IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT, DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
FEB 11 1971
JAMES R. COONEY, CLERK
BY DEPUTY Margaret Driver

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

FIRST AMENDED ANSWER OF DEFENDANT, COMBUSTION ENGINEERING, INC. TO PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

Now comes Combustion Engineering, INc., one of the defendants in the above-entitled and numbered cause, and makes and files this, its First Amended Answer to the Plaintiffs' Second Amended Original Complaint, and for such answer says:

This defendant admits the allegations of paragraph (2) under the first unnumbered paragraph of said Complaint, being the preamble thereof; and as to paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10) and (11), these paragraphs do not relate to this defendant and defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof.

1.

As to the allegations of Paragraph 1 reading, "That the ground upon which jurisdiction of this Court depends is diversity of citizenship of the parties hereto", defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof, inasmuch as it does not have knowledge as to the citizenship of the parties other than this defendant.

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This defendant admits the allegations of paragraph 1 of said Complaint to the effect that the amount in controversy herein exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs, but denies that the plaintiffs are entitled to any recovery herein against this defendant in any amount.

2.

This defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity of the allegations of paragraph 2 of said Amended Complaint.

3.

This defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity of the allegations of paragraph 3 of said Amended Complaint.

4.

With reference to the allegations of paragraph 4 defendant admits the same but denies that the plaintiffs or any of them are entitled to recover anything of this defendant under the Articles or Statutes referred to.

4-A

With reference to the allegations of paragraph 4-A of said Complaint, this defendant denies that it was engaged in the manufacture of materials used for insulation prior to December 31, 1967, but admits that since said date it has

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been and is now engaged in the manufacture of materials used for insulation, some of which contain asbestos. Defendant denies 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 products to insulation contractors who employ experienced insulation workers in the application of the products.

This defendant does not purport to answer said allegations for or as to the other defendants named in this cause.

5.

This defendant denies the allegations of paragraph 5 of said Complaint.

6.

This defendant denies the allegations of Paragraph 6 of said Complaint.

7.

Answering the allegations contained in paragraph 7, this defendant denies that any injury and damage complained of by plaintiff were directly and proximately caused by any negligence or carelessness of this defendant.

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

This defendant denies the allegations of Paragraph 7 (b), (c), (d) and (e) and each of them.

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8.

Answering the allegations of Paragraph 8, this defendant denies that it breached any warranty to the deceased or any other person in any respect, and denies the allegations of Par. 8 and of subsections (a), (b), (c) and (d) and each of them.

8-A.

This defendant denies the allegations of paragraph 8-A of said Amended Complaint.

9.

This defendant denies the allegations of paragraph 9 of said amended Complaint.

10.

As to the allegations of Paragraph 10, this defendant denies the same, with the exception that it admits that Clarence Borel died on or about the date stated, and defendant denies that any condition with which he was suffering prior to his death, or his death, resulted from any act or omission of this defendant, or from the use of any product manufactured by this defendant, or from any breach of warranty, if any, by this defendant.

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11.

This defendant denies the allegations of paragraph 11 of said Complaint.

12.

This defendant denies the allegations of paragraph 12 of said Complaint.

13.

With reference to the allegations of paragraph 13, with the exception of the allegations reading, "and has suffered damages in the amount of Five Hundred Thousand ($500,000.00) Dollars", defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof. As to the allegations quoted in this paragraph defendant denies the same.

14.

This defendant denies the allegations of paragraph 14 of said amended Complaint, and denies that the plaintiffs are entitled to any recovery against this defendant.

15.

This defendant denies the allegations of the prayer of said Complaint, and denies that the plaintiffs are entitled to recover any damages or any relief against this defendant.

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AFFIRMATIVE DEFENSES.

16.

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

17.

Defendant denies that the plaintiff sustained any injury as the result of contact with or use of any product manufactured by this defendant, and denies that any product or products which it manufactured and sold in anywise caused or brought about any injury or illness, if any, to the plaintiff, and defendant further says that the physical condition of which plaintiff complains was in nowise caused or brought about by any product manufactured and sold by this defendant, and that such condition was due solely to disease and other causes.

18.

Further answering herein, defendant alleges that if the plaintiff did sustain any injury as the result of the use of any product manufactured by this defendant, which is not admitted but expressly denied, then such injury was sustained as a result of the occupation of the plaintiff as an insulator or worker in the insulation field for a number of years; and at all times he knew that he was working in dust laden air

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which contained asbestos dust and other dust particles, created by his own work and the work of other insulators, and by the failure of his employers or the owners of the premises on which he was working to provide facilities and means for the elimination of dust laden air, and therefore, any such injury as he may have sustained was some occupational disease resulting from his continued occupation over a long period of time as an insulator, and not as a result of any isolated incident or contact with any product manufactured by this defendant; and this defendant is not legally liable therefor; and further, this defendant denies that the plaintiff worked with products manufactured by this defendant.

19.

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 of insulation which was the purpose for which they were manufactured and sold, and the plaintiff'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

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which the plaintiff worked were at all times prescribed by his employer or the owner of the premises where the plaintiff was employed, and defendant had no responsibility for the condition or conditions at the place of work where plaintiff was performing his work.

