IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
M. JUL 15 1970 19
James R. Cooney, Clerk, U. S. Court
By Margaret Driver DEPUTY

CLARENCE BOREL

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6449

FIRST AMENDED ANSWER OF DEFENDANT, FIBREBOARD CORPORATION, TO PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT, FILED SUBJECT TO THIS DEFENDANT'S MOTION TO STRIKE CERTAIN ALLEGATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Fibreboard Corporation (named herein as Fibreboard Paper Products Corporation), and subject to its motion to strike certain allegations, files this, its first amended answer to plaintiffs' pleading entitled plaintiffs' second amended original complaint, and for such answer this defendant would show the Court:

1.

Assuming that the domicile and place of incorporation of the various corporate defendants is correctly alleged, it is admitted that this Court has jurisdiction based upon diversity of citizenship of the parties. It is admitted that the claim asserted by plaintiffs exceeds the jurisdictional amount.

2.

This defendant can neither admit nor deny the allegations as to the residence of the various plaintiffs for lack of knowledge.

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3.

Answering the allegations in Paragraph 3, this defendant is without knowledge as to each and all of said allegations except it is admitted that Clarence Borel died on the 3rd day of June, 1970.

4.

In reply to Paragraph 4, it is denied that plaintiffs have any cause of action for wrongful death under Article 4671, Revised Civil Statutes of the State of Texas. It is further denied that Article 5525, Revised Civil Statutes of the State of Texas, creates any cause of action, but to the contrary, this is a limitation statute which provides that a cause of action for personal injury is barred by the two year statute of limitations. It is denied that this defendant caused the deceased any personal injury during his lifetime.

4-A

In answer to Paragraph 4-A, it is admitted that Fibreboard Corporation (formerly Fibreboard Paper Products Corporation), and its predecessors, has been and is now engaged in the manufacture of materials used for pipe insulation which contain some asbestos. It is denied that the insulation products manufactured by this defendant are placed on the market to be purchased and used by the general public, but to the contrary, this defendant sells its product to insulation contractors who employ experienced insulation workers in the application of the product.

This defendant does not purport to answer said allegations contained in Paragraph 4-A for each and all of the other defendants.

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5.

In answer to Paragraph 5, this defendant has filed a motion to strike said allegations. Subject to the motion to strike, and in the event the motion is overruled, this defendant in answer to said allegations says that it is without knowledge as to the employment of deceased as an insulator between the years 1936 to 1969, and it is likewise without knowledge that he was required to handle large quantities of the products manufactured and distributed by the above named defendants, including this defendant.

This defendant denies each and all of the allegations contained in the last sentence of the same Paragraph 5, and it specifically denies that the insulation products manufactured by it were dangerous.

6.

The allegations in Paragraph 6 are denied.

7.

This defendant has moved to strike Paragraph 7, Subdivisions (b) and (e).

In reply to the allegations contained in Paragraph 7, this defendant answers only for itself, but it denies that any injury and damage complained of by plaintiffs on behalf of the deceased was directly and/or proximately caused by any negligence and carelessness of this defendant.

In reply to the allegations in Paragraph 7 (a), this defendant answers only for itself, and it denies said allegations.

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This defendant says that the allegations in this paragraph are too vague, general and indefinite and do not apprise this defendant of any date or dates on which the deceased worked with any materials manufactured by this defendant, and it is not specified what the materials were, the name thereof, or their content. Under this set of facts, this defendant cannot answer such allegations as to any specific product manufactured by it.

Subject to the objections and the foregoing comment, the allegations of Paragraph 7 (b), (c), (d) and (e) are all denied.

8.

In reply to the allegations contained in Paragraph 8, this defendant denies that it made or breached any warranty as to its product to the deceased.

(a) The allegations of Paragraph 8 (a) are denied.

Defendant has moved to strike the allegations in Paragraph 8, Subdivisions (b), (c) and (d).

