FILED

JAN 15 1968

James R. Cooney, Clerk, U. S. Court
By Virginia A. Lewis DEPUTY

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CLAUDE J. TOMPLAIT,
PLAINTIFF

VS.

COMBUSTION ENGINEERING, INC., ET AL, DEFENDANTS

CIVIL ACTION NO. 5402

MOTION OF DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION, 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 Fiberglas Corporation, Pittsburgh Corning Corporation, Gustin-Bacon Manufacturing Company, Pittsburgh Plate and Glass Company, Fibreboard Paper Products Corporation and Eagle-Picher Industries, Inc. are defendants, Owens-Corning Fiberglas Corporation 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 came into contact with

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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 attached, 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. A. 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,

The Tomplait v. Combustion Engineering Case File (1962-1969), Motion for summary judgment Published by AsbestosClaims.Law
ACL Doc 10648 · Page 2 of 10 asbestosclaims.law/library/10648/2

loss of appetite and clubbing of the fingers. The patient gave a history of working for the past twenty-one 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 his entire period of time, and the dusty element is quite considerable at his face level. The material has to be cut with a saw or knife, which creates considerable dust.

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

-4-

According to the deposition of the plaintiff, Claude J. Tomplait, 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. W-67299, styled Claude J. Tomplait vs. Armstrong Contracting and Supply Company, that claimant's incapacity began on approximately

The Tomplait v. Combustion Engineering Case File (1962-1969), Motion for summary judgment Published by AsbestosClaims.Law
ACL Doc 10648 · Page 3 of 10 asbestosclaims.law/library/10648/3

July 26, 1961, and that he was exposed to the hazards of this occupational disease with the following employers: Armstrong Contracting and Supply Corporation, Houston, Texas, from August 17, 1961; the Aber Company, Houston, from approximately September 7, 1961, to the middle of January, 1962; Industrial Insulating, Houston, 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.

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, styled Claude J. Tomplait vs. The Travelers Insurance Company, et al, a certified copy of said petition being attached hereto, said petition being filed December 21, 1962, alleging personal injury in July, 1961, while employed by Armstrong Contracting and Supply Company. An amended complaint was filed in said cause on March 25th, 1963, complaining of The Travelers Insurance Company, the insurance carrier of Armstrong Contracting and Supply Company; Texas Employers' Insurance Association, 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 complaint is attached.

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.

The Tomplait v. Combustion Engineering Case File (1962-1969), Motion for summary judgment Published by AsbestosClaims.Law
ACL Doc 10648 · Page 4 of 10 asbestosclaims.law/library/10648/4

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 under Cause No. A-13,196, styled Claude J. Tomplait vs. The Queen Insurance Company of America, and judgment was rendered in this cause on May 26, 1966. A certified copy of this judgment is likewise attached.

-7-

This defendant has plead as a defense that the plaintiff's cause of action, if any he ever had, which is denied, is barred by the two (2) year statute of limitation 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 Owens-Corning Fiberglas Corporation accrued on the date of any alleged harmful contact with products which may have been manufactured by this defendant. In any event, the cause of action of the plaintiff, Tomplait, for personal injury allegedly resulting from contact with this defendant's product, 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 direct attention of the plaintiff, Claude J. Tomplait, 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, and probably 1966.

The Tomplait v. Combustion Engineering Case File (1962-1969), Motion for summary judgment Published by AsbestosClaims.Law
ACL Doc 10648 · Page 5 of 10 asbestosclaims.law/library/10648/5

The running of the two (2) year statute of limitation, which began at least in July, 1961, was not suspended as to this defendant, Owens-Corning Fiberglas Corporation, for the reason that plaintiff had no claim against an employer who used Owens-Corning Fiberglas products, and further, no claim for compensation was filed until December, 1961.

If it can be contended that the statute of limitation was suspended by the filing of the compensation claim against 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, 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 exposure to dust and the fact that he was being exposed to asbestos products 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 asbestos 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

The Tomplait v. Combustion Engineering Case File (1962-1969), Motion for summary judgment Published by AsbestosClaims.Law
ACL Doc 10648 · Page 6 of 10 asbestosclaims.law/library/10648/6

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 Owens-Corning Fiberglas Corporation is barred by the two (2) year statute of limitation.

Owens-Corning Fiberglas Corporation further says that the plaintiff has not alleged any employer for whom the plaintiff worked beginning in 1959, who furnished any materials manufactured by this defendant. If it did furnish the materials to any employer after July and August, 1961, the plaintiff had full knowledge of the potential dangers of working in the dust generated from the cutting and sawing of these products such that he does not have a cause of action for damages.

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.

The Tomplait v. Combustion Engineering Case File (1962-1969), Motion for summary judgment Published by AsbestosClaims.Law
ACL Doc 10648 · Page 7 of 10 asbestosclaims.law/library/10648/7

-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 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.

Respectfully submitted,

KING, SHARPSTEIN & RIENSTRA

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The Tomplait v. Combustion Engineering Case File (1962-1969), Motion for summary judgment Published by AsbestosClaims.Law
ACL Doc 10648 · Page 8 of 10 asbestosclaims.law/library/10648/8

True copies of this Motion for Summary Judgment were mailed by certified mail on the 15th day of January, 1968, to the following attorneys of record:

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The Tomplait v. Combustion Engineering Case File (1962-1969), Motion for summary judgment
ACL Doc 10648 · Page 9 of 10
Published by AsbestosClaims.Law
asbestosclaims.law/library/10648/9

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