

IP 03-1564-C Y/K Amcoat v Sobieray
Judge Richard L. Young

Signed on 2/4/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMCOAT TECHNOLOGIES, INC.,)	
)	
Plaintiff,)	
vs.)	NO. 1:03-cv-01564-RLY-TAB
)	
RICHARD SOBIERAY,)	
)	
Defendant.)	

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

AMCOAT TECHNOLOGIES, INC.,)

Plaintiff,)

vs.)

1:03-CV-1564-RLY-TAB

RICHARD SOBIERAY,)
Defendant.)

ENTRY ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

This case is the byproduct of a home improvement project gone wrong. The protagonist in this life play is a home owner and his antagonist is the owner of a coating contractor which performed the work that ended with an admittedly less than acceptable result. However, there is a twist. This case is not about payment for the home improvement project. Rather, the home owner is the defendant and a different contractor, owned by the very same antagonist who owned the home coating company which worked on the defendant’s home, is the plaintiff. This case is based upon the new contracting entity’s claim that it has been defamed by the homeowner and had a business relationship interfered with by that same homeowner. The homeowner has moved for summary judgment in his favor.

FACTS

Steve Dominique was the sole shareholder and President of ProCraft Services, Inc., (“ProCraft”) an Indiana company which applied ceramic coating products to homes as a long lasting alternative to painting. On May 12, 1999 the defendant, Richard Sobieray of Greenwood, Indiana, contracted with ProCraft for the application onto his home of a product ProCraft was marketing under the name “Liquid Vinyl”. Liquid Vinyl was one of the many names, including

“Liquid Siding” and “Ceramic Coat” used by the manufacturer, Kryton Coatings International (“Kryton”) and its dealers to market Kryton’s ceramic coating product. ProCraft was a Kryton dealer and the sole distributor of Kryton’s ceramic coating products in Indiana.

After ProCraft applied Liquid Vinyl to Sobieray’s home, it began to blister, peel and chip, contrary to the manufacturer’s warranty. This happened to the homes of numerous other ProCraft customers as well. Many homeowner lawsuits followed, including one brought by Sobieray. In defending the lawsuits, ProCraft claimed that Kryton’s product was defective and Kryton claimed that ProCraft misapplied the product. Meanwhile, Dominique started a new company called Amcoat Technologies, which he eventually incorporated as a Florida corporation under the name Amcoat Technologies, Inc. (“Amcoat”). Dominique formed Amcoat so that he could continue in the home coatings application business, utilizing products other than those manufactured by Kryton. ProCraft had been testing other ceramic coating products, but had been informed by Kryton that the ProCraft name was proprietary and could be used only in connection with the distribution of Kryton products. Kryton terminated ProCraft’s dealership in September of 2001 and Amcoat was incorporated in December of 2001.

Dominique remained the sole shareholder when he incorporated Amcoat. Many of the same subcontractors that worked with ProCraft were used by Amcoat and the key employees of ProCraft became employees of Amcoat as well. For some period of time, both companies operated out of the same offices and utilized the same phone numbers. Generally, the phone was answered as Amcoat and Dominique testified that its crews would be dispatched to service prior ProCraft applications. ProCraft was eventually dissolved as an Indiana corporation in 2003. Amcoat offers a ceramic coating product manufactured by a different company. It initially marketed the product as Ceramic Coat or a similar name and eventually adopted Rhino Shield as

its brand name. In some Amcoat advertisements it lays claim to ProCraft's history and experience in the business without mention of the previous separate corporation. It also lists ProCraft as a "doing business as" name for Amcoat in Better Business Bureau filings and credits itself with ProCraft's years in business.

Stan Hirshfeld is President and an owner of HSI Show Productions, the company which puts on the Indiana Flower and Patio Show. He is also a long time acquaintance of Mr. Sobieray. Many home improvement companies and product manufacturers exhibit at the annual Indiana Flower and Patio Show, which is held at the State Fairgrounds each spring in Indianapolis. Upset that the problems with the ceramic coating on his home had yet to be rectified, and that he had to resort to litigation to attempt to resolve the situation, Sobieray decided to share his displeasure with Hirshfeld. By letter dated June 11, 2003, Sobieray explained to Hirshfeld that he was in litigation with "the Liquid Siding / Kryton company and the individuals who run the Amcoat enterprises", that he and others were victims of a finger pointing game engaged in by the product manufacturer and the applicator and that these companies marketed through the "Home Show"¹ in the past. Sobieray concluded his letter by offering to share his experience in more detail if there were standards the show participants needed to meet, because, as he opined, "[T]hese guys do not belong in business."²

¹The "Home Show" is actually another popular annual exhibition held at the Indiana State Fairgrounds which Sobieray apparently confused with the Indiana Flower and Patio Show in this letter.

