IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION.

FILED
JAN 5 1968
James R. Clerk
By Mildred C. Verret DEPUTY

CLAUDE J. TOMPLAIT, PLAINTIFF, §

VS. §

CIVIL ACTION NO. 5402

COMBUSTION ENGINEERING, INC., §

ET AL, DEFENDANTS. §

MOTION OF DEFENDANTS, COMBUSTION ENGINEERING, INC., AND R & I REFRACTORY AND INSULATION CORPORATION, FOR SUMMARY JUDGMENT.

TO THE HONORABLE JUDGE OF SAID COURT:

Now come Combustion Engineering, Inc., and R & I Refractory and Insulation Corporation, defendants in the above-entitled and numbered cause, wherein Claude J. Tomplait is plaintiff, and Combustion Engineering, Inc., R & I Refractory and Insulation Corporation, Fibreboard Paper Products Corporation, Johns-Manville Products Corporation, Johns-Manville Fiber Glass, Inc., Owens-Corning Fiber Glass Corporation, Pittsburgh Corning Corporation, Gustin-Bacon Manufacturing Company, Pittsburgh Plate and Glass Company and Eagle-Picher Industries, Inc., are defendants, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, make and file this, their Motion for Summary Judgment, and as grounds for said motion would show unto the Court the following:

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dangerous and harmful to human beings and to the health of man; that such materials were defective and were not suitable for the purposes for which they were intended. It is further alleged that beginning in the year 1959, plaintiff worked in the insulation industry with various employers, all of whom are named in Paragraphs 15 through 36 of the Amended Complaint, and that he came in contact with the various insulation materials specified in said paragraphs. The employers named include work and contact as late as the year 1964.

Plaintiff alleges that he sustained personal injury as a result of coming in contact with said products. Specifically, he alleges that he sustained serious and permanent injury to his lungs and respiratory system which affected other parts of his body.

2.

Plaintiff, Claude J. Tomplait filed claim with the Industrial Accident Board dated February 24, 1962, which was filed with the Industrial Accident Board on March 3, 1962, a certified copy of which is attached to the Motion for Summary Judgment filed herein by the defendant,Fibreboard Paper Products C orporation, which certified copy is hereby referred to for all purposes, in which he claimed that he sustained severe external and internal injuries including pulmonary fibrosis, etc., while employed with Armstrong Contracting and Supply Company at the Firestone Plant in Orange.

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He described his condition as of February 24, 1962, as follows:

> "Injury to my body caused by asbestosis and silicosis causing severe external and internal injuries, namely pulmonary fibrosis," etc.

The original claim was dated December 11, 1961, and was filed with the Industrial Accident Board with an accompanying letter dated December 14, 1961. This claim states:

> "Describe Accident and Your Injury (in your own words): Injury to my body caused by asbestosis and silicosis causing severe external and internal injuries including pulmonary fibrosis", etc.

This claim shows that the first distinct manifestation of this occupational disease was in July, 1961.

3.

A medical report filed with the Industrial Accident Board by Dr. T.R.Jones, addressed to Mr. Claude J. Tomplait, 210 Kay Street, Bridge City,Texas, states that the doctor saw Claude J. Tomplait on 8/1/61 with the chief complaintof dyspnea on exertion, tightness in the chest, malaise, loss of appetite and clubbing of the fingers. The patient gave a history of working for the past 21 years in the insulation business, stating that his job consisted of installing insulation material of various kinds, including asbestos, foam glass, fiber glass, rock wool, silicates, and various other types of insulating materials. He further stated that he had never used a face mask during this entire period of time, and the dusty element is quite considerable at his face level. The material had to be cut with a saw or knife, which created considerable dust.

Dr. Jones diagnosed the patient's complaints as pulmonary fibrosis secondary to inhalation of probable asbestos fibers, silicates which contained some degree of silica, with a final diagnosis of pneumoconiosis.

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4.

According to the deposition of the plaintiff, Claude J. Tomplait, in the instant case, he was told that he had some spots on his lungs in July, 1961. (Dep., Pg. 31). Dr. Jones told him that if he wanted to live to get out of the insulation work and quit smoking. Tomplait further stated that Dr. Jones told him that his lungs had a lot of insulation materials on them and that both lungs were in bad condition. (Dep., Pg. 32). Dr. Jones told him that he had silicosis and advised him to get out of this type of work. (Dep., Pg. 38).

