IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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COACH USA, INC. and
KEESHIN CHARTER SERVICE,
INC.,

OPINION and ORDER

Plaintiffs,

06-C-457-C

v.

VAN HOOL N.V. and
ABC BUS COMPANIES, INC.,

Defendants.

- -

In this civil action for monetary relief, plaintiffs Coach USA, Inc. and Keeshin Charter Services, Inc. contend that defendants Van Hool N.V. and ABC Bus Companies, Inc. are liable in tort for damage caused when a bus manufactured by Van Hool and leased to plaintiffs by Coach USA caught fire on July 15, 2005. Jurisdiction is present under 28 U.S.C. § 1332.

Presently before the court is defendant ABC Bus Companies, Inc.'s motion to dismiss plaintiffs' claims against it under Fed. R. Civ. P. 12(b)(6). (Defendant Van Hool is not a party to the pending motion. Therefore, all references to "defendant" will be to defendant

ABC Bus Company.) The motion will be granted because the parties' contract expressly bars the claims plaintiffs have brought against defendant in this lawsuit.

For the sole purpose of deciding this motion, I accept as true the allegations in the complaint. In addition, because the parties' lease agreement is central to determining whether plaintiff has stated a claim, I have considered that document which I may do without converting the pending motion into a motion for summary judgment under Fed. R. Civ. P. 56. Continental Casualty Co. v. American National Insurance Co., 417 F.3d 727, 731 n. 3 (7th Cir. 2005). From the complaint and the operating lease agreement, I draw the following facts.

FACTUAL ALLEGATIONS

A. Parties

Plaintiff Coach USA, Inc. is a Delaware corporation with its principal place of business in Paramus, New Jersey. Plaintiff Keeshin Charter Service, Inc. is an Illinois corporation with its principal place of business in Chicago, Illinois. It is a wholly owned subsidiary of plaintiff Coach USA. Defendant Van Hool, N.V. is a foreign corporation organized under the laws of Belgium. Defendant ABC Bus Company is a Minnesota

corporation with its principal place of business in Faribault, Minnesota.[1]

B. Lease Agreement

On February 1, 2002, plaintiff Coach USA entered into a lease agreement with defendant ABC Bus Company in which the bus company leased to plaintiff Coach USA for a period of 60 months a 1997 Van Hool T945 bus, manufactured by defendant Van Hool. Under the terms of the lease, plaintiff was obligated to lease the bus for the full 60 months, after which it would be given the option of purchasing the vehicle for the price of $41,000.

The lease agreement provided:

> This agreement creates a lease of Equipment only and does not create a sale thereof or the creation of any other interest in or to the Equipment by Lessee. Lessor shall remain the sole owner of the Equipment, and nothing contained in this agreement or in the payment of rent hereunder shall enable Lessee to acquire any right, title or interest in or to the Equipment not specifically set forth herein.

Contained in the lease agreement was a warranty clause, which stated:

> Except as otherwise provided . . . LESSOR MAKES NO WARRANTY, REPRESENTATION, OR GUARANTEE, EXPRESS OR IMPLIED, WRITTEN OR ORAL, OF MECHANICAL CONDITION, RELIABILITY,

[1] Contrary to the allegations in the complaint, the parties' lease agreement states that plaintiff Coach USA is a Texas corporation and defendant ABC Bus Company is a Florida corporation. Although the parties do not attempt to explain this discrepancy, diversity jurisdiction exists regardless whether the complaint or the agreement is correct. Consequently, I will consider defendant's motion on its merits.

CAPACITY, MERCHANTIBILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE WHATSOEVER. THE EQUIPMENT IS LEASED AND ACCEPTED BY LESSEE STRICTLY "AS IS." LESSOR SPECIFICALLY DISCLAIMS ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE AND ANY LIABILITY FOR ANY CONSEQUENTIAL OR INCIDENTAL DAMAGES ARISING OUT OF THE USE OF OR INABILITY TO USE THE EQUIPMENT. FURTHER, LESSEE SPECIFICALLY ACKNOWLEDGES THAT IT HAS HAD FULL OPPORTUNITY TO INSPECT SAID EQUIPMENT TO ITS FULL AND COMPLETE SATISFACTION . . . .

In addition, the agreement contained the following indemnity clause:

Lessee hereby agrees to defend, indemnify and hold Lessor harmless from any and all liability arising out of the ownership, leasing, use, unauthorized use, licensing, maintenance, condition, or operation of the Equipment during the term of this Lease or as long as lessee has control over the Equipment. . .

It is the parties' intention to shift all liability from lessor to Lessee whether the liability was, or may have been, caused in whole or in part by Lessor, Lessee, or both. The foregoing covenants of indemnity are absolute and unconditional and shall continue in full force and effect regardless of where, how or by whom the subject Equipment is operated. . . .

