IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MAR 17 1970
JAMES R. COONEY, CLERK
BY DEPUTY Imogene R. Jones

SAMUEL R. POTTER

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6329

FIRST AMENDED ANSWER OF DEFENDANT, FIBREBOARD CORPORATION, TO PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Fibreboard Corporation, and files this, its first amended answer to plaintiff's second amended 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.

2.

In reply to Paragraph 2, this defendant admits that plaintiff seeks to recover a sum which is within the monetary jurisdiction of this Court and which exceeds the sum of $10,000, but denies that plaintiff is entitled to any recovery herein against this defendant in any sum.

3.

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

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4.

In answer to Paragraph 4, it is admitted that Fibreboard Corporation, and its predecessors, has been and is now engaged in the manufacture of materials used for pipe and heat 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 for each and all of the other defendants.

5.

In answer to the allegations contained in Paragraph 5, this defendant says that it is without knowledge as to the employment of plaintiff as an insulator between the years 1940 to 1967, inclusive, and it is likewise without knowledge that he was required to handle large quantities of the products manufactured and distributed by each and all of the defendants. This defendant has no knowledge that the plaintiff worked with products manufactured by it at any time, and because of this claim this allegation is denied.

This defendant denies each and all of the remaining allegations contained in the last sentence of the same Paragraph 5, and it specifically denies that the insulation products containing asbestos which are manufactured by this defendant were dangerous or contained dangerous materials.

6.

This defendant denies the allegations contained in Paragraph 6 of the plaintiff's complaint.

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 2 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/2

7.

This defendant denies the allegations contained in Paragraph 7 and all subdivisions thereunder, subparagraphs (a) through (e), inclusive.

8.

In reply to the allegations contained in Paragraph 8 of the complaint, this defendant denies that it breached any warranty which may have existed as to its product, and as to the plaintiff.

Specifically, this defendant denies each and all of the allegations contained in Paragraph 8, and all subdivisions thereof, including subparagraphs (a) through (d), inclusive.

8-A.

This defendant denies each and all of the allegations contained in Paragraph 8-A of plaintiff's second amended complaint, and it denies that the theory of strict liability is applicable to the facts alleged in plaintiff's complaint.

9.

This defendant denies the allegations contained in Paragraph 9 of plaintiff's second amended complaint. For further answer, this defendant says that the doctrine of res ipsa loquitur has no application under the facts alleged by plaintiff.

10.

In reply to the allegations in Paragraph 10 of the complaint, this defendant denies that plaintiff sustained any injury as a result of any act or omission on the part of this defendant, and denies that plaintiff was injured as a result of any act or omission of this defendant or as a result of any breach of warranty, and denies the breach of any implied warranty or duty to the plaintiff.

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 3 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/3

This defendant says that it has no knowledge or information as to the injury or the disease that plaintiff may be suffering from and, therefore, can neither admit nor deny the injuries alleged by plaintiff, but this defendant does specifically deny that any such injury was the result of any duty owed by this defendant to plaintiff or the result of any act or omission.

11.

This defendant denies the allegations contained in Paragraph 11 of plaintiff's second amended complaint.

12.

The allegations contained in Paragraph 12 are denied, and it is specifically denied that any such medical treatment was for injury or disease caused or brought about by any act or omission or breach of warranty of this defendant, and this defendant denies that plaintiff is entitled to recover any such alleged medical expenses against this defendant.

13.

This defendant denies the allegations contained in Paragraph 13 of the plaintiff's amended complaint, and further denies that plaintiff is entitled to any recovery sought against this defendant.

14.

This defendant denies the allegations contained in Paragraph 14 of the plaintiff's amended complaint, and denies that plaintiff is entitled to any recovery sought herein against this defendant. Further, this defendant denies that any cause of action exists for gross negligence under the allegations contained in plaintiff's complaint.

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 4 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/4

15.

This defendant denies the allegations contained in Paragraph 15 and says that this is nothing more than an exact duplication of the allegations contained in Paragraph 13 of the complaint.

This defendant likewise denies the allegations contained in the last unnumbered paragraph of the complaint and the prayer of the complaint and would specifically deny that plaintiff is entitled to any recovery herein or to any relief sought by him in this action against this defendant.

AFFIRMATIVE DEFENSES

First Affirmative Defense

This defendant denies that the plaintiff 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.

Third Affirmative Defense

If plaintiff 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 plaintiff, in that he had been engaged as an insulator or worker in the insulation field for a number of

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 5 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/5

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 plaintiff in the course of his employments over a number of years; and further, this defendant denies that the plaintiff 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 the plaintiff, and this defendant says that the physical conditions of which plaintiff complains was in nowise caused or brought about by any product manufactured or sold by this defendant, but such condition was due solely to disease and other causes or to the acts and omissions of third persons, and the acts of the plaintiff.

Fifth Affirmative Defense

Further answering herein, and while denying that the plaintiff sustained any injury as a result of contact or use of

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 6 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/6

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, which this defendant denies, then this defendant says that plaintiff 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 plaintiff failed to use and utilize any safety devices such as mask 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 plaintiff 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 and was well known to the plaintiff 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 dust from insulation material.

