IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

JAN 21 1971

JAMES R. COONEY, CLERK
BY DEPUTY Logan R Jones

CLARENCE BOREL

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6449.

DEFENDANT RUBEROID COMPANY'S FIRST AMENDED ORIGINAL ANSWER IN REPLY TO PLAINTIFF'S SECOND AMENDED ORIGINAL COMPLAINT.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Ruberoid Company, one of the named Defendants in the above styled and numbered cause, subject to its Motion to Dismiss, and files this its FIRST AMENDED ANSWER in reply to Plaintiff's Second Amended Original Complaint, respectfully representing unto the Court as follows:

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 Plaintiff exceeds the jurisdictional amount.

II.

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

III.

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.

IV.

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

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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. It is denied that this Defendant caused the deceased any personal injury during his lifetime.

IV-A.

In answer to Paragraph 4-A, it is admitted that Ruberoid Company 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.

V.

In reply to Paragraph 5, this Defendant says that it has no knowledge with reference to the employment of Clarence Borel at any time mentioned in said paragraph, but denies the allegations contained in said paragraph with regard to Borel's contact with dangerous products.

VI.

This Defendant denies the allegations contained in paragraph No. 6.

VII.

This Defendant denies the allegations contained in paragraph No. 7.

VIII.

This Defendant denies the allegations contained in paragraph No. 8.

VIII-A.

This Defendant denies the allegations contained in paragraph No. 8-A.

IX.

This Defendant denies the allegations contained in paragraph No. 9.

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X.

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.

XI.

This Defendant denies the allegations contained in paragraph No. 11.

XII.

This Defendant denies the allegations contained in paragraph No. 12.

XIII.

This Defendant denies the allegations contained in paragraph No. 13 with the exception of the age of the deceased at the time of his death.

XIV.

This Defendant denies the allegations contained in paragraph No. 14.

XV.

This Defendant denies the allegations contained in Plaintiff's prayer.

FIRST AFFIRMATIVE DEFENSE

This Defendant says that Plaintiffs' cause of action is barred by the two year Statute of Limitations and that for such good and sufficient reason, Plaintiffs' pleadings should be dismissed, at least as to this Defendant.

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SECOND AFFIRMATIVE DEFENSE.

This Defendant says further that deceased was guilty of acts and omissions of negligence proximately causing the condition made the basis of this suit.

THIRD AFFIRMATIVE DEFENSE.

This Defendant says further that deceased voluntarily exposed himself to a known risk which he appreciated and did so as the result of deliberate choice, and therefore Plaintiffs are barred from recovery by the doctrine of volenti non fit injuria.

FOURTH AFFIRMATIVE DEFENSE.

This Defendant says further that the deceased's condition made the basis of this lawsuit was caused solely by acts of parties other than this Defendant.

FIFTH AFFIRMATIVE DEFENSE.

This Defendant says further, in the alternative, that the deceased's condition made the basis of this lawsuit was the result of an unavoidable accident as between the said deceased and this Defendant, since this Defendant was guilty of no negligence proximately causing the same.

SIXTH 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.

SEVENTH AFFIRMATIVE DEFENSE.

This Defendant says further that Clarence Borel was exposed to its product, if at all, only briefly and not substantially, and that any exposure to

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asbestos as a result of Clarence Borel's contact with this Defendant's products was minimal in nature or nonexistent, and that Borel's condition and his ultimate death were not affected by his contact with this Defendant's products but on the contrary, his condition and his eventual death would have occurred just as it did had he had no contact with this Defendant's products.

EIGHTH AFFIRMATIVE DEFENSE.

As a further ground 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, premises considered, this Defendant prays that it be dismissed and that it go hence without day and recover its costs.

Respectfully submitted,

BARNES & BARNES

BY Robert E. Barnes

P. O. Box 5098,
Beaumont, Texas 77706,
Attorneys for Ruberoid Company.

CERTIFICATE OF SERVICE

I, Robert E. Barnes, certify that a copy of the above and foregoing ANSWER has been served upon all counsel of record by depositing the same in the United States Mail, properly addressed, with postage paid, on the 21st day of January, 1971.

Robert E. Barnes

Robert E. Barnes.

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No. 6449

In the United States District Court for the Eastern District of Texas, Beaumont Division

Clarence Borel

vs.

Fibreboard Paper Products Corporation, et al.

DEFENDANT RUBEROID CO.'S FIRST AMENDED ORIGINAL ANSWER IN REPLY TO PLAINTIFF'S SECOND AMENDED ORIGINAL COMPLAINT.

BARNES & BARNES
ATTORNEYS AT LAW
2315 CALDER - P. O. BOX 5098
BEAUMONT, TEXAS 77706

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