Subject to the objections on file and the motion to strike, the allegations of Paragraph 8, Subdivisions (b), (c) and (d), are denied.

8-A

This defendant denies the allegations contained in Paragraph 8-A of the complaint, and it is specifically denied that its product was unsafe for its intended use as pipe insulation.

9.

This defendant has moved to strike the allegations contained in Paragraph 9 of the complaint for the reason that

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the doctrine of res ipsa loquitur does not apply and could not apply to the factual situation herein alleged.

Subject to this defendant's motion to strike, the allegations of Paragraph 9 are denied.

10.

In reply to the allegations in Paragraph 10, this defendant denies that deceased sustained any injury as a result of any act or omission on the part of this defendant and denies that deceased was injured as a result of any alleged breach of warranty of this defendant. This defendant has no knowledge or information as to the cause or causes of deceased's alleged disability and death, but it denies that same was caused or brought about as a result of any act or omission on the part of this defendant or from the use of any product manufactured by this defendant.

This defendant expressly denies any violation of the Uniform Commercial Code adopted under the laws of the State of Texas, for the reason that said Code was not effective in Texas until midnight, June 30, 1966, and was not retroactive.

11.

The allegations of Paragraph 11 are denied.

12.

The allegations of Paragraph 12 are denied.

13.

This defendant denies the allegations in Paragraph 13 and denies that plaintiffs, or either of them, are entitled to recover any sum against this defendant.

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14.

This defendant has moved to strike Paragraph 14, which is a claim for gross negligence, on the grounds that said complaint fails to state any cause of action for gross negligence, but to the contrary, shows on its face that plaintiffs have no claim for gross negligence under the laws of the State of Texas.

Subject to the action of the Court on the motion to strike this paragraph, this defendant denies the allegations contained in Paragraph 14.

15.

This defendant denies the allegations contained in the prayer and denies that plaintiffs, or either of them, are entitled to recover any damage, either actual, special or exemplary, and denies that plaintiffs are entitled to any relief against this defendant.

AFFIRMATIVE DEFENSES

First Affirmative Defense

This defendant denies that deceased sustained any injury as a result of contact or use of any product manufactured by this defendant.

Second Affirmative Defense

Further answering, and by way of affirmative defense, defendant says that the products which this defendant manufactured and sold were at all times reasonably fit and suitable for the purposes for which they were manufactured and sold, and defendant denies that the same were in anywise defective for the use for which they were manufactured.

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Third Affirmative Defense

If deceased did sustain any injury as a result of the use of any product manufactured by this defendant, which is expressly denied, then such injury was sustained as a result of the occupation of the deceased, in that he had been engaged as an insulator or worker in the insulation field for a number of years (alleged to be 33 years), and at all times knew that he was working in dust-laden air which contained asbestos dust, as well as other dust particles, part of which were created by his own work and the work of other insulators, and by the failure of his employer or the owner of the premises on which he was working to provide facilities for the elimination of dust-laden air, and therefore any such injury as he may have sustained was some occupational disease resulting from his long continued occupation as an insulator and not as a result of any isolated incident or contact with any product manufactured by this defendant. This defendant says that it is not legally liable or responsible for any occupational disease which was suffered or sustained by deceased in the course of his employments over a number of years; and further, this defendant denies that the deceased worked with products manufactured by this defendant.

Fourth Affirmative Defense

This defendant denies that any product or products which it manufactured and sold for heat insulation purposes in anywise caused or brought about any injury or illness, if any, to deceased, and this defendant says that the physical conditions of which plaintiffs complain was in nowise caused or brought about by any product manufactured or sold by this defendant, but such

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condition was due solely to disease and other causes or to the acts and omissions of third persons, and the acts of the deceased.

