

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

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ERVIN GAGAS,

Plaintiff,

v.

WISCONSIN CENTRAL, LTD.,

Defendant and Third Party Plaintiff,

SAMUELS RECYCLING COMPANY and  
RESIDUAL MATERIALS, INC.,

Third Party Defendants.

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OPINION AND  
ORDER

06-C-651-C

In this civil action for money damages, plaintiff Ervin Gagas alleges that he was hit in the head with a piece of scrap metal while working at a railroad facility run by defendant Wisconsin Central, Ltd. Plaintiff sued defendant under the Federal Employers Liability Act, 45 U.S.C. § 51, contending that defendant was negligent in failing to provide a safe work place. (Apparently, defendant not only denies any negligence but denies even that plaintiff was hit by a piece of scrap metal. Dft.'s Ans., dkt. #6, at ¶ 9.) Defendant then filed a third party complaint against Samuels Recycling Company and Residual Materials, Inc., contending that Residual Materials' negligence contributed to any accident that occurred

and that Samuels has a contractual duty to indemnify defendant for any amount it pays as a result of plaintiff's injuries.

No party has moved for summary judgment on plaintiff's claim for negligence, but both defendant and third party defendant Samuels Recycling Company have moved for summary judgment on the question whether Samuels is obligated to indemnify defendant for any amounts that it must pay to plaintiff for injuries he may have sustained. Third party defendant Samuels raises two arguments in support of its motion and in opposition to defendant's: (1) plaintiff's lawsuit is premised on a theory of negligence and the indemnification agreement does not extend to acts of negligence; and (2) the indemnification agreement does not extend to incidents occurring at one of defendant's facilities. In addition, Samuels has moved for summary judgment on Residual Materials' cross claim against Samuels. (Residual Materials never filed a brief in opposition to this motion, but instead filed a letter on July 26, 2007, stating that it and Samuels were preparing a stipulation regarding this claim. Dkt. #37. The court has not yet received such a stipulation.)

Although I understand the parties' desire to resolve these issues, I cannot do so at this time because the question is not yet ripe. Under Wisconsin law, a court must resolve questions of liability *before* determining questions of indemnification of any party for such liability (and whether Samuels must indemnify Residual Materials or contribute to it).

General Casualty Co. v. Hills, 209 Wis. 2d 167, 176 n.11, 561 N.W.2d 718, 722 n.11 (1997) (citing Newhouse v. Citizens Security Mutual Insurance Co., 176 Wis. 2d 824, 834-36, 501 N.W.2d 1 (1993)). (The parties assume in their briefs that Wisconsin law applies to their dispute so I need not conduct a choice of law analysis. FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 283 (7th Cir. 2002); State Farm Mutual Automobile Insurance Co. v. Gillette, 2002 WI 31, ¶ 51, 251 Wis. 2d 561, 641 N.W.2d 662.) Because defendant has not conceded that it has violated plaintiff's rights under the Federal Employer's Liability Act and no party has moved for summary judgment on this issue, the resolution of the indemnification issue will have to wait until the resolution of plaintiff's claim against defendant at trial.

One other issue is before the court. Plaintiff requests that the court issue trial subpoenas for five witnesses he says have refused to testify voluntarily. Defendant opposes the motion because, it says, each witness is a current or former employee of defendant and each has told defendant that he or she will testify voluntarily. Although plaintiff may rely on defendant's assurances if he wishes, he is not obligated to do so under Fed. R. Civ. P. 45, which requires the clerk of court to issue subpoenas to any party requesting them. Plaintiff's

motion will be granted.

ORDER

IT IS ORDERED that

1. The motions for summary judgment filed by defendant Wisconsin Central, Ltd. (dkt. #27) and third party defendant Samuels Recycling Company (dkt. #31) are DENIED as unripe for review.

2. Plaintiff Ervin Gagas's request for the issuance of subpoenas (dkt. #49) is GRANTED. The clerk of court shall issue five signed but otherwise blank subpoenas to plaintiff.

Entered this 11th day of September, 2007.

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