IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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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.

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After purchasing a truck that allegedly didn't work, plaintiffs Ken Begalke and Sandra Begalke filed this civil action against defendants Sterling Truck Company and Freightliner, LLC in the Circuit Court for Chippewa County, invoking Wisconsin's Lemon Law, Wis. Stat. § 218.0171. On April 4, 2006, defendants removed the action to this court, and trial was scheduled for November 13, 2006. Defendants filed a motion to dismiss, which was converted to a motion for summary judgment.

After the motion was denied in part on July 12, 2006, dkt. #18, defendants filed a third party complaint against third party defendant Caterpillar, which manufactured the engine for plaintiff's allegedly defective truck. Because third party defendant would have had little opportunity to conduct discovery before the originally-scheduled trial date, this court granted third party defendant's motion to continue the trial, rescheduling it for May 14, 2007. Dkt. #36.

Now before the court is plaintiffs' "Motion for Severance and Separate Trial," in which plaintiffs request that the court hold separate trials under Fed. R. Civ. P. 42(b) or sever defendants' third-party claim under Fed. R. Civ. P. 21. Because plaintiffs have not shown how they would be prejudiced by a failure to separate the claims in this action and because trying the case as a whole will be more efficient than bifurcation, plaintiffs' motion will be denied.

Although plaintiffs have moved for "severance" of defendants' third party claim, they have invoked Rules 20(b) and 42(b), which govern the *separation* of claims in an action in which multiple parties have been joined. (Technically, severance occurs under Fed. R. Civ. P. 21 and "creates two separate actions or suits where previously there was but one." Gaffney v. Riverboat Services of Indiana, Inc., 451 F.3d 424, 442 (7th Cir. 2006) (citing United States v. O'Neil, 709 F.2d 361, 368 (5th Cir. 1983)). In this case, plaintiffs are seeking separation, not severance.) Because the inquiries under Rules 42 and 20 differ

slightly, I will examine each in turn.

A. Fed. R. Civ. P. 20(b)

Rule 20(b) permits the court to

> . . . make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and . . . order separate trials or make other orders to prevent delay or prejudice.

Plaintiffs contend that they will incur needless expense if they are forced to try their case in the same trial in which defendants pursue their third party claim. In their brief in support of their request for separation, plaintiffs focus on the fact that they have not asserted a claim against third party defendant directly. Plaintiffs assert that they "should not have to participate in an expanded legal forum and prolonged or irrelevant and expensive discovery or wait for briefing and resolution of legal issues which are not part of [their] burden and should not hinder [their] expeditious progress through litigation." Dkt. #35, at 6. However, plaintiffs offer no concrete examples of how they would be prejudiced by trying their case in May, rather than in late January or February, as they have requested. A three month delay is not alone enough to justify separate trials. Moreover, plaintiffs have not provided any description of the type of "irrelevant and expensive discovery" into which they fear being drawn. Without a more substantial and concrete showing that plaintiffs would be unfairly

burdened by trying their case in conjunction with defendants' third party claim, I find no reason to separate the claims under Rule 20(b).

B. Fed. R. Civ. P. 42(b)

Under Fed. R. Civ. P. 42(b),

> [t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. . . .

To determine whether bifurcation is appropriate under Rule 42(b), first the court must "determine whether separate trials would avoid prejudice to a party or promote judicial economy." Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999) (citing DeWitt, Porter, Huggett, Schumacher & Morgan v. Kovalic, 991 F.2d 1243, 1245 (7th Cir. 1993)). If either of these criteria is met, the court must determine whether bifurcation would unfairly prejudice the non-moving party. Id. Finally, separate trials must not be granted if doing so would violate the Seventh Amendment's guarantee that "no fact tried by a jury shall be otherwise reexamined." Id. In other words, the district court "must not divide issues between separate trials in such a way that the same issue is reexamined by different juries." Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995). Although two juries may examine overlapping evidence, they may not decide factual issues

that are common to both trials and essential to the outcome of both. Houseman, 171 F.3d at 1126.

In this case, plaintiffs' request satisfies neither of the threshold criteria for bifurcation. As discussed above, plaintiffs have not described with any specificity the kind of prejudice they might suffer were their case to proceed to trial without bifurcation and considerations of judicial economy weigh heavily in favor of trying the case as a whole.

Were that not reason enough to deny plaintiffs' motion, bifurcating the claims in this case would risk inconsistent verdicts on the same facts. To prove that they are entitled to recover against defendants, plaintiffs will have to show that the truck they purchased was defective. Chief among the defects they have alleged are engine problems. These engine problems, if proven, form the basis for defendants' third party claim. Bifurcating plaintiffs claims from defendants' third party claim would require the court to try the same factual disputes twice with the risk of inconsistent outcomes. Because the two claims at issue in this case are factually intertwined, it would be inappropriate to bifurcate them in the absence of a compelling reason to do so. Plaintiffs have not come forward with such a reason; consequently, their motion will be denied.

ORDER

IT IS ORDERED that plaintiff's "Motion for Severance [or] Separate Trial" is

DENIED.

Entered this 26th day of October, 2006.

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