IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 3 - 1969
JAMES R. COONER, CLERK
By Margaret Driver

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| CLARENCE BOREL | / | |
| | / | |
| VS | / | CIVIL ACTION NO. 6449 |
| | / | |
| FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL | / | |

MOTION TO STRIKE CERTAIN ALLEGATIONS
CONTAINED IN PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Defendant, JOHNS-MANVILLE PRODUCTS CORPORATION, and files this, its Motion under Rule 12(f) of the Federal Rules of Civil Procedure, to strike the paragraphs indicated in this Motion and certain claims of the Plaintiff as follows:

I.

This Defendant moves the Court to strike the allegation contained in Paragraph 5, page 3, as follows:

> "That in addition to the fact that the Plaintiff actually used the products manufactured by the above-named Defendants, and many more, as an insulator, and specifically many and various products containing asbestos, the Plaintiff says that on many of the jobs, while not using himself the specific products manufactured by the Defendants, he was nevertheless exposed to the dangerous materials and especially asbestos dust and fibers which were used by other workers in the same area at which Plaintiff was working,"

for the following reasons:



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(a) Said allegations are too broad, general and indefinite and therefore fail to state a claim upon which recovery may be had.

(b) Said allegations are so speculative and conjectural, and particularly the allegation that the Plaintiff not only used the products of the eleven named Defendants, but also "many more," that there is no basis upon which the Plaintiff can predicate a recovery against this Defendant, Johns-Manville Products Corporation.

(c) Such allegations do not state a claim or cause of action against this Defendant, Johns-Manville Products Corporation, for the reason that it is not alleged that the workers were using the products of this Defendant at the time of any alleged occurrence.

(d) The allegation that the Plaintiff used "many and various products containing asbestos," is insufficient to state a cause of action against this Defendant, Johns-Manville Products Corporation, and accordingly, said allegation should be stricken.

II.

This Defendant moves to strike the allegations contained in Paragraph 6 of said Complaint, and particularly the allegation that Plaintiff "was employed as an insulator from the year 1936 to 1969, inclusive.....," and the further allegation that due to the negligence and carelessness of the Defendants, "he was caused to come in contact with the insulation produced and manufactured and distributed by the Defendants.....," for the following reasons;

(a) Said allegations are vague, indefinite, conjectural and speculative and fail in any respect to allege or aver that during any of said 33 year period, between the years 1936 and 1969, that Plaintiff came in contact with any product which this Defendant, Johns-Manville Products Corporation, allegedly manufactured, nor does the Plaintiff allege the date or dates upon which any recovery may be based against this Defendant, Johns-Manville Products Corporation, for any alleged injury or injuries, if any.


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III.

This Defendant moves the Court to strike the allegations contained in Paragraph 7 (a) of said Complaint for the reason that said allegations fail to show, in what manner, or on what date or dates this Defendant, Johns-Manville Products Corporation, is alleged to have "negligently failed to take any reasonable precautions or exercise reasonable care to warn Plaintiff of the danger or harm to which he was exposed by handling the Defendants' said insulation."

IV.

This Defendant moves the Court to strike the allegations contained in Paragraph 7 (b) of said Complaint for the following reasons:

(a) No duty existed on the part of this Defendant, Johns-Manville Products Corporation, to advise the Plaintiff as to what would be reasonable, safe and sufficient wearing apparel and proper protective equipment and appliances for the reason that there existed no relationship or privity of contract as between the Plaintiff and this Defendant, which imposed any such duty upon Defendant, Johns-Manville Products Corporation.

(b) Because the allegation that Defendant "ought to have known," that its insulation was harmful to Plaintiff's body, lungs, respiratory system, etc., wholly fails to state a cause of action upon which recovery may be had.

V.

Defendant moves to strike the allegations contained in Paragraph 7 (e) of said Complaint, for the following reasons:

(a) Said allegations wholly fail to state a claim or cause of action upon which any recovery may be had against this Defendant.

(b) No duty exists on the part of this Defendant to instruct the Plaintiff in the proper handling or installation of insulation, since it is not alleged and, in fact, cannot be proven, that Plain-


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tiff was at any of the times material herein, employed by this Defendant and therefore, any duty which may have existed to instruct the Plaintiff regarding the proper handling or installation of insulation, existed on the part of the Plaintiff's own employer at the time or times in question.

(c) There is no duty and no relationship whereby this Defendant could enforce a reasonably safe time and method of handling the installation of insulation manufactured by it, since any insulation which was sold and delivered by this Defendant during the short period of time that it has manufactured such products, was sold and delivered to insulation contractors, who each and all knew that said insulation product contained a small amount of asbestos.

VI.

Defendant moves the Court to strike Paragraph 8 (b) of said Complaint for the following reasons:

(a) The same fails to state a claim or cause of action upon which recovery may be had against this Defendant.

(b) No duty exists on the part of this Defendant to remove its product from the market.

(c) There are no fact or facts alleged which show that the product manufactured by this Defendant is not reasonably suited for the purposes for which it was intended, or that its application was hazardous when applied under the supervision of experienced insulation contractors, and by experienced insulation workers.