²The entirety of the June 11, 2003 letter read as follows:

Mr. Stan Hirschfeld
7273 Waterview Point
Noblesville, IN 46060

Re: Liquid Siding/Kryton

In late July 2003, a representative of Amcoat telephoned the Director of Exhibits for the Indiana Flower and Patio Show, Donnell Walton, and requested information about exhibiting at the next show. In response, Walton wrote to Amcoat, explaining that the show had become aware of a number of lawsuits filed by “dissatisfied customers”, including one filed by a friend of the owner of the company which puts on the show. The letter, dated July 29, 2003, explains

Amcoat/RhinoShield/Ceramic Coat

Dear Stan:

The above referenced companies are currently marketing heavily in Indianapolis and surrounding counties. And, both have used the Home Show as a vehicle to expand their marketing

I am currently in a lawsuit, along with many others, against the Liquid Siding/Kryton company and the individuals who run the Amcoat enterprises because they were the installers and dealer of the Liquid Siding product in 1999 when I had it installed.

I will not bore you with all of the details of the suit other than to tell you that they play a unique game with their warranty. When a problem arises, the applicator blames the product and the manufacturer blames the applicator. The consumer is left with only legal remedy. But the game only begins. These guys open and close businesses with regularity in order to hide under corporate protections. Stan, they have this down to a science.

I have noted this to the BBB and they cannot comment on lawsuits. Angie’s List is only interested if you pay a membership to report a problem.

I don’t know if you have any guidelines for the Home Show participants, but if you do I would be happy to share my experience in more detail. These guys do not belong in business. And they should not have access to venues which somehow give them credibility.

This has been a nightmare and, as you can imagine, the legal process is slow and favors the criminal.

FYI

Sincerely,

/s/

Richard Sobieray

that the Indiana Flower and Patio Show was not willing to assume the risk of letting Amcoat exhibit at the show. Walton concluded the letter by inviting Amcoat to contact him if it believed “this information is unfounded.”

Amcoat apparently responded because Sobieray was contacted by the Flower and Patio Show and informed that Walton, as Director of Exhibits would be interested in learning about the problems he had experienced. Sobieray then provided additional information to Walton. He provided information to Walton via an e-mail³ as well as through sending him a copy of a newspaper article he authored in the local paper discussing the need for buyers to beware of Kryton’s “Liquid Siding” product. The article described his experience with ProCraft, the results of the application of the ceramic coating to his home and the ensuing litigation. The article was forwarded with a letter to Walton which provided a list of “current lawsuits that involve Mr. Dominique and/or the manufacturer of Liquid Siding.” There were six lawsuits listed and the letter also provided the names of four other homeowners who had contacted Sobieray regarding similar problems they had and the materials sent by those persons to

³The text of the e-mail read as follows:

Mr. Walton . . . I have a lawsuit against the principals of Amcoat Technology as a result of their application of the coating product that they applied as the Procraft dealer here in Indianapolis. There are at least six other lawsuits pending. I also have a lawsuit against the principals that represent the product named “Liquid Siding”. There is a new dealership in Greenwood that represents this product and while they are not part of the lawsuit, their product is.

I would be happy to share more specific details with you at your convenience. As a matter of fact, I wrote a story about my experience and would be happy to send you a copy.

I hope you will maintain screening of companies that have a booth at your show. In my opinion, neither the product, Liquid Siding, nor the principals of Amcoat Technology belong in this important event.

Richard Sobieray

Sobieray were included with the letter to Walton. The letter of August 20, 2003 reads as follows:

Donell Heberer Walton
Director of Exhibits
Indiana Flower & Patio Show

Re: Amcoat Technology/Steve Dominique
Liquid Siding/TSP of Greenwood

Dear Donell:

Please excuse my failure to include your address above but, at the time of preparing this info, I did not have your mailing address.

Here is the list of current lawsuits that involve Mr. Dominique and/or the manufacturer of Liquid Siding. These are the only ones known to me. There may be others.

