FILED
MAY 24 1968
M
James R. Cooney, Clerk, U. S. Court
By Margaret Turner DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

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

ANSWER OF THE DEFENDANT, JOHNS-MANVILLE PRODUCTS CORPORATION TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant, Johns-Manville Products Corporation, in response to plaintiff's second amended complaint, says:

1.

Defendant cannot admit or deny Paragraph 1 with respect to jurisdiction as defendant has no knowledge or information as to the residency and citizenship of other defendants.

2.

Answering paragraphs 2 and 3, defendant admits the same.

3.

Answering paragraph 6, this defendant admits that it is a foreign corporation, organized, created and existing under and by virtue of the laws of the State of Delaware.

4.

Answering paragraphs 4, 5, 7, 8, 9, 10, 11 and 12, defendant says that such paragraphs refer to parties other than this defendant and this defendant is not required to and does not have sufficient information to answer the same.

5.

Answering paragraph 13, defendant says that it is without sufficient knowledge or information to admit or deny the allegations which refer to the products manufactured by all of

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the defendants, but this defendant does admit that it manufactured and sold insulating materials, but it is denied that any of such products caused any injury to plaintiff.

6.

Answering the allegations in paragraphs 14, 37, 38, 39, 40, 41, and 43, defendant denies the same.

7.

Answering the allegations contained in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, defendant says it is without sufficient knowledge or information to admit or deny the same.

8.

Answering the allegations contained in paragraphs 25 and 36, this defendant admits that in 1962, 1963 and 1964, the plaintiff worked for Johns-Manville Sales Corporation. In reply to the remaining allegations contained in paragraphs 25 and 36, this defendant does not, at this time, have sufficient knowledge or information to either admit or deny the same.

9.

Answering the allegations contained in paragraph 42, this defendant says it is without sufficient knowledge or information to admit or deny the same.

10.

Answering the prayer to plaintiff's complaint, defendant denies that plaintiff is entitled to any of the relief sought.

AFFIRMATIVE DEFENSES

11.

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 purpose for which manufactured and sold. It is denied that the same were in anywise defective.

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12.

Defendant denies that any product which it manufactured and sold in awywise caused or brought about any injury or illness to plaintiff, and defendant further says that 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.

13.

Further answering herein, defendant says that plaintiff's cause of action, if any, accrued more than four (4) years prior to the institution of this action, and defendant pleads the four-year Statute of Limitations of the State of Texas in bar of plaintiff's claim.

14.

Further answering herein, defendant says that plaintiff's cause of action, if any, accrued more than two (2) years prior to the institution of this action, and defendant pleads the two-year Statute of Limitations of the State of Texas in bar of plaintiff's claim.

15.

Further answering, defendant says that the injuries, conditions and damages of which plaintiff complains were due solely and alone, or in the alternative, were proximately caused by the negligent acts, wrongs and omissions of the plaintiff, and that at all times material hereto plaintiff failed to exercise ordinary care for his own safety, all of which proximately caused the injuries and conditions of which he complains, all of which is pled in bar hereof.

16.

For further answer and affirmative defense, defendant says that as early as 1961 plaintiff became ill, suffering from

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weakness and shortness of breath, and he was then and there instructed and directed by a physician of his own choice to stop working with, in and around materials or in areas whereby he was exposed to inhalation of dust or other foreign substances. Plaintiff failed to heed such warnings, instructions and directions and continued to voluntarily expose himself to the matters of which he now complains, and plaintiff failed to take reasonable precautions, such as the use of a safety mask or respirator, and he voluntarily exposed himself to the conditions and hazards of which he complains and voluntarily assumed the risk of injury thereby, all of which is pled in bar hereof.

17.

Further answering herein, defendant says that the plaintiff's injuries and damages, if any, were the result of an unavoidable accident.

18.

Further answering herein, defendant says that the failure of the plaintiff to heed the warnings in 1961 to stop working with, in and around materials or in areas whereby he was exposed to inhalation of dust or other foreign substances, was the sole cause of plaintiff's injuries and damages, if any.

19.

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 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 such conditions

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and if he did use products manufactured by this defendant, after having been advised that he had asbestosis and should not continue to work as an insulator, then he assumed any risk in connection with the use of such product and such danger, if any, in the use of insulation products was open and obvious and apparent to the plaintiff, and he cannot recover for any period in which he deliberately subjected himself to the dangers, if any, involved in working with insulation materials. In the alternative, if there was any danger, and such was not open and obvious and apparent to plaintiff at all times, nevertheless he knew at all times of the dangers, if any, involved in working with insulation materials and in working around same and continued to use and work with such materials under such conditions and with such knowledge and, therefore, this defendant owed him no duty to warn him of any dangers involved and he is, therefore, barred from any recovery under the theory of volenti non fit injuria. Still further in the alternative, from and after the date on which the plaintiff was advised and had knowledge that he was sustaining injury from working with insulation materials, if this defendant ever owed him any duty to warn of the possible effects of working with insulation materials, which is denied, then this defendant owed the plaintiff no duty to warn him of any alleged dangers involved after he had full knowledge of his condition and was fully warned to remove himself from said work or the area where he could be subjected to air which had insulation dust in it. He is, therefore, barred from recovery on the basis that this defendant owed him no duty and this defendant violated no duty of care, owed to said plaintiff.

20.

For further answer, defendant says that if plaintiff should recover any judgment herein (and defendant denies that

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plaintiff is entitled to recover judgment), that then under the provisions of Article 2212, Vernon's Annotated Civil Statutes, as well as at common law, defendant is entitled to judgment for contribution over and against the co-defendants, and each of them, jointly and severally.

WHEREFORE, defendant moves and prays the Court that upon trial hereof plaintiff recover nothing, and in the alternative, for judgment against the co-defendants for contribution, and for such other and further relief in the premises as it may show itself justly entitled to receive.

Gordon R. Pate

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Attorney for Defendant, Johns-Manville Products Corporation

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Answer of the Defendant, Johns-Manville Products Corporation to Plaintiff's Second Amended Complaint, was on the 24th day of May, 1968, served upon counsel for each of the other parties herein, 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, Post Office Box 350, Beaumont, Texas 77704; Mr. Charles S. Pipkin, Post Office Box 1632, Beaumont, Texas 77704; Mr. George Duncan, Beaumont Savings Building 77701; Mr. John Tucker, Beaumont Savings Building, Beaumont, Texas 77701;

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CIVIL ACTION NO. 5402

CLAUDE J. TOMPLAIT

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BEAUMONT DIVISION

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