Fifth Affirmative Defense

Further answering herein, and while denying that the deceased sustained any injury as a result of contact or use of any product manufactured by this defendant, if he did sustain injury or did sustain an occupational disease as a result of the use of any insulation product manufactured by this defendant, separately, or in conjunction with products manufactured by other defendants, then this defendant says that deceased was guilty of various acts, wrongs and omissions, each and all of which amounted to negligence in the performance of his work and occupation, which acting together or separately was a proximate cause of his injury. In this connection, this defendant would show that deceased failed to use and utilize any safety devices such as masks and respirators for breathing; that he failed to request the use of such masks and respirators; that he failed to request his employer to furnish blowers and other equipment to remove the dust-laden air and he worked in dust-laden air with full knowledge that he was inhaling such dust-laden air; and he continued to work with insulation materials containing some asbestos after he knew, or in the exercise of ordinary care should have known, that it was affecting his health.

Sixth Affirmative Defense

This defendant says that if deceased sustained any injury as a result of the use of any material or materials manufactured by this defendant, which is denied, the danger, if any, arising from the continued use of such material or materials was open and obvious

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and was well known to the deceased, or should have been known to him; but nevertheless, he continued to work as an insulator and continued to subject himself to air which was laden with insulation material.

In the alternative, if there was any danger and such was not open and obvious and apparent to deceased at all times, nevertheless, he knew at all times of the dangers involved with insulation materials containing some asbestos and in working in dust-laden air where insulation materials were in use, and he continued to use and to work with such materials and under such conditions with such knowledge, and therefore this defendant owed him no duty to warn him of any potential dangers involved, and he is therefore barred from any recovery under the theory of volenti non fit injuria.

Seventh Affirmative Defense

(a) If deceased did sustain any injury as a result of the use of any product manufactured by this defendant, which is denied, then such occurred more than two (2) years prior to the filing of this suit on the 20th day of October, 1969, and such cause of action is barred by the two (2) year statute of limitation of the State of Texas.

(b) If deceased did sustain any injury as the result of the use in the State of California of any product manufactured by this defendant, which is denied, then such occurred more than one (1) year prior to the filing of this suit on the 20th day of October, 1969, and such cause of action is barred by the one (1) year statute of limitation of the State of California. The law of California provides for a one (1) year statute of limitation

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as to actions for personal injury, and further provides that the filing of a claim for workmen's compensation does not toll or suspend the running of the statute of limitation. Defendant gives notice that it will rely upon the law of the State of California.

(c) If deceased did sustain any injury as the result of the use in the State of Louisiana of any product manufactured by this defendant, which is denied, then such occurred more than one (1) year prior to the filing of this suit on the 20th day of October, 1969, and such cause of action is barred by the one (1) year statute of limitation of the State of Louisiana. The law of Louisiana provides for a one (1) year statute of limitation as to actions for personal injury, and further provides that the filing of a claim for workmen's compensation does not toll or suspend the running of the statute of limitation. Defendant gives notice that it will rely upon the law of the State of Louisiana.

(d) If deceased did sustain any injury as the result of the use of any product manufactured by this defendant in any other state of the union, then this defendant gives notice and pleads each and all of the statutes of limitation of the respective states where the alleged cause of action arose as to said alleged cause of action. Defendant likewise pleads the statute of limitation of the State of Texas as to each and all of said alleged causes of action.

Eighth Affirmative Defense

If deceased did sustain any injury as a result of the use of any product manufactured by this defendant, which is denied,

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then such occurred more than four (4) years prior to the filing of this suit on the 20th day of October, 1969, and such cause of action is barred by the four (4) year statute of limitation of the State of Texas.

Ninth Affirmative Defense

Further answering, this defendant says that deceased was an experienced insulation worker according to his allegations and knew at all times that he was working with asbestos and products containing asbestos, as well as other products, which were harmful to him; or in the alternative, if he did not know this, his employers at all times knew that they were working with insulation materials which contained some asbestos, and said employers had knowledge of the fact that particles of said products could enter the air when said product was cut or applied, and his employers likewise had knowledge that if blowers or fans were not used in the area that their employees would be subject to the dust hazard and inhalation of dust; and further, it is common knowledge that if an individual works in an area where the air is laden with dust, that the individual will breathe this dust into his nose and body system unless the employee uses some mask, respirator or some protective device, or unless the employer provides some means whereby the dust is removed from the air as a safety measure.