A. Richard & Geraldine Sobieray: 808 Surrey Hill Lane, Greenwood, IN

Johnson County Circuit Court
Cause #41C01-0205-CC-79

B. Cecil & Linda Crohn: 5323 W. Dunlap Rd., Ellettsville, IN

Monroe Circuit Court
Cause # 53CO50206CT01038

C. Cheryl Nickels: 931 E. Raymond St., Indianapolis, IN

Marion Superior Court
Cause # 490070202PL000364

D. Richard Moore: 8329 E. St. Rd. 38, New Castle, IN

Henry County Superior Court
Cause # 33001-0103CT003

E. Terry & Lynn Jacob: 11279 Echo Ridge Lane, Indianapolis, IN

Marion Superior Court
Cause # 49DO30111CT001781

F. Ken & Gerry Asher: 25102 Bull Fork Rd., Oldenberg, IN

Franklin County Circuit Court
Cause #24 C01-0110-CP-300

The following have also contacted me regarding problems and are in various stages of agony. I have attached anything sent by these individuals.

Alan Carlson
Patti Wallace
Michael Sullivan
Don & Pat Roddy

The Roddy's live in a historic home around 14th & Pennsylvania. I do not have a phone number handy but theirs is really a sad story.

Mr. Dominique, as a previous Procraft dealer has left a trail of destruction but his claim is that Liquid siding is a defective product and has a lawsuit against Kryton, the manufacturer. Kryton has a lawsuit against Mr. Dominique for failure to apply the product satisfactorily. Dominique also claims that the deceptive advertising was created by Kryton. While Kryton claims that Mr. Dominique created the deceptive ads.

This should give you some idea of the type of people you are dealing with here.

I hope this helps and if I never see a booth at the Flower & Patio Show for either Amcoat Technology or Liquid Siding it won't be long enough. I hope you enjoy the Buyer Beware story. Before writing it, I delivered a similar speech to the Indianapolis Historic Commission. Liquid Siding was making a presentation to get their product approved on some historic structures. The Commission turned them down.

Sincerely,
/s/
Richard Sobieray, AIA

The information provided to Walton by Sobieray was presumably sent on to Amcoat, because it responded with a letter to Walton dated September 12, 2003. The unsigned letter read as follows:

Dear Ms. Walton,

We received you (*sic*) letter and the correspondence from a Mr. Sobieray. It is understandable that you would want to ensure quality products and companies in your show.

The information provided to you by Mr. Sobieray is not accurate and borders on defamation. The only suit list that involves AmCoat Technologies is a suit brought by Mr. Sobieray. AmCoat has never had a contract or done business with Mr. Sobieray. The suit is being contested. As far as the other consumers, we have never heard of most of them.

Liquid siding is a product that has had a lot of problems but we do not and have never sold or installed Liquid Siding We consider them a competitor. Our product, though a coating, is not similar in makeup or performance to Liquid Siding.

After reading the information provided it seems clear that H.S.I. and Mr. Sobieray are trying to intentionally interfere with our company and prevent us from marketing our products.

At Amcoat we are proud of our work and reputation in many states. We have quality control procedures, test our products thoroughly, and have hundreds of happy customers. Please reconsider your position and we will await your response.

AmCoat Technologies, Inc.

The Flower and Patio Show did not change its position and Amcoat has not been allowed to exhibit at the Indianapolis show. As a result, Amcoat claims it has suffered damages in the form of lost sales. It filed this action against Sobieray alleging defamation and tortious interference with a business relationship.

STANDARD OF REVIEW

Summary judgment is only to be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine fact exists, the court examines the pleadings and the proof as

presented in depositions, answers to interrogatories, admissions, and affidavits made a part of the record. *First Bank & Trust v. Firststar Information Services, Corp.*, 276 F.3d 317 (7th Cir.2001). The court also draws all reasonable inferences from undisputed facts in favor of the non-moving party and views the disputed evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However, the non-moving party may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; rather it must go beyond the pleadings and support its contentions with properly admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Only competing evidence regarding facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). And, if the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment is properly granted to the moving party. *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir.1996).

The Local Rules of this district require the moving party to include in a supporting brief “a section labeled ‘Statement of Material Facts Not in Dispute’ containing the facts potentially determinative of the motion as to which the moving party contends there is no genuine issue.” Local Rule 56.1(a). The opposing party is to file a response brief which “shall include a section labeled ‘Statement of Material Facts in Dispute’ which responds to the movant’s asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment.” Local Rule 56.1(b). “For purposes of deciding the motion for summary judgment,

the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts: are specifically controverted in the opposing party's 'Statement of Material Facts in Dispute'" Local Rule 56.1(e). In this matter, Plaintiff is the opposing party and did not challenge any of the undisputed facts set forth in Defendant's brief.

