IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
JAN 15 1968
James R. Cooper, Clerk, U. S. District Court
By DEPUTY

CLAUDE J. TOMPLAIT		
VS.		CIVIL ACTION NO. 5402
COMBUSTION ENGINEERING, INC., ET AL		

MOTION OF DEFENDANT, GUSTIN-BACON MANUFACTURING COMPANY, FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

In the above entitled and numbered cause wherein Claude J. Tomplait is plaintiff and Combustion Engineering, Inc., R & I Refractor and Insulation 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, Fibreboard Paper Products Corporation and Eagle-Picher Industries, Inc. are defendants, Gustin-Bacon Manufacturing Company files this, its motion for summary judgment, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, and as grounds for said motion for summary judgment would show:

1.

Plaintiff, Claude J. Tomplait, in his first amended complaint, alleges that the defendants manufactured certain insulation materials which contained chemicals and minerals and deleterious substances which were highly poisonous, 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 plaintiff's petition, and that he

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came into contact with the various 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 into 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 his claim with the Industrial Accident Board dated February 24, 1962, filed with the Industrial Accident Board March 3, 1962, a certified copy of which is filed with the motion for summary judgment filed by Fibreboard Paper Products Corporation, claiming 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. 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 accompanying a 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 he saw Claude J. Tomplait on 8/1/61 with the chief complaint of dyspnea on exertion, tightness in the chest, malaise, loss of appetite and clubbing of the fingers. The patient gave a history of working

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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, 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.

This defendant says 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.

Another firm basis for the granting of a motion for summary judgment is that the alleged injurious exposure was well known to the plaintiff, or should have been known, and there existed no duty on the part of any of the defendants in this case to warn or advise him that he was creating dust from the 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 into the air which he would breathe into his nose. In any event, neither of the defendants in this case could be liable or responsible for any contact with its product from and after July or August, 1961, when he was advised to discontinue this type of work. The plaintiff's claim 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 an 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 the

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Gustin-Bacon Manufacturing Company is barred by the two (2) year statute of limitation.

Defendant, Gustin-Bacon Manufacturing Company, further says that in plaintiff's amended complaint, plaintiff has not alleged that he was employed by any employer who used any product manufactured by this defendant, after June 15, 1962, and that under the allegations in said amended complaint, if he was ever exposed to any product manufactured by this defendant, which defendant does not admit, but denies, then such exposure occurred prior to June 16, 1962, and any claim predicated thereon would be clearly barred by the two year statute of limitations. Defendant further shows to the Court that under the undisputed facts, plaintiff had full knowledge as to the alleged effects of exposure to insulating materials prior to the time that he worked with any product manufactured by this defendant, and accordingly, as a matter of law, he could not recover against this defendant because he was contributorily negligent and assumed the risks involved in continuing to work with such products after having been informed of the dangers incident thereto.

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. This defendant says that if it is entitled to summary judgment as against the claim of the plaintiff, then the cross-plaintiffs have no cause of action for contribution as it would not be a joint tort feasor.

11.

This defendant asks the Court to enter an order to the effect that

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affidavits and exhibits to this motion for summary judgment be filed separately and such exhibits can be considered as an exhibit to this motion, as well as to the motions of each other defendant for summary judgment without duplicating said exhibits. This defendant relies upon the exhibits, the pleadings, the deposition on file, and the affidavits attached.

WHEREFORE, this defendant prays that the Court set this motion for hearing, and after timely notice to the respondents, that summary judgment be granted as against the plaintiff, and that the claims of the cross-plaintiffs for contribution be dismissed.

John G. Tucker
Beaumont Savings Building
Beaumont, Texas
Attorney for Gustin-Bacon Manufacturing Company

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion for Summary Judgment of Gustin-Bacon Manufacturing Company, was on the 15 day of January, 1968, served upon counsel for each of the other parties herein by depositing the same in the United States mail postage prepaid, addressed to Mr. Ben L. Reynolds, Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002; Mr. Ward Stephenson, Stephenson Building, Orange, Texas; Mr. John Rienstra, Beaumont Savings Building, Beaumont, Texas 77701; Mr. George A. Weller, P. O. Box 350, Beaumont, Texas 77704; Mr. Charles S. Pipkin, P. O. Box 1632, Beaumont, Texas 77704; Mr. George Duncan, Beaumont Savings Building, Beaumont, Texas 77701; Mr. Gordon Pate, Beaumont Savings Building, Beaumont, Texas 77701; Mr. James W. Mehaffy, San Jacinto Building, Beaumont, Texas 77701; Mr. George Murphy, San Jacinto Building, Beaumont, Texas 77701.

Attorney for Gustin-Bacon Manufacturing Company

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VS.

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MOTION OF DEFENDANT, GUSTIN-BACON MANUFACTURING COMPANY, FOR SUMMARY JUDGMENT, AND ORDER OF COURT SETTING HEARING

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