), trans. denied. The moving party bears the burden of showing that there are no genuine issues of material fact; if the moving party meets its burden, then the burden shifts to the non-moving party to set forth facts showing the existence of a genuine issue for trial. Id. In determining whether the trial court properly granted summary judgment, we give careful scrutiny to the pleadings and designated materials, construing them in the light most favorable to the non-movant, while also clothing the trial court's decision with a presumption of validity. Davis v. LeCuyer, 849 N.E.2d 750, 752 (Ind. Ct. App. 2006), trans. denied.

I. At-Will Employment

Indiana follows the doctrine of employment at will. Wior v. Anchor Industries, Inc., 669 N.E.2d 172, 175 (Ind. 1996). If there is no definite or ascertainable term of employment, then the employment is at will, and is presumptively terminable at any time, with or without cause, by either party. Coutee v. Lafayette Neighborhood Housing Services, Inc., 792 N.E.2d 907, 911 (Ind. Ct. App. 2003), trans. denied. There are,

however, a few well-defined exceptions to the employment-at-will doctrine. The three recognized exceptions are: (1) adequate independent consideration to support a contract, (2) public policy, and (3) promissory estoppel. Orr v. Westminster Village North, Inc., 689 N.E.2d 712, 718 (Ind. 1997).

Crouse initially argues that he falls within the first exception to the employment-at-will doctrine: adequate independent consideration to support a contract. If an employee establishes that "adequate independent consideration" supports the employment contract; the Court generally will conclude that the parties intended to establish a relationship in which the employer may terminate the employee only for good cause. See Romack v. Public Service Co., 511 N.E.2d 1024, 1026 (Ind. 1987) (adopting in substantial part and incorporating Romack v. Public Service Co., 499 N.E.2d 768, 777 (Ind. Ct. App. 1986) (Conover, J., dissenting)). Generally, simply surrendering another job or moving to another location to accept a new position which the employee sought, standing alone, does not constitute adequate independent consideration. Wior, 669 N.E.2d at 173-77. Such adequate independent consideration is provided, however, when, for example, the employer is aware that "the employee had a former job with assured permanency (or assured non-arbitrary firing policies)" and "the employee was only accepting the new job upon receiving assurances the new employer could guarantee similar permanency," Wior, 669 N.E.2d at 175-76 (citing Romack, 499 N.E.2d at 778), or when the employee entered into a settlement agreement releasing the employer from liability on an employment-related claim against the employer. Speckman v. Indianapolis, 540 N.E.2d 1189, 1192 (Ind. 1989).

Crouse was indeed employed by Republic following the sale of Crouse Companies; however, no documentation exists that connects Crouse's employment with the sale. Appellee's App. pp. 50-63. Crouse had every opportunity to include the issue of his future employment in the sales agreement or in a separate agreement that was merged into the sales agreement, but he did not do so.

Crouse argues that by closing his law firm to take a job with Republic, he provided adequate independent consideration. While his law firm may have been employment with some assured permanency, there is no evidence that Crouse accepted the position with Republic with similar assurances of permanency. In fact, Crouse does even not claim that Republic made such assurances, only that Crouse believed that the new job offered similar permanency. Appellant's Br. p. 11. As observed by us in Ohio Table Pad Co. v. Hogan,

> [t]he reason for [determining that moving one's household to a new location and giving up one's prior job is not necessarily adequate independent consideration] is that in moving and/or giving up [his] prior job, the employee is merely placing [himself] in a position to accept the new employment. There is no independent detriment to the employee because [he] would have had to do the same things in order to accept the job on any basis, and there is no independent benefit bestowed upon the employer.

424 N.E.2d 144, 146 (Ind. Ct. App. 1981). Crouse's act of closing his law firm does not constitute adequate independent consideration when he would have been required to do so to take the full-time position with Republic and Republic received no independent benefit from the closure.

Crouse also argues that he declined the opportunity to sell the Crouse Companies to Onyx because Republic offered him a job. Crouse states that if Onyx had purchased

the Crouse Companies on the same terms as Republic did, then he would have received more transfer station royalties because of the amount of waste Onyx would likely move through that station. However, Crouse fails to support this position with anything other than mere conjecture. He simply refers to the amount of waste that Onyx moves historically and assumes that a significant portion of that waste would go through the transfer station. Most importantly, Crouse failed to designate any evidence that Onyx actually offered to buy the Crouse Companies. Rather, the designated evidence only supports an assertion that Onyx attempted to determine whether or not to exercise their right of first refusal. Appellant's App. pp. 77, 78.

Finally, Crouse claims that his employment with Republic falls within an exception to at-will employment because, by forgoing Republic's offer to employ him as a consultant and instead choosing to be employed by Republic as a full-time employee, he provided adequate independent consideration to Republic. Crouse asserts that Republic offered him two employment options. The first option would employ Crouse as a consultant with Republic for three years with total compensation being $75,000. The second option would employ Crouse as a full time employee. Assuming that Crouse's claim is true, he chose to accept the full-time position, not the consultant position. He cannot now argue that if he had known that he would be terminated, then he would have taken the consultant's position.