He knew after he had seen Dr. Jones that if he worked with insulation materials after that date they could do him harm. (Dep. Pgs. 35 and 41).

5.

Claim was made by Tomplait's attorney before the Industrial Accident Board in Case No. W67299, styled Claude J. Tomplait vs. Armstrong Contracting and Supply Company, that claimant's incapacity began on approximately July 26, 1961, and that he was exposed to the hazards of this occupational diseases with the following employers: Armstrong Contracting and Supply Corporation, Houston,Texas, from August 17, 1961; the Aber Company, Houston, Texas, from approximately September 7, 1961 to the middle of January, 1962; Industrial Insulating, Houston, Texas, for approximately one week during the month of October, 1961; Johns-Manville from approximately the middle of January, 1962 to the middle of February, 1962, and Armstrong Contracting and Supply Company, Houston, for one week during the latter part of February, 1962.

(4)

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There was an appeal from the award of the Industrial Accident Board, with the original petition being filed in Cause No. 13,916 in the 128th District Court of Orange County, Texas, styled Claude J. Tomplait vs. The Travelers Insurance Company et al, a certified copy of said petition being attached to the motion for summary judgment filed by Fibreboard Paper Products Corporation, defendant herein, reference to which is hereby made for all purposes, said petition being filed December 21, 1962, alleging personal injury in July, 1961, while employed by Armstrong Contracting and Supply Company. An amended petition was filed in said cause on the 25th day of March, 1963, complaining of The Travelers Insurance Company as the insurance carrier of Armstrong Contracting and Supply Company; Texas Employers' Insurance Association, as the compensation carrier for Johns-Manville Corporation and Johns-Manville Sales Corporation; and Queen Insurance Company of America, the insurance carrier of the Aber Company. A copy of said amended petition is attached to the motion for summary judgment filed herein by the defendant, Fibreboard Paper ProductsCorporation, reference to which is hereby made for all purposes.

A final judgment was rendered in Cause No. A-13,916-A, styled Claude J. Tomplait vs. The Travelers Insurance Company and Texas Employers' Insurance Association, for all claims against Armstrong Contracting and Supply Company and Johns-Manville Corporation and Johns-Manville Sales Corporation, on September 16, 1964.

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The claim against the Queen Insurance Company as the workmen's compensation carrier for the Aber Company remained on the docket of the District Court of Orange County,Texas, under Cause No. A-13,196, styled Claude J. Tomplait vs. The Queen Insurance Company of America, and judgment was rendered in that cause on May 26, 1966, a certified copy of which judgment is likewise attached to the motion for summary judgment filed herein by the defendant, Fibreboard Paper Products Corporation, reference to which is hereby made for all purposes. In this connection defendants would show unto the Court that under the Texas Workmen's Compensation Law and the cases permitting the tolling of the Statute of Limitations as to Third Parties until such time as the compensation case is disposed of, shows that the rule is only applicable as to third parties causing the injury for which compensation claim is brought. Therefore, in this matter, the statute of limitations was tolled only as to the suppliers or manufacturers of the Aber Company for the exposure complained about in the compensation claim. The manufacturers and suppliers are listed at Page 4 of the deposition of Doyle Glen Adair, taken in the compensation suit, and referred to as Appendix A in the motion for summary judgment filed by the defendant, Eagle-Picher Industries, Inc., reference to which appendix is hereby made for all purposes.

7.

These defendants have pleaded as a defense that the plaintiff's cause of action, if any he ever had, which is not

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admitted but denied, is barred by the two (2) year statute of limitations of the State of Texas, Article 5526, Subdivision 6, Revised Civil Statutes of Texas, which provides:

> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following descriptions: ***
> "(6) Action for injury done to the person of another."

The plaintiff's cause of action, if any he ever had against the defendants, Combustion Engineering, Inc., and R & I Refractory and Insulation Corporation, accrued on the date of any alleged harmful contact with products which may have been manufactured by the defendant, R & I Refractory and Insulation Corporation, it not being admitted but denied that he came in contact with any such products which may have been manufactured by the defendants. (In this connection, defendants show unto the Court that the defendant, Combustion Engineering, Inc., does not now and has never, on the dates claimed by the plaintiff, or otherwise, manufactured or produced insulating materials or products). In any event, these defendants say the cause of action, if any, of the plaintiff, Tomplait, for personal injury allegedly resulting from contact with defendant's products, which is denied, accrued at the time of the diagnosis made by his physician in July or August, 1961. This diagnosis was brought to the direction attention of the plaintiff, Claude J. Tomplait,

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as he admits that the doctor told him that he had silicosis resulting from the breathing of various products, and that he should get out of the insulation work, otherwise it would continue to be injurious to his health. Despite this warning, the plaintiff continued to work with insulation products and is attempting to assert a claim for subsequent exposures in working with insulation products as late as 1964.