In addition to their customary meaning, the following definitions are provided: "liability" means but is not limited to, responsibility for any claim sounding in tort, contract or otherwise, for death, injury or damage to person, property, real or personal, tangible or intangible, or any other claim, loss or damage. "Indemnify" means, but is not limited to, the shifting of liability from lessor to lessee whether the liability was, or may have been, caused in whole or in part by Lessor, lessee or both. . . .

C. Accident

Plaintiffs used the leased bus to transport passengers and their personal property. On

July 15, 2005, the bus caught fire while being driven on Interstate 90 North in Janesville, Wisconsin. The fire caused substantial damage to the vehicle and to passengers' personal property.

D. Lawsuit

On July 11, 2006, plaintiffs filed a lawsuit against defendants ABC Bus Companies and Van Hool in the Circuit Court for Rock County, Wisconsin. On August 18, 2006, defendants removed to this court. In their complaint, plaintiffs allege that defendant ABC Bus Companies owed plaintiffs a duty "to use reasonable care in the sale and distribution of the [bus]" leased to plaintiffs and that ABC breached that duty by:

> a. S[elling] the subject vehicle which ABC knew was prone to a foreseeable hazard of an electrical malfunction which posed an unreasonable fire hazard;
>
> b. Failing to properly inspect the subject vehicle for defects prior to certifying the subject vehicle as worthy to be placed in the stream of commerce;
>
> c. Failing to properly route, secure, fasten, and protect battery cables and ground wires to avoid movement, abrasion and vibration;
>
> d. Fail[ing] to provide, use and install adequate clamps, ties or securing devices to be [sic] fasten, hold and secure the battery cables and ground wires in a fixed position to prevent vibration and abrasion;
>
> e. Fail[ing] to properly inspect the subject vehicle and ensure that the battery cables and ground wires in the motor coach were assembled and installed pursuant to SAEJ1292 Oct 1981 standards for motor coaches.

In the complaint, plaintiffs requested relief in the form of (1) "contribution and/or indemnification" for all damages plaintiffs paid to their passengers for the destruction of the passengers' personal property and (2) damages for the value of the bus and the loss of its use.

OPINION

A. Claims against Defendant ABC Bus Company

Although plaintiffs allege that defendant ABC Bus Companies, Inc. committed various torts against them, this is not a tort case. Rather, it is a case governed by the plain, unequivocal, unambiguous language of the parties' lease agreement. Under that agreement, defendant disclaimed all warranties and plaintiffs agreed that defendants would not be liable for any damages arising out of plaintiffs' use of the leased vehicle. Moreover, the agreement defines liability to include "responsibility for any claim sounding in tort, contract or otherwise, for death, injury or damage to person, property, real or personal, tangible or intangible, or any other claim, loss or damage." In short, the agreement precludes plaintiffs from raising any of the claims they are asserting against defendant in this lawsuit.

Plaintiffs seek to recover for damage to the bus and to the personal property of plaintiffs' passengers. Defendant points out (and by their silence on the matter, plaintiffs appear to concede) that plaintiffs do not and never have owned the vehicle in question. Under the terms of the lease agreement, *defendant* is the "sole owner" of the vehicle. Of

course, it would be absurd to require the owner of the damaged vehicle to compensate the lessee for the value of the vehicle in which the lessee has no proprietary interest. Because plaintiffs have made no attempt to rebut defendant's argument on this point, I understand them to have withdrawn their request for money damages for harm caused to the bus itself.

That leaves plaintiffs' request for damage caused to their passengers' personal property. Plaintiffs contends that defendant is liable for this damage because it acted negligently by failing to inspect the vehicle and secure the bus's battery cables and ground wires. In its motion, defendant asserts alternate grounds upon which to dismiss plaintiffs' claims. First, it asserts, plaintiffs' tort claims are barred by the plain language of the lease agreement. In the alternative, defendant suggests that plaintiffs' claims are barred by the economic loss doctrine, which seeks "to preserve the distinction between contract and tort law and to prevent parties from eschewing agreed-upon contract remedies and seeking broader remedies under tort theory than the contract would have permitted." Cerabio LLC v. Wright Medical Technology, Inc., 410 F.3d 981, 987-988 (7th Cir. 2005).

In their response brief, plaintiffs ignore defendant's primary allegation, that the contract bars plaintiffs' claims. Instead, plaintiffs assert that an exception to Wisconsin's economic loss doctrine permits them to continue litigating their tort claims. They are mistaken.