VII.

Defendant moves the Court to strike Paragraph 8 (c) of said Complaint for the following reasons:

(a) No duty exists on the part of this Defendant to prescribe the method of application of the product by the Plaintiff, or by insulation contractors who employed the Plaintiff, and who were using this Defendant's product, if they were using such.


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(b) No duty exists on the part of this Defendant which would require it to provide Plaintiff with a safe place in which to work, when using a product manufactured by this Defendant, for the reason that this Defendant was not the employer of Plaintiff, and therefore, any duty was imposed on the Plaintiff's employer.

(c) There are no facts alleged showing that it was reasonably foreseeable that insulation workers working in the construction trade would contract asbestosis while applying insulation products which contain some asbestos.

VIII.

This Defendant moves the Court to strike Paragraph 8 (d) of said Complaint for the following reasons:

(a) As a matter of law, an insulation product containing asbestos is manufactured for insulation purposes and is not expressly or impliedly warranted for any other purpose.

(b) As a matter of law, an insulation product containing some asbestos is merchantable for the purpose for which it was manufactured.

(c) The allegations contained in Plaintiff's Complaint are vague and general, but nevertheless seek to impose a warranty to the public generally, and a warranty of merchantability generally, contrary to the actual facts which are that said products are not sold to the general public, but are sold to insulation contractors who employ experienced insulation workers and each and all of the contractors and insulation workers have expertise in their field and know that the product contains some asbestos and that asbestos dust may be created by cutting and sawing the product.

IX.

This Defendant moves the Court to strike Paragraph 9 of said Complaint wherein Plaintiff attempts to invoke the doctrine of res ipsa loquitur, for the following reasons:


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(a) Plaintiff has wholly failed to allege any facts upon which the doctrine of res ipsa loquitur could be made to apply.

(b) The doctrine of res ipsa loquitur, as a matter of law, would not apply to the factual situation alleged by Plaintiff, and it is insufficient for the Plaintiff merely to allege or show that he has asbestosis or claim that he has asbestosis in order to cast the burden on this Defendant to show that the Plaintiff did not know that he was working with a product which contained some asbestos, or to show that the Plaintiff did not work with Defendant's products.

(c) As a matter of law, the burden is on Plaintiff to show the time and the place that he worked with and used the products of the various Defendant, and this Defendant, in particular, which contained asbestos, and which caused him to sustain injury therefrom.

(d) As a matter of law this Defendant had no control over the product which it manufactured and sold, and there existed no relationship which gave this Defendant control over the manner and method by which a particular insulation contractor installed its product, or the safety practice or practices which were instituted by the various employers of the Plaintiff.

X.

This Defendant moves the Court to strike Paragraph 13 of said Complaint for the reason that Plaintiff alleges generally that "Plaintiff has suffered and sustained at the hands of the Defendants, and each of them, general and special damages in the sum of Five Hundred Thousand Dollars ($500,000.00) which allegation is vague, indefinite, conjectural and prejudicial to this Defendant, in that there is no showing of the amount of such alleged damages attributable to loss of earnings, nor is there any showing of the items of damages attributable to the alleged personal injury, if any, of the Plaintiff, the alleged diminished earning capacity of the Plaintiff or how, or in what manner the said sum of $500,000.00 was computed by the said Plaintiff.


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XI.

This Defendant moves the Court to strike Paragraph 14 of said Complaint for the reason that said Plaintiff alleges the Defendants, and each of them, were guilty of gross negligence, and the Complaint does not allege or aver any fact or facts which would entitle the Plaintiff to recover exemplary damages under and by virtue of the general allegations contained in said Paragraph 14, nor are there any facts which show any gross or willful negligence on the part of this Defendant, under the laws of the State of Texas.

Further, said allegations of gross negligence are prejudicial and inflammatory to this Defendant upon a trial of this case, when as a matter of law, the Plaintiff is not entitled to recover exemplary damages.

XII.

Defendant moves to strike Paragraph 15 of the Complaint for the reason that the same is a repetition of Paragraph 13.

WHEREFORE, premises considered, this Defendant, Johns-Manville Products Corporation, prays the Court to rule on each and all of the Motions to Strike the various paragraphs of Plaintiff's Original Complaint.

Respectfully submitted,

Gordon Pate

GORDON R. PATE
1119 Beaumont Savings Building
Beaumont, Texas

Attorney for Defendant, Johns-Manville Products Corporation

CERTIFICATE OF SERVICE

A copy of the above and foregoing Motion to Strike Certain Claims contained in Plaintiff's Original Complaint and proposed Order was mailed to Mr. Ward Stephenson, Stephenson & Thompson,


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Stephenson Building, Orange, Texas, Attorney for Plaintiff, by certified mail, return receipt required on the 3rd day of December, 1969, and a copy of said Motion and proposed Order were mailed to all counsel for Defendants of record on the same date.

Gordon R. Pate
GORDON R. PATE



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