The running of the two (2) year Statute of Limitations, which began at least in July, 1961, was not suspended as to these defendants, Combustion Engineering, Inc., and R & I Refractory and Insulation Corporation, for the reason that plaintiff had no claim against an employer who used the products of the defendant, R & I Refractory and Insulation Corporation; and further, no claim for compensation was filed until December, 1961.

If it can be contended that the statute of limitations was suspended by the filing of the compensation claim against the workmen's compensation insurers of Armstrong Contracting and Supply Company and Johns-Manville Corporation or Johns-Manville Sales Corporation, then the running of said statute was only suspended until September 16, 1964, the date on which a final judgment was rendered on said claim, and more than two (2) years accrued from and after said date prior to the filing of plaintiff's original complaint in the instant suit on December 23, 1966.

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These defendants say that these facts are undisputed, that the plaintiff asserted and made his own claim that he had asbestosis in July of 1961, and there was a medical diagnosis in July and August of 1961, of which he was fully advised, and he was advised to get out of insulation work, but failed and refused to heed the advice of the examining physician.

8.

As a further grounds for the granting of a motion for summary judgment, these defendants show unto the Court that the exposure to dust and the fact that he was being exposed to insulation products was well known to the plaintiff, or should have been known, and there existed no duty on the part of the defendants in this case to warn or advise him that he was creating dust from insulation products by sawing into them and cutting them. He further admits on page 40 of his deposition that he knew that the sawing and cutting of the products created dust particles in the air which he would breathe into his nose. In any event, even if it be found or held that the plaintiff came in contact with any product of these defendants or either of them, which is not admitted but denied, neither of the defendants could be liable or responsible for any contact by the plaintiff with such product from and after July or August, 1961, when the plaintiff was advised to discontinue this type of work. The plaintiff's claim

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for any alleged injury from and after July and August, 1961, is barred by the undisputed facts, in that there existed no duty to warn the plaintiff of any alleged danger of which he already had knowledge and was fully advised.

9.

Since the foregoing facts as to the date on which the plaintiff had actual knowledge and notice and notice of an actual diagnosis of his condition is undisputed, the cause of action, if any, of the plaintiff against these defendants is barred by the two (2) year statute of limitations.

Further, the undisputed facts showing that the plaintiff continued to work in the insulation industry and subject himself to insulation dust is sufficient to convict him of contributory negligence as a matter of law, at least from and after July and August, 1961, when he had full knowledge of the alleged harmful effects from the use of such products.

10.

Various defendants have filed a cross-action for contribution under Article 2212, Revised Civil Statutes of Texas. These defendants say that if they are entitled to summary judgment as against the claim of the plaintiff, then the respective cross-plaintiffs have no cause of action for contribution as these defendants would not be joint tort feasors.

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11.

As further part of this motion, these defendants pray the Court to enter an order to the effect that the exhibits to the motion for summary judgment of Fibreboard Paper Products Corporation and of Eagle-Picher Industries, Inc., also be considered as exhibits to this motion, as well as to the motions of the other defendants for summary judgment, without duplicating said exhibits; and that any affidavits that these defendants deem necessary or proper to be filed herein in support of this motion be allowed to be filed prior to the hearing on the motion.

WHEREFORE, these defendants pray that the Court set this motion for hearing, and after timely notice to the parties herein, that summary judgment be granted as against the plaintiff, and that the claims of the cross-plaintiffs for contribution against these defendants be dismissed.

ATTORNEY FOR DEFENDANTS, COMBUSTION ENGINEERING, INC., AND R & I REFRACTORY AND INSULATION CORRORATION;
1014 San Jacinto Bldg., P.O.Box 1632,
Beaumont,Texas.

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True copies of the foregoing motion were mailed by Certified Mail on the 15th day of January, 1968, to the following attorneys of record:

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ATTORNEYS FOR DEFENDANTS, COMBUSTION ENGINEERING, INC., AND R & I REFRACTORY AND INSULATION CORPORATION.