The economic loss doctrine prevents "commercial contracting parties . . . [from]

escalat[ing] their contract dispute into a charge of tortious misrepresentation if they could easily have protected themselves from the misrepresentation of which they now complain." All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 866 (7th Cir. 1999) (applying Wisconsin law). For purposes of the doctrine, "economic loss" is "the loss in a product's value which occurs because the product is inferior in quality and does not work for the purposes for which it was manufactured and sold." Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 401, 573 N.W.2d 842, 845 (1998). The doctrine prevents "end runs" around a contract by prohibiting parties from reworking a disclaimed contract warranty into a legitimate tort claim, when the underlying complaint is the same: a product was defective. The economic loss doctrine applies primarily when a contract is silence with respect to tort claims, but is clear in its prohibition of contract warranties.

It is doubtful that reliance on the doctrine is necessary in cases like this one, in which the parties' contract disclaims expressly "any claim sounding in tort, contract or otherwise, for death, injury or damage to person, property, real or personal, tangible or intangible, or any other claim, loss or damage." See, e.g., Restatement (Third) of Torts, § 2 (1999) ("[A] contract between the plaintiff and another person absolving the person from liability for future harm bars the plaintiff's recovery from that person for harm."). When signing the lease agreement, the plaintiffs and defendant anticipated the possibility of future tort claims. Plaintiffs expressly disclaimed their ability to bring such actions. In the absence of any

suggestion by the parties that the lease agreement is unenforceable, plaintiffs are not free to ignore the plain terms of their contract. To permit them to do so would be contrary to the parties' legitimate expectations at the time the lease agreement was signed and would violate the terms of their freely-negotiated agreement.

Even if I were to apply the economic loss doctrine to the facts of this case, the result would be the same. Under the doctrine, a party unhappy with the performance of a product may not seek in tort remedies that are unavailable to it under the terms of its contract. The reason for this is simple:

> Contract law, and the law of warranty in particular, is well suited to commercial controversies . . . because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, [there is] no reason to intrude into the parties' allocation of the risk.

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 872-873 (1986) (internal citations omitted) (applying economic loss doctrine in context of federal maritime law).

Plaintiffs assert that insofar as they are seeking damages for harm caused to their passengers' luggage, they are not complaining about the failure of the bus, but rather the damage the bus's failure caused to other property. Under Wisconsin law, when an allegedly defective product damages "other property," tort claims are not barred by the economic loss doctrine. Wausau Tile, Inc. v.. County Concrete Corp., 226 Wis. 2d 235, 247, 593 N.W.2d

445 (1999) ("The economic loss doctrine does not preclude a product purchaser's claims of personal injury or damage to property other than the product itself.")

To determine whether damaged property is "other property," Wisconsin courts employ two tests: the "integrated system" test and the "disappointed expectations" test. Grams v. Milk Products, Inc., 2005 WI 112, ¶¶ 27-28, 31, 283 Wis. 2d 511, 699 N.W.2d 167. Under the "integrated system" test, courts determine whether the allegedly defective product is a component in a larger system. Id., ¶ 27. "[O]nce a part becomes integrated into a completed product or system, the entire product or system ceases to be 'other property' for purposes of the economic loss doctrine." Selzer v. Brunsell Bros., 2002 WI App 232, ¶ 38, 257 Wis. 2d 809, 652 N.W.2d 806. However, if a product has no function apart from its value as a part of a larger system, the larger system and its component parts are not "other property." Grams, 283 Wis. 2d 511, ¶ 30. In this case, the luggage and other personal property for which plaintiffs are seeking damages were not integrated into the bus plaintiffs leased from defendant. Consequently, the integrated system test does not bar plaintiffs' tort claims. The next question is whether the disappointed expectations test does.

Under the disappointed expectations test, the "determination of whether particular damage qualifies as damage to 'other property' turns on the parties' expectations of the function of the bargained-for product." Id., ¶ 32 (citing Rich Products Corp. v. Kemutec, Inc., 66 F. Supp. 2d 937, 972 (E.D. Wis. 1999). When "prevention of the subject risk was

one of the contractual expectations motivating the purchase of the defective product," the economic loss doctrine applies to bar tort claims, even when the damages sought relate to property other than that which was the direct subject of the parties' contract. Id., ¶ 43.

Plaintiffs leased a bus from defendant for the purpose of transporting passengers and their personal property from one location to another. Given the fact that the parties' lease agreement made specific mention of "real or personal property," explicitly transferring all liability for damage from defendant to plaintiffs, it is clear that the type of property damage for which plaintiffs are seeking recovery was contemplated by the parties at the time they entered into the lease agreement. As a result, the "other property" exception cannot be used to defeat Wisconsin's economic loss doctrine.

Plaintiffs' claims against defendant are barred by the parties' lease agreement and by the doctrine of economic loss; therefore, defendant's motion to dismiss will be granted.

ORDER

IT IS ORDERED that the motion to dismiss of defendant ABC Bus Companies, Inc. is GRANTED. Defendant ABC Bus Companies, Inc. is DISMISSED from this lawsuit, as

are plaintiffs' claims against it.

Entered this 5th day of December, 2006.

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