20.

Further answering herein, if need be, and by way of further affirmative defense, this defendant specially denies that the plaintiff sustained any injury as a result of contact with or use of any product manufactured by this defendant, and specially denies any fault or breach of warranty on the part of this defendant, and specially denies that it or any of it s servants, agents or employees, were guilty of any negligence proximately causing or contributing to cause the plaintiff's alleged injuries and damages, if any; but on the contrary this defendant alleges that the ~~plaintiff~~ himself was guilty of various acts, wrongs and omissions, each and all amounting to negligence, which, acting together or separately, were the sole proximate cause of his alleged injuries and damages, if any, or in the alternative, were a proximate cause thereof.

21.

Further answering herein, and in the alternative, defendant alleges that the plaintiff's alleged injuries and damages, if any, were caused solely, or in the alternative, were proximately caused by acts, wrongs, omissions and negligences of third parties or a third party, for whose acts this defendant is in nowise liable or responsible; or, in the

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alternative, the physical condition of which plaintiff complains was due solely to causes other than any negligence, fault or breach of warranty, none of which are admitted but denied, on the part of this defendant.

22.

Further answering herein, and in the alternative, defendant would show unto the Court that all situations and conditions, and the danger, if any, arising from the continued use of such insulating material or materials were open and obvious to the plaintiff, and if any dangers existed as claimed by him, which are not admitted but denied, same, if existing, were apparent and were easily discernible by him, and the plaintiff knew as much about same as did the defendant, and such matters were well known to him 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, and such conditions, if existing, were not such that this defendant would be legally liable to the plaintiff therefor.

23.

In the alternative, defendant alleges that the plaintiff at all times knew of the dangers involved with insulation materials containing asbestos and in working in dust laden air where insulation materials were in use, and he had actual notice and knowledge thereof, or in the alternative should have known of same, and he knew and appreciated the nature or extent of such dangers, if any, and he continued to use and to work with

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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, if any, and defendant pleads the doctrine of volenti non fit injuria herein.

24.

Further answering herein, in the alternative, 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 the plaintiff was doing, and ordinarily incident thereto, the plaintiff and his employers using their own manner, method and means of doing the work, and defendant owed no duty with respect thereto.

25.

Further answering herein, in the alternative, this defendant says that the plaintiff's alleged injuries and damages, if any, were the result of an unavoidable accident.

26.

Further answering herein, in the alternative, this defendant says that any cause of action, if any, which the plaintiff has or may ever have had against this defendant, which is not admitted but denied, accrued more than two years prior to the commencement of this suit against this defendant, and is barred by the Texas Two-Year Statute of Limitations, Article 5526, Vernon's Texas Civil Statutes, and defendant pleads same in bar to this suit.

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27.

Further answering herein, in the alternative, this defendant says that any cause of action, if any, which the plaintiff has or may ever have had against this defendant, which is not admitted but denied, accrued more than four years prior to the commencement of this suit against this defendant, and is barred by the Texas Four-Year Statute of Limitations, Article 5529, Vernon's Texas Civil Statutes, and defendant pleads same in bar to this suit.

28.

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 Article 2212 of Vernon's Annotated Civil Statutes of the State of Texas.

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28-A

This defendant says that if the deceased sustained any injury while working in the State of California as a result of the use of any product or products manufactured by this defendant, which is expressly denied, then any such action for personal injury occurring in the State of California accrued more than one year prior to the filing of this suit, and such cause of action is barred by the one-year statute of limitations of the State of California.

28-B.

Defendant further says that if the plaintiff sustained any injury in the State of Louisiana as a result of the use of any product or products manufactured by this defendant, which is expressly denied, then any such action for personal injuries occurring in the State of Louisiana, is barred by the one-year statute of limitations of the State of Texas.

28-C

In the event plaintiff sustained any injury in any state other than Texas, California or Louisiana, as a result of the use of any product manufactured by this defendant, which is not admitted but denied, then such occurred more than one or two years or the period provided by the particular state where plaintiff claims that the injury occurred, and defendant pleads each and all statutes of limitations as to said alleged cause of action under the law of the state where such alleged action arose.

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28-D

Further answering, defendant shows unto the Court that the plaintiff, Thelma Freida Borel, instituted this suit against various defendants, including Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company and others, seeking recovery against such defendants for the full amount of her damages, alleged to have been in the sum of $1,000,000.00. Your defendant, Combustion Engineering, Inc., has filed cross-actions against the said Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company, seeking full indemnity, or in the alternative, contribution. Thereafter, for valuable consideration, to wit, $4,225.55, paid to the said Thelma Freida Borel and intervenor in "final compromise and settlement of all claims and causes of action asserted by the said Thelma Freida Borel" and $4,225.55 paid by Standard Asbestos Manufacturing & Insulating Company, she "fully and finally released and discharged the said Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company of any and all claims which were or might be asserted against them," and the said Thelma Freida Borel, in her own right and as the surviving widow of Clarence Borel, for the consideration of $4,225.55, fully and finally released the said Owens-Corning Fiberglas Corporation from this suit and also released "any and every character of claim, demand, damage, cause of action and expense" that she now had or might have against such concern, and acknowledged that said suit, as well as all claims, demands, damages, causes of action and expense, already accrued or which might arise in the future were in all things fully and finally compromised, settled and released." In consideration of $1,225.55 paid by Standard Asbestos Manufacturing & Insulating Company she executed a similar release. Defendant shows unto the Court that having received and accepted such sums and fully