ANALYSIS

In order to prevail in an action for defamation under Indiana law, a plaintiff must establish four elements: 1) a communication with a defamatory imputation; 2) malice; 3) publication; and 4) damages. *Poyser v. Peerless*, 775 N.E.2d 1101, 1106 (Ind. App. 2002). A communication is defamatory if it tends to lower a person's esteem or harm his reputation in the community. *Rambo v. Cohen*, 587 N.E.2d 140, 145 (Ind. App. 1992). A communication which imputes misconduct in a person's profession is defamatory per se and damages are presumed. *Id.* The determination of whether a communication is defamatory is initially a question of law for the court; it is to be presented to the jury as a question of fact only if the communication is reasonably susceptible to either defamatory or non-defamatory interpretation. *Ratcliff v. Barnes*, 750 N.E.2d 433, 436 (Ind. App. 2001). Even if a statement is defamatory, it does not necessarily form the basis for a recovery. In order to recover in an action for defamation, that which caused the alleged defamation must be both false and defamatory. *Ratcliff*; 750 N.E.2d at 436; *Kitco, Inc. v. Corporation for General Trade*, 706 N.E.2d 581, 587 (Ind. App. 1999).⁴

⁴While Amcoat is a corporate entity, the standards of proof for defamation of a corporation are the same as they are for an individual. *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 269 (7th Cir. 1983).

Though at first, it was not at all clear from the Complaint which communication Amcoat claims to have been defamatory, the Plaintiff has brought clarity to that issue in its response brief to this motion when it states: “[T]he statements at issue were made in a communication sent to the Indiana Flower and Patio Show by Mr. Sobieray in the summer of 2003.” It goes on to argue that despite having knowledge that Amcoat and ProCraft were separate corporate entities and that Amcoat did not sell or apply the same product that ProCraft had applied on his home, Sobieray disparaged Amcoat in his letter to Walton by listing lawsuits which were brought against ProCraft as opposed to Amcoat. It argues that of the four additional complaining persons listed by Sobieray in the letter, only one had a relationship with Amcoat. According to Amcoat, Sobieray’s reference to Amcoat on the “re line” of the letter leaves a distinct impression that it manufactured the product and that the lawsuits involve Amcoat, as opposed to ProCraft.

Sobieray argues that he is entitled to summary judgment on the defamation claim because the communication is true and because it was not made with actual malice. He also argues that Amcoat had no existing business relationship with the Flower and Patio Show that he could have interfered with and that defamation can not serve as a basis for a claim of tortious interference. After examining the letter complained of closely and in context, as is required under Indiana law, *See Rambo v. Cohen*, 587 N.E.2d at 145, the court agrees that it is not an actionable defamation of Amcoat . Further, a claim for tortious interference with a business relationship requires a showing of illegality, and defamation, even if proved, does not constitute illegal conduct. *Levee v. Beeching*, 729 N.E.2d 215, 222-223 (Ind. App. 2000).

When examining the August 20, 2003 letter from Sobieray to Walton it is important for context to understand that the day before, Sobieray had sent Walton a brief e-mail indicating

that he had brought a lawsuit, others had done the same and he would provide more detail if Walton so desired. In that e-mail of August 19, 2003 the very first line starts with “Mr. Walton ... I have a lawsuit against the principals of Amcoat Technology as a result of their application of the coating product that they applied as the Procraft dealer here in Indianapolis.” That first sentence makes it quite clear that the lawsuit is against the principals of Amcoat and was the result of action taken when they were operating Procraft. Apparently Walton did desire further details as Sobieray’s letter to Walton was drafted the next day. So, prior to receiving the letter of August 20, 2003, Walton was made aware of who Sobieray was suing and that there were other lawsuits pending as well.

The letter of August 20th did nothing to alter the target of Mr. Sobieray’s concern and dissatisfaction as expressed in the e-mail. In the letter he sets forth a list of lawsuits “that involve Mr. Dominique and/or the manufacturer of Liquid Siding.” Defendant’s uncontested Statement of Material Facts Not In Dispute makes it clear that each of the lawsuits involved either the manufacturer, Kryton (as a defendant in four of the six lawsuits) or Steve Dominique (as a defendant in one and as an officer and sole shareholder of ProCraft in all six lawsuits). Amcoat’s argues that the use of its name in the “re line” infers that it was the manufacturer of the problematic coating and that the use of Dominique’s name with both was an attempt to make the reader believe that Amcoat and ProCraft were one in the same. However this argument ignores the remainder of the letter. On the second page of the letter, Sobieray makes it quite clear that Dominique, ProCraft and Kryton are who he holds responsible for his and other’s problems. He writes “Mr. Dominique, as a previous Procraft dealer has left a trail of destruction but his claim is that Liquid Siding is a defective product and has a lawsuit against Kryton, the manufacturer.”

