IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUL 30 1971
JAMES R. COONEY, CLERK
BY DEPUTY Margaret Brewer

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

SECOND 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 with leave of the Court makes and files this, its Second 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 deceased 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 deceased, and defendant further says that the physical condition of the deceased of which the plaintiffs complain was in nowise caused or brought about by any product manufactured and sold by this defendant, nor was his death so caused or brought about, and such condition was due solely to disease and other causes.

18.

Further answering herein, defendant alleges that if the deceased 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 deceased as an insulator or worker in the insulation field for a number of years; and at all time he knew that he was working in dust laden air which contained

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asbestos 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 deceased's injury, if any, and death 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

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was employed, and defendant had no responsibility for the condition or conditions at the place where plaintiff was performing hiw work.

20.

Further answering herein, if need be, and by way of further affirmative defense, this defendant specially denies that the deceased 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 its servants, agents or employees, were guilty of any negligence proximately causing or contributing to cause the alleged injuries and death of the deceased, and the plaintiffs' damages, if any; but on the contrary this defendant alleges that if the deceased sustained any injury as a result of contact or use of any product manufactured by this Defendant, or 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 manufacturers, none of which is admitted but all of which is denied; then this defendant says that the 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 such 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, and that he failed to request the use of such masks

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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.

21.

Further answering herein, and in the alternative, defendant alleges that the deceased'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 alternative, the physical condition of the deceased of which plaintiffs complain 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.

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 not admitted but denied, the danger, if any, arising from the continued use of such material or materials was open and obvious 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.

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23.

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 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.

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 deceased was doing, and ordinarily incident thereto, the deceased and his employers using their own manner, method and means of doing the work, and defendant owed no duty with respect thereto.

24-A.

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

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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 the employer 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.

25.

Further answering herein, in the alternative, this defendant says that the deceased's alleged injuries, if any, and death, and the plaintiff's 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 deceased had 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 deceased 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.

27-A

Further answering herein, this Defendant says 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.

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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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 $4,225.55 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.,
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CERTIFICATE OF SERVICE

I hereby certify that on this 27thday of July, 197 1, a true and correct copy of the foregoing instrument was mailed to the following named attorneys of record:

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