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and finally released said defendants that such constitutes a final and complete payment and discharge of all claims and causes of action of the said Thelma Freida Borel in her own right and as surviving widow of Clarence Borel, and by virtue of the receipt and acceptance of such payments all claims and damages of the said Thelma Freida Borel have been fully and finally paid, satisfied and extinguished.

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28-E

In the alternative, defendant shows unto the Court that if the payment and receipt of said sum of $4,225.55 paid by each of said defendants and the execution of such releases of all claims already accrued or which might arise in the future does not constitute full payment and satisfaction of all claims for all of plaintiff's damages, that then since said Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company were guilty of negligence, breach of express and implied warranty, and responsible for the injury and death of the said Clarence Borel and the damages sued for by the said Thelma Freida Borel, that such payment constitutes a partial discharge and acquittance of plaintiff's damages and any damages, if any, awarded plaintiff on trial hereof should be reduced by one half or such other proportion as may be just and proper under the evidence and verdict.

28-F

Further answering, defendant shows unto the Court that in connection with the final disposition and payment by Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company to Thelma Freida Borel, that the said Thelma Freida Borel and her attorney, Ward Stephenson, agreed to forever indemnify and save harmless the said Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company from any and all claims, demands, damages, causes of action or liability, which they or their successors, receivers and assigns, might have or which might be asserted against them by the various defendants named herein, including your defendant, Combustion Engineering, Inc., defendant being entitled to judgment for indemnity over and against Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company, or, in the alternative, for judgment for contribution, asserts such releases and indemnity agreements in full and final release

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of all claims herein asserted, or, in the alternative, partial release thereof, which releases and indemnity agreements your defendant is entitled to assert in order to avoid circuity of actions.

28-G

Your defendant further shows unto the Court that by virtue of such compromise, settlement, release and indemnity agreement there has been entered an interlocutory judgment in this cause providing that Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company have finally discharged any and all claims which were or might be asserted against them "including claims asserted by way of intervention and cross-action," and which interlocutory judgment further recites that the Court determine that the said defendants, Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company should be in all things dismissed from this suit. Should such interlocutory judgment be construed as a dismissal of the cross-actions asserted by Combustion Engineering, Inc., against Owens-Corning Fiberglas and Standard Asbestos Manufacturing & Insulating Company, then defendant asserts the same as a full and complete bar of any and all claims herein asserted by or in behalf of the said Thelma Freida Borel, individually and as the heir of Clarence Borel, deceased, because by virtue of such action your defendant and cross-plaintiff has been deprived of the right of indemnity or contribution asserted against the said Owens-Corning Fiberglas Corporation and Standard Asbestos Manufacturing & Insulating Company by way of cross-action.

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CROSS-CLAIM

Now comes Combustion Engineering, Inc., one of the defendants in the above-entitled and numbered cause, and files this, its Cross-Claim against the other defendants herein, Fibreboard Paper Products Corporation, Johns-Manville Products Corporation, Owens Corning Fiber Glass Corporation, Eagle-Pitcher Industries, Pittsburgh Corning Corporation, Unarco Industries, Inc., Philip Carey Corporation, Armstrong Cork Company ~~[illegible]~~ Standard Asbestos Manufacturing and Insulating Company and Ruberoid Company, all hereinafter called cross-defendants, and says if the plaintiff sustained any injury as the result of any act or omission on the part of this defendant, Combustion Engineering, Inc., which is not admitted but denied, then such injury was caused and brought about and contributed to and proximately caused by the acts and omissions of the remaining defendants above-named, and if any judgment is entered herein against this defendant, then in such event this defendant is entitled to indemnity from each and all of the other defendants; or, in the alternative, is entitled to contribution against each and all of the other defendants in accordance with the provisions of Article 2212, Vernon's Annotated Civil Statutes of Texas.

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WHEREFORE, this defendant prays judgment that plaintiffs take nothing against it herein, and that it go hence with its costs, without day; and, in the alternative, that it have judgment for indemnity, or in the alternative, for contribution, as set forth above.

ATTORNEY FOR DEFENDANT AND CROSS-PLAINTIFF, COMBUSTION ENGINEERING, INC.,
1014 San Jacinto Bldg., P.O. Box 1632.
Beaumont, Texas

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of FEBRUARY, 1971 a true and correct copy of the foregoing instrument was mailed to the following named attorneys of record:

Mr. Ward Stephenson, Attorney,
Stephenson and Thompson,
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Orange, Texas. 77630
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Mr. Dale Dowell, Attorney,
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Attorney for Defendant,
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Chas S Rice

ATTORNEY FOR DEFENDANT,
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