While Mr. Dominique might have reason to quarrel with the strong language in that sentence, Amcoat has none.

The message Sobieray is delivering to Walton and the Flower and Patio Show seems very clear to the court. At its essence the message can be described as follows. He and many others had a very big problem with the application of a ceramic coating product on their homes. The product was manufactured by Kryton and applied by ProCraft. The two companies are blaming each other and neither of the two are fixing the problem. Steve Dominique, the owner of ProCraft started another company called Amcoat which is performing the same type of work and involves the same key people who operated as ProCraft. These people have used the Flower and Patio Show in the past to promote their business and Sobieray thinks the show ought to be careful about letting them exhibit in light of their past. In fact, Sobieray would prefer to never see Amcoat or Liquid Siding exhibit at the show again.

Amcoat seems to think that as a new corporate creation of Mr. Dominique it is somehow shielded from any unwanted criticism based upon Dominique's background and ownership interest in a predecessor corporation which engaged in the very same type of business. While it may have a right to a separate corporate identity and enjoy the benefits of independent corporate status, it does not have a right to be cleansed of whatever reputation its owner and management may have gained in the operation of the predecessor entity. That is especially true when Amcoat itself lists ProCraft as a d/b/a in its Better Business Bureau submission and advertises itself utilizing ProCraft's years of experience in the business. And, while there is no denying that Sobieray was attempting to lower the esteem of Amcoat in the eyes of Walton and to persuade the Flower and Patio Show not to allow Amcoat to exhibit, he was doing so utilizing the truth

about his and others' experience with a predecessor corporation owned and operated by the same people. While Amcoat calls this malicious because his and the others' complaints arise out of dealings with ProCraft or its principals, the law defines the element of actual malice in a much different manner.

A private party bringing a defamation action must show actual malice on the part of a defendant in matters of public or general concern. *Journal-Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E.2d 446, 452 (Ind. 1999); *Poyser v. Peerless*, 775 N.E.2d 1101, 1107 (Ind. App. 2002). Actual malice is the publication of a defamatory statement with knowledge that it is false or with reckless disregard for the accuracy of the statement. *Poyser*, 775 N.E.2d at 1107.⁵ The circumstances here do not include the publication of a false statement. Soberay listed lawsuits involving Kryton and the principals who are now operating Amcoat, and he made that fairly clear. So, though Sobieray may have intended that his letter have a negative effect on Dominique's new corporate entity, Amcoat, it did not contain an inaccurate defamatory statement and therefore no proof of actual malice exists. As a matter of law the court finds no actual malice and no defamation on the part of Mr. Sobieray.

Amcoat's claim of tortious interference with a business relationship is even easier to dispose of. All that Amcoat has complained of with respect to Mr. Sobieray is his alleged defamatory statements. Even if they had been defamatory, Indiana law clearly requires more than that to bring a successful claim of tortious interference. *Levee v. Beeching*, 729 N.E.2d 215,

⁵Since, as this court previously mentioned, Indiana defamation law has developed a separate requirement that a defamatory statement must be false in order to be actionable, the additional requirement that actual malice be shown in matters of public or general concern really amounts to a requirement that the communicator have knowledge of the falsity or have demonstrated a reckless disregard of whether the published statement was true or false.

222-223 (Ind. App. 2000). Further, and perhaps most important in the analysis of this claim, it is uncontested that Amcoat had no existing business relationship with the Flower and Patio Show and there must be an existing relationship in order to support a claim for tortious interference. *Id.* at 222. Interestingly, Amcoat argues that the fact that Steve Dominique and ProCraft had previously developed a relationship with the Flower and Patio Show, which had produced income for its predecessor, should have some impact in determining that a business relationship existed between his new company, Amcoat, and the show. Though this seems consistent with Amcoat's desire to usurp whatever good came from ProCraft (i.e. its phone number, advertising referrals and years of experience in the business) while insulating itself from liability or reputation for its problems, Procraft's business relationship with the Flower and Patio Show can not form the basis for Amcoat's claim of tortious interference.

CONCLUSION

For the reasons discussed above, the court finds that no material question of fact remains and summary judgment should be entered in favor of the Defendant, Richard Sobieray and against the Plaintiff, Amcoat Technologies, Inc. on both claims raised in the Complaint. Accordingly, Defendant's Motion For Summary Judgment is GRANTED and a separate judgment shall be entered in favor of Richard Sobieray.

SO ORDERED this ____ day of _____, 2005.

RICHARD L. YOUNG, JUDGE
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

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