Tenth Affirmative Defense

This defendant denies the existence of any warranty on the part of this defendant and denies any fault or breach of warranty on the part of this defendant, but to the contrary, says that the insulation product or products manufactured by it were at all times reasonably fit and suitable for the purpose

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of insulation which was the purpose for which they were manufactured and sold, and the deceased's injury, if any, did not result from any defect in said product. Further, any and all dust conditions which resulted from use of the product were created during the application thereof at which time the product was cut or changed from the original form in which it was manufactured by this defendant, and the conditions under which the deceased worked were at all times prescribed by his employer or the owner of the premises where the deceased was employed. This defendant had no responsibility for the condition or conditions at the place of work where deceased was performing his work.

Eleventh Affirmative Defense

Further answering herein, and in the alternative, this defendant says that the deceased's alleged injuries, death and damages, if any, were caused solely, or in the alternative, were proximately caused by acts, wrongs, omissions and negligence of third parties, or a third party, for whose acts this defendant is in nowise liable or responsible; or in the alternative, if deceased sustained any injury from the use of any product, or from any breach of warranty, none of which are admitted, but denied, then such was the result of the fault or breach of warranty of third parties other than this defendant.

Twelfth Affirmative Defense

Further answering herein, and in the alternative, this defendant says that the deceased's claims to injury and damage, if any, were the result of an unavoidable accident.

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Thirteenth Affirmative Defense

Further answering herein, and in the alternative, this defendant would show that there is and was no legal liability on the part of this defendant because of the fact that the alleged happenings in question were brought about or caused by transitory conditions arising in the course of the work which the deceased was doing, and ordinarily incident thereto; and deceased and his employers used their own manner, method and means of performing such work, and this defendant owed no duty with respect to such work, nor was there any relationship as between deceased and this defendant which created any duty on the part of this defendant as to the manner or method in which the work was done or the conditions under which the deceased performed such work.

Fourteenth Affirmative Defense

Further answering herein, this defendant says that during the period of time for which the deceased is asserting a claim and injury that the State of Texas had enacted a workmen's compensation law which provided that the disease of asbestosis is an occupational disease for which a person engaged in the occupation of an asbestos worker or working with asbestos products can claim workmen's compensation disability benefits against his last employer at the time the disease is discovered. According to the plaintiffs' pleadings, deceased worked with asbestos and asbestos products over a period of some 33 years, and if deceased had asbestosis, such was due to the nature of his occupation and was acquired over a long period of time and was not the result of working with any particular product or products, but was due to the nature of his employment.

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Further, the Texas Workmen's Compensation Act provides workmen's compensation benefits for the death of an employee if the death resulted from an injury or occupational disease incurred or sustained in the course of his employment and such death benefits accrue to the widow of the deceased employee.

Fifteenth Affirmative Defense

As a further grounds of relief, and pleading in the alternative, this defendant says that if any judgment is entered herein jointly and severally against it and other defendants, that in such event this defendant is entitled to contribution against such other defendants in accordance with the provisions of the laws of the State of Texas or the laws of any state where any alleged cause of action arose.

WHEREFORE, this defendant prays judgment of the Court that plaintiffs take nothing against it and that it go hence and recover its costs; in the alternative, that it have judgment for contribution against the other defendants as set out above.

Respectfully submitted;

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BY _____
GEO. A. WELLER,
ATTORNEYS FOR DEFENDANT,
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument was served on the following attorneys by mailing a true and correct copy thereof to their respective offices on the 14TH day of JULY, 1970.

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CIVIL ACTION NO. 6449

CLARENCE BOREL

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

MOTION OF FIBREBOARD CORPORATION FOR LEAVE TO FILE FIRST AMENDED ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT, ORDER, AND FIRST AMENDED ANSWER.

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