In the alternative, if there was any danger and such was not open and obvious and apparent to plaintiff at all times,

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 7 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/7

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

For further answer, and by way of affirmative defense, this defendant would show that if plaintiff did sustain any injury as the result of the use of any product manufactured by this defendant, which is denied, that any cause of action which plaintiff has or may ever have against this defendant, which is not admitted but denied, accrued more than two (2) years prior to the filing of this suit on May 27, 1969, and such cause of action for personal injury is barred by the two (2) year statute of limitations, Article 5526, Vernon's Annotated Civil Statutes of the State of Texas, and this defendant pleads the same in bar to this action.

Eighth Affirmative Defense

For further answer, if such be necessary, this defendant would show that any cause of action, if any, which plaintiff has or may ever have against this defendant, which is not admitted but expressly denied, accrued more than four (4) years prior to the commencement of this suit against this defendant, and such cause of action for personal injury is barred by the four (4) year statute of limitations of the State of Texas, Article 5529, Vernon's Texas Civil Statutes, and this defendant pleads the same in bar to this action.

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 8 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/8

Ninth Affirmative Defense

If plaintiff did sustain any injury in the State of California as the result of the use of any product or products manufactured by this defendant, which is denied, then any such action for personal injury occurring in the State of California accrued more than one (1) year prior to the filing of this suit on May 27, 1969, and such alleged cause of action is barred by the one (1) year statute of limitations of the State of California, Code of Civil Procedure, Section 340, Subdivision 3, which fixes the time within which an action for personal injury must be filed at one (1) year, and therefore any cause of action for personal injury occurring in the State of California is barred by the one (1) year statute of limitations of the State of California.

In this connection, this defendant further pleads that the law of the State of California is that the one (1) year statute of limitations on a cause of action for personal injury against a third party is not tolled while an injured employee pursues his workmen's compensation remedy. See Hanna, California Law of Employee Injuries and Workmen's Compensation, Second Edition, Volume 2, Chapter 23, Section 23.04 (5); State Comp Insurance Fund vs. Matulich, 55 California Appeals 2d, 528, 131 Pacific 2d 21.

Tenth Affirmative Defense

According to Louisiana Law Digest, Limitation of Actions, the law in Louisiana is:

> "Periods of prescription which operate to release debts are as follows:
>
> "One Year Period - The following actions are prescribed after one (1) year: xxx; all tort actions."

According to the interpretation of the Louisiana law, the one (1) year statute of limitations applies to an action for

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 9 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/9

personal injury and the pendency of a workmen's compensation claim does not suspend the running of the statute of limitations.

Eleventh Affirmative Defense

If plaintiff did sustain 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 denied, then such occurred more than one (1) year or two (2) years or the period provided by the particular state where plaintiff claims that the injury occurred, and this defendant pleads each and all of the statutes of limitations as to said alleged cause of action under the law of the state where such alleged cause of action arose.

Twelfth Affirmative Defense

Further answering, this defendant says that plaintiff 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 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.

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 10 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/10

Further, in this connection, this defendant would show that the plaintiff's employers for a number of years have furnished respirators or masks to protect an employee working with products containing some asbestos from the inhalation of an excessive amount of dust. Further, the plaintiff is charged with the knowledge of each and all of his employers as to the possible harmful effect of the inhalation of an excessive amount of dust.

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

Fourteenth Affirmative Defense

Answering still further, if such be necessary, and by way of further affirmative defense, this defendant specially denies that plaintiff sustained any injury or disease as a result of contact

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 11 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/11

with or use of any product manufactured by this defendant, and specially denies any fault or breach of warranty, express or implied, on the part of this defendant, and specially denies that this defendant was guilty of any negligence proximately or contributing to cause plaintiff's alleged injuries and damages, but to the contrary, this defendant alleges that the plaintiff himself was guilty of various acts, wrongs and omissions, each and all of which amounted 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.

Fifteenth Affirmative Defense

Further answering herein, and in the alternative, this defendant says 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 negligence of third parties, or a third party, for whose acts this defendant is in nowise liable or responsible; or in the alternative, if plaintiff 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, for whom this defendant is not liable or responsible.

Sixteenth 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 plaintiff was doing, and ordinarily incident thereto; and plaintiff and his

The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 12 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/12

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 plaintiff 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 plaintiff performed such work.

Seventeenth Affirmative Defense

Further answering herein, and in the alternative, this defendant says that the plaintiff's claims to injury and damage, if any, were the result of an unavoidable accident as that term is defined in law.

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

WHEREFORE, this defendant prays judgment of the Court that plaintiff 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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The Potter v. Fibreboard Case File (1969-1972), Amended answer to second amended complaint
ACL Doc 10344 · Page 13 of 15
Published by AsbestosClaims.Law
asbestosclaims.law/library/10344/13

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing first amended answer of Fibreboard Corporation was served on the following attorneys by mailing a true and correct copy thereof to their respective offices, this 17 day of March, 1970.

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