IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
M. June 23 1969
James R. Cooney, Clerk, U. S. Court
By Myra Barton
DEPUTY

SAMUEL R. POTTER,
PLAINTIFF

VS.

FIBREBOARD PAPER
PRODUCTS CORPORATION,
ET AL, DEFENDANTS

CIVIL ACTION NO. 6329

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

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Owens-Corning Fiber Glass 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:

1.

This defendant moves the Court to strike the allegation contained in Paragraph 6, Page 3, as follows: "That in addition to the fact that the plaintiff actually used the products manufactured by the above named defendant, 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:

(a) Said allegations fail to state a claim upon which a recovery can be made.

(b) Said allegations are based solely upon speculation and conjecture, and no recovery could be had upon such a claim.

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(c) Such allegations do not state a claim against the defendant, Owens-Corning Fiber Glass Corporation, for the reason that it is not alleged that the workers were using the products of this defendant at the time of the alleged occurrence.

2.

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

(a) There existed no duty on the part of this defendant to provide knowledge to the plaintiff as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances because there existed no relationship as betwen the plaintiff and this defendant which imposed any such duty.

(b) Because the allegation that the defendant "ought to have known" that their insulation was harmful to plaintiff's body, lungs, respiratory system, etc., does not state a cause of action upon which a recovery can be had.

3.

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

(a) Because such fails to state a claim or cause of action upon which any recovery can be had.

(b) Because there exists no duty on the part of this defendant to instruct the plaintiff in the proper handling or proper installation of insulation, but to the contrary if any such duty existed it existed on the part of the plaintiff's employer.

(c) Because there existed no duty and there existed no relationship whereby this defendant could enforce a reasonably safe plan and method of handling the installation of insulation manufactured by it since such insulation was sold and delivered to insulation contractors who each and all knew that said insulation product contained asbestos.

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4.

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

(a) Because such fails to state a claim or cause of action upon which any recovery can be had.

(b) Because there exists no duty on the part of this defendant to remove its product from the market.

(c) Because the product manufactured by this defendant is pipe insulation for high temperatures and there are no fact or facts alleged which show that said product is not reasonably suited for the purposes for which it was intended or that its application was hazardous when applied under the supervision of an experienced insulation contractor and by experienced insulation workers.

5.

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

(a) Because there exists no duty on the part of this defendant to prescribe the method of application of its product by the plaintiff or by insulation contractors using the defendant's product.

(b) Because there exists no duty on the part of this defendant to provide the plaintiff with a safe place to work in when using a product containing asbestos, but this duty was imposed on the plaintiff's employer.

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

6.

This defendant moves the Court to strike Paragraph 8(d) for the following reasons:

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(a) Because as a matter of law an insulation product containing asbestos is manufactured for heat insulation and it 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) Because the allegations of plaintiff's complaint are couched in general language and seek to impose a warranty to the public generally and a warranty of merchantability generally, when in truth and in fact 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 the insulation workers know that the product contains some asbestos.

7.

Defendant moves the Court to strike Paragraph 9 wherein plaintiff claims that he is entitled to invoke the doctrine of res ipsa loquitur, for the following reasons:

(a) There are no facts alleged under which the doctrine of res ipsa loquitur would apply.

(b) As a matter of law, the doctrine of res ipsa loquitur does not apply to this factual situation and the plaintiff merely by alleging or showing that he has asbestosis or claims he has asbestosis cannot 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 its product, but to the contrary, the burden is on the plaintiff to show the time and the place that he worked with and used the product of the various defendants which contained asbestos and sustained injury therefrom.

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(c) Because as a matter of law, this defendant did not have control 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 contractor employers of the plaintiff.

8.

Defendant moves the Court to strike Paragraph 14, which is a claim for gross negligence, for the reason that the petition does not allege or state any fact or facts which would entitled the plaintiff to recover exemplary damages, or any facts which show any gross or willful negligence on the part of this defendant under the laws of the State of Texas. Further, such allegations of gross negligence are highly prejudicial to the rights of this defendant upon a trial when in truth and in fact as a matter of law the plaintiff is not entitled to recover exemplary damages.

9.

Defendant moves the Court to strike Paragraph 14 of the complaint for the reason that such is a repetition of Paragraph 13.

WHEREFORE, premises considered, this defendant prays that the Court rule on each and all of the motions to strike the various paragraphs of plaintiff's complaint.

Respectfully submitted,

KING, SHARFSTEIN & RIENSTRA

BY: Dale Dowell

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Beaumont, Texas
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Owens-Corning Fiber Glass
Corporation

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CERTIFICATE OF SERVICE

A copy of this Motion to Strike Certain Claims Contained in Plaintiff's Original Complaint was mailed to Mr. Ward Stephenson, Stephenson, Thompson & Morris, Stephenson Building, Orange, Texas, on the 23rd day of June, 1969, by Certified Mail.

Dale Dowell

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