IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
JUL 30 1971
James R. Cooney, Clerk, U. S. Court
By Hazel E. Studdard DEPUTY

SAMUEL R. POTTER §

VS. §

FIBREBOARD PAPER PRODUCTS §

CORPORATION ET AL §

CIVIL ACTION NO. 6329

FIRST AMENDED ANSWER OF DEFENDANT, COMBUSTION ENGINEERING, INC., TO PLAINTIFF'S 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 First Amended Answer to the Second Amended Original Complaint of the Plaintiff, 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), (11) and (12), 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 of said Complaint, this 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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2.

This defendant admits the allegations of paragraph 2 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 plaintiff is entitled to any recovery herein against this defendant in any amount.

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 of said Amended 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 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.

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5.

This defendant denies the allegations of Paragraph 5 of said Amended Complaint.

6.

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

8.

Answering the allegations of paragraph 8, this defendant denies that it breached any warranty to the plaintiff 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.

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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.

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10.

Answering the allegations of Paragraph 10, this defendant denies the allegations reading, "That as a direct and proximate cause of the aforesaid occurrence and circumstances and the negligence and carelessness of the defendants, and the defendants' breach of warranties, the plaintiff was permanently and severely injured", and denies that it was guilty of any negligence or carelessness and denies any breach of warranties on its part, and denies that any injury or disability from which plaintiff is suffering, if any, has 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. As to the remaining allegations of Par. 10, this defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof.

11.

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

12.

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

13.

This defendant denies the allegations of paragraph 13 of said Amended Complaint, and denies that the plaintiff is entitled to any recovery against this defendant.

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14.

This defendant denies the allegations of paragraph 14 of said Amended Complaint, and denies that the plaintiff is entitled to any recovery against this defendant.

15.

This defendant denies the allegations of paragraph 15 of said Amended Complaint, and denies that the plaintiff is entitled to any recovery against this defendant.

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

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

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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 sutain 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 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.

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18-A

This defendant denies the existence of any warranty on the part of this Defendant and denies any fault or breach of warranty on its part, but to the contrary says that any insulation product or products manufactured by it were at all times reasonably fit and suitable for the purposes of insulation which was the purpose for which same were manufactured and sold, and plaintiff's damages and injury, if any, did not result from any defect in said product. Further, any and all dust conditions, if any, 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 employers or the owners of the premises where he worked, and third party Defendant had no responsibility for the condition or conditions at the place or places of work where the plaintiff was performing his work.

19.

Further answering herein, if need be, and by way of further affirmative defense, this defendant, Combustion Engineering, Inc., specially denies that the plaintiff sustained any injury as a result of contact with or use of any product manufactured by this defendant, and especially 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

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or contributing to cause the plaintiff's alleged injuries and damages, if any; but on the contrary alleges that if the plaintiff 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 denied; then this defendant says that the 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 masks and respirators, for breathing, and 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.

20.

Further answering herein,and in the alternative,defendant alleges that 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 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.

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21.

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 apparant 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.

22.

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 such materials and under such conditions with such knowledge, and therefore, this defendant owed him no duty towarn him of any potential

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

23.

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

24.

Further answering this Defendant says that the 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

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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, this Defendant alleges that if the plaintiff did sustain any injury as a result of the use of any product manufactured by this Defendant, which is denied, then such occurred more than two (2) years prior to the commencement of this suit against this Defendant and said cause of action is barred by the two (2) year Statute of Limitation of the State of Texas, Article 5526, Vernon's Texas Civil Statutes, and Defendant pleads same in bar to this suit.

26.

Further answering herein, this Defendant alleges that if the plaintiff did sustain any injury as a result of the use of any product manufactured by this Defendant, which is denied, then such occurred more than four (4) years prior to the commencement of this suit against this Defendant and said cause of

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action is barred by the four (4) year Statute of Limitation of the State of Texas, Article 5529, Vernon's Texas Civil Statutes, and Defendant pleads same in bar to this suit.

27.

Further answering herein, this Defendant says if plaintiff 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 ground of relief and pleading in the alternative, this Defendant says that if any judgment is entered herein jointly and severally against it and the 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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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 Contracting and Supply Corporation, Standard Asbestos Manufacturing and Insulating Company and Ruberoid Company, and Armstrong Cork 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 plaintiff 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,
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CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of July, 1971, a true and correct copy of the foregoing instrument was mailed to the following named attorneys of record:

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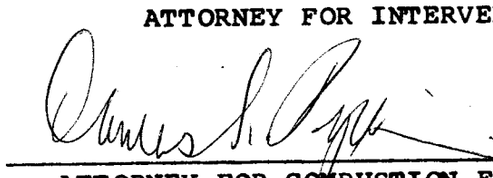
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