Crouse also argues that he falls within the third exception to the employment-at-will doctrine, promissory estoppel. To do so effectively, the employee must plead or assert the doctrine with particularity. The employee must assert and demonstrate that the

employer made a promise to the employee; that the employee relied on that promise to his detriment; and that the promise otherwise fits within the Restatement test for promissory estoppel. See Jarboe v. Landmark Community Newspapers of Indiana, Inc., 644 N.E.2d 118, 121 (Ind. 1995) (adopting Restatement (Second) of Contracts § 90(1) (1981)).[2]

Crouse claims that Republic promised him a position in exchange for agreeing to sell the Crouse Companies to Republic. We note that Crouse claims that he would not have sold the Crouse Companies to Republic but for Republic's promise of employment; however, he failed to include that integral term in any of the sales documents or in any other document related to the sale of the Crouse Companies, or for that matter, in any document that he signed prior to beginning work for Republic. Crouse fails to provide any basis for his assertion that Republic promised him employment following the sale of the Crouse Companies that would not be at-will. Crouse also fails to demonstrate that he relied on Republic's promise of employment as a basis for the sale of the Crouse Companies. Crouse's employment does not fall within the third exception to the employment at-will doctrine.

Crouse failed to designate any evidence that would support his claims that his employment was not at-will employment. The trial court therefore properly granted

[2] Section 90(1) of the Restatement (Second) of Contracts (1981) provides: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. The remedy for breach may be limited as justice requires." Id. at 242.

Republic's summary judgment motion on the issue of Crouse's employment with and subsequent termination from Republic LLC.[3]

II. Defamation

Crouse next argues that Republic defamed him in communications with Republic's clients. To establish a claim of defamation, a plaintiff must prove the existence of "a communication with defamatory imputation, malice, publication, and damages." Davidson v. Perron, 716 N.E.2d 29, 37 (Ind. Ct. App. 1999). Any statement actionable for defamation must not only be defamatory in nature, but false. Doe v. Methodist Hospital, 690 N.E.2d 681, 687 (Ind. 1997) (citing Restatement (Second) of Torts § 558 (1977)). "Whether a communication is defamatory or not is a question of law for the court, unless the communication is susceptible to either a defamatory or non-defamatory interpretation-in which case the matter may be submitted to the jury." Kelley v. Tanoos, 865 N.E.2d 593, 596 (Ind. 2007) (citation omitted).

Crouse alleges that Republic defamed him by telling a customer of Republic (formerly of the Crouse Companies) that service problems "were related to the conversion from Crouse Disposal to Republic, and that the problems were caused by Mr. Crouse not having everything organized when he left the company." Appellee's App. p. 176. Because this statement was spoken, not written or published, it will be examined as defamation by slander. See Branaman v. Hinkle 137 Ind. 496, 502, 37 N.E. 546, 548

[3] Crouse also alleges constructive fraud. An integral part of a claim of constructive fraud is that the complaining party must have had a reasonable right to rely upon the statements made. Darst v. Illinois Farmers Ins. Co, 716 N.E.2d 579, 581 (Ind. Ct. App. 1999) trans. denied. In this case, a promise of employment was not included in the sales agreement nor was it memorialized in any other document related to the sale of the Crouse Companies. Additionally, a promise of permanent employment was not included in any employment documents signed by Crouse when he began work at Republic LLC. Crouse did not have a reasonable right to rely on any statements made regarding employment with Republic LLC.

(1894). Specifically, Crouse argues that this statement should be considered slander per se in that it imputes misconduct in a person's trade, profession, office, or occupation. In the case of defamation per se, "[t]he law presumes the plaintiff's reputation has been damaged, and the jury may award a substantial sum for this presumed harm, even without proof of actual harm." Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992) trans. denied (citations omitted). "In addition, the plaintiff, upon proper proof, is entitled to special damages, i.e., damages, generally pecuniary in nature, which are consequential to the defamation." Id. at 145-46.

While interpreting Indiana's notice pleading provision in the context of a defamation claim, our Supreme Court has held that

> even under notice pleading, a plaintiff must still set out the operative facts of the claim. Indeed, hornbook law stresses the necessity of including the alleged defamatory statement in the complaint. See, e.g., 53 C.J.S. §§ 128-163; 9 Indiana Practice §§ 28.3-28.14. There is sound reason for this policy, as the absence of a statement in the complaint works a detriment on both the court and the defendant. The court is handicapped without the statement since, without it, the court cannot actually determine if the statement is legally defamatory. Journal-Gazette Co., v. Bandido's Inc., 712 N.E.2d 446, 457 (Ind. 1999). The defendant is placed on an unfair footing since the absence of the statement denies her the opportunity to prepare appropriate defenses . . . . Permitting defamation actions to proceed without the inclusion of the alleged statement would sanction claims brought by individuals who allege nothing more than that someone must have said something defamatory about them[.]

Trail v. Boys and Girls Clubs of Nw. Ind., 845 N.E.2d 130, 136-38 (Ind. 2006).

An allegedly defamatory communication "is to be viewed in context and given its plain and natural meaning, according to the idea it is calculated to convey and the persons to whom it is addressed." Davidson v. Perron, 716 N.E.2d 29, 37 (Ind. Ct. App. 1999), trans. denied. Crouse's initial complaint alleged that Republic told customers that billing

errors were the fault of Crouse. However, such an allegation is not sufficiently specific enough to determine whether it is or is not defamatory.

In Crouse's response to Republic's motion for summary judgment, he attached a customer's affidavit who stated that Republic explained that the customer's service problems "were related to the conversion from Crouse Disposal to Republic, and that the problems were caused by Mr. Crouse not having everything organized when he left the company." Appellee's App. p. 176. While this statement is sufficiently specific to determine whether it is or is not defamatory, a plain and natural meaning of the statement does not uncover any defamatory meaning or implication. Without any more evidence designated regarding the statements, the trial court properly granted Republic's summary judgment motion on this issue.

Conclusion

The trial court properly granted Republic's motion for summary judgment on the issues of Crouse's at-will employment and dismissal from Republic LLC, as well as on the allegedly defamatory statements made about Crouse.

Affirmed.

RILEY, J., and KIRSCH, J., concur.