

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEN and SANDRA BEGALKE
d/b/a KEN'S SEPTIC CLEANING,

Plaintiffs,

v.

ORDER

06-C-186-C

STERLING TRUCK CORPORATION
and FREIGHTLINER, LLC,

Defendants and
Third-Party Plaintiffs,

v.

CATERPILLAR, INC.,

Third-Party Defendants.

Trial is scheduled for November 13, 2006, in this diversity case brought by plaintiffs Ken and Sandra Begalke under Wisconsin's Lemon Law, Wis. Stat. § 218.0171. In an order dated July 12, 2006, this court denied in part a motion for summary judgment brought by defendants Sterling Truck Corporation and Freightliner, LLC. A review of the docket sheet reveals that approximately one month later defendants filed a third party complaint, naming Caterpillar, Inc. as a third party defendant in this case. Now before the court is Caterpillar's

motion for a continuance of the trial.

Because the procedural history of this case is atypical, a brief summary is in order. Shortly after this case was removed to federal court, defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b). Because the motion required the court to consider matters outside the pleadings, at the preliminary pretrial conference held May 2, 2006, the parties agreed that the motion would be converted to a motion for summary judgment under Fed. R. Civ. P. 56. Defendants were not required to file their answer until the court ruled on the pending motion.

On July 12, 2006, the court granted in part and denied in part the motion for summary judgment. On July 26, 2006, defendants filed a timely answer, and nine days later, they filed a third party complaint against Caterpillar. The addition of third party defendants to a lawsuit is governed by Fed. R. Civ. P. 14(a), which provides:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action.

It is this court's normal practice to require parties to obtain leave to file third-party complaints, even when those complaints are filed within the 10-day window authorized by

Rule 14. However, a review of the preliminary pretrial conference order issued in this case, dkt. #7, at 2, reveals that the portion of the standard order addressing third-party complaints was omitted inadvertently from the pretrial conference order. Although the parties were admonished to seek leave of the court before amending existing pleadings, they were not directed to seek leave before filing any new pleadings. Consequently, there was nothing improper or untimely about defendants' third-party complaint.

That brings us to Caterpillar's pending motion. Because Caterpillar was not served with a complaint until August 4, 2006, long after the deadline for filing dispositive motions had passed and the schedule for discovery had been established, it was not given any opportunity to engage in discovery or file dispositive motions in this case. It would be unreasonable to expect Caterpillar to proceed to trial in two months' time without first providing it with an opportunity to conduct discovery and file dispositive motions, if any are warranted. Therefore, I will grant the motion for a continuance. United States Magistrate Judge Stephen L. Crocker will arrange a telephone conference with the parties to set a date for trial and establish a schedule for discovery with respect to defendants' complaint against third party defendant Caterpillar, Inc.

ORDER

IT IS ORDERED that third party defendant Caterpillar, Inc.'s motion for a

continuance is GRANTED. United States Magistrate Judge Stephen L. Crocker will arrange a telephone conference with the parties to set a date for trial and establish a schedule for discovery.

Entered this 7th day of September, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge