IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
JUL 12 1968
James R. Cooney, Clerk, U. S. Court
By _____ DEPUTY

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

REPLY OF THE DEFENDANT AND THIRD-PARTY PLAINTIFF TO MOTIONS OF GUSTIN-BACON MANUFACTURING COMPANY, PITTSBURGH PLATE GLASS COMPANY AND JOHNS-MANVILLE FIBER GLASS, INC. FOR SUMMARY JUDGMENT, AS WELL AS REPLY TO THE ANSWER OF PLAINTIFF TO THE MOTIONS FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant and third-party plaintiff, Fibreboard Paper Products Corporation, and files this, its reply to motions of Gustin-Bacon Manufacturing Company, Pittsburgh Plate Glass Company and Johns-Manville Fiber Glass, Inc. for summary judgment, as well as reply to the answer of plaintiff to the motions for summary judgment, and for such reply says:

1.

In plaintiff's original petition and in his first amended petition, it was alleged that plaintiff was injured as a result of being required to come into contact with Kaytherm (calcium silicate), Aber 2 to 3 (cement), Sealfas 3149 (mastic), Foam Glass (foamed silicate), Unabestos (asbestos fiber), etc.

In plaintiff's second amended complaint, he likewise alleged that he was injured as a result of coming in contact with

insulation containing fiber glass, rock wool, foam glass, magnesium insulation, mineral wool, calcium silicate and asbestos.

The allegations are substantially the same in the plaintiff's third amended complaint.

2.

Defendant's Reply to Plaintiff's Answer to Motions for Summary Judgment

Plaintiff alleges that it was agreed by the attorney for plaintiff and the attorneys for defendants, which would include this defendant, that plaintiff would be sent to Dr. Stanton Fischer, of Houston, Texas, for an examination, and in making such agreement it was understood that Dr. Leary, who had examined the plaintiff in the past, would not be called to give his medical opinion or conclusions, and that if none of such medical opinion or conclusions were used that the plaintiff's attorney would then agree to allow an examination by Dr. Fischer.

The attorney for this defendant made no such agreement and had no such understanding, and would not have made such agreement for and on behalf of this defendant for the reason that under the Federal Rules of Civil Procedure this defendant had a right to have plaintiff examined by a physician. Dr. Leary had examined the plaintiff in connection with a prior workmen's compensation case. In any event, this defendant would be entitled to use the history given by the plaintiff to Dr. Leary, as well as any X-rays which were then examined by Dr. Leary in the course of his examination.

The plaintiff has heretofore contended by his claim in the workmen's compensation case, by testimony given in that

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case, as well as by deposition testimony given in this case, that his injury was due to working with foam glass which produced a silicate dust, and asbestos and other products. There has likewise been a previous diagnosis of silicosis by Dr. T. R. Jones, of Houston, Texas, who will be a witness in this case. All counsel have a copy of such report.

Plaintiff's attorney alleges that the attorney for this defendant has violated an agreement, which statement is untrue. It is the position of this defendant that the plaintiff's attorney and attorneys for other defendants could in no wise bind this defendant or this Court to prevent the production of testimony as to prior medical examinations which might be material to the defense of this case. This defendant intends to show upon the trial of this case the claims and inconsistent claims of the plaintiff and the testimony of the various doctors as to the diverse opinions, some of which will be that the plaintiff has silicosis in addition to having emphysema.

3.

The defendant, Johns-Manville Fiber Glass, Inc., in its motion for summary judgment, states that the plaintiff is predicating his claim solely upon the contention that he is suffering from a disease or condition of asbestosis, and therefore such defendant is entitled to summary judgment.

4.

The defendant, Gustin-Bacon Manufacturing Company, makes the same contention, that is that it only sold fiber glass products, and therefore could not be responsible for the condition of asbestosis.

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As reflected by this defendant's motion for summary judgment, the plaintiff, Claude J. Tomplait, filed his claim for workmen's compensation before the Industrial Accident Board of Texas dated February 24, 1962, a certified copy of which is attached and of record in this cause, claiming that he sustained severe external and internal injuries, including pulmonary fibrosis caused by asbestosis and silicosis. The original claim filed before the Industrial Accident Board dated December 11, 1961, made the same claim. Plaintiff likewise filed with the Industrial Accident Board the report of Dr. T. R. Jones showing a diagnosis of Tomplait's condition as pulmonary fibrosis secondary to inhalation of asbestos fibers and silicates.

Plaintiff in Cause No. 13,916 in the District Court of Orange County, styled Claude J. Tomplait vs. The Traveler's Insurance Company, et al, a certified copy of which is on file in this cause, alleged that he had an occupational disease of asbestosis and silicosis and that his disability was caused by dust, asbestos and other materials causing asbestosis and silicosis. Plaintiff is bound by these judicial admissions to the claim theretofore made and asserted in a legal proceeding and cannot now be heard in a second legal proceeding arising out of the same claim of injury to assert a different and contrary claim.

It is undisputed that the fiber glass products do produce silicate dust and that a person working with such products in a close place will inhale such dust. It then becomes a medical opinion as to whether this silicate dust

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will harm and cause injury to an individual. Under all the facts and circumstances in this case as shown by the record, this defendant should in no wise be restricted in its defenses as to the alleged cause of the disability claimed by the plaintiff.

If the plaintiff desires to no longer prosecute his suit against the manufacturers of fiber glass products or foam glass products or glass insulation products, all he has to do is to take a voluntary non-suit, but this defendant will not agree that it will not use and utilize the facts as shown by the claims made and the testimony given in the prior case which involves the very claim before this Court.

WHEREFORE, this defendant prays that the motions for summary judgment of the fiber glass defendants be refused.

Respectfully submitted;

WELLER, WHEELUS & GREEN
P. O. BOX 350
BEAUMONT, TEXAS 77704

BY _____
GEO. A. WELLER,
ATTORNEY FOR DEFENDANT,
FIBREBOARD PAPER PRODUCTS
CORPORATION.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply of the defendant and third-party plaintiff to motions of Gustin-Bacon Manufacturing Company, Pittsburgh Plate Glass Company and Johns-Manville Fiber Glass, Inc. for summary judgment, as well as reply to the answer of plaintiff to the motions for summary judgment, was served on Mr. Ward Stephenson, Stephenson, Thompson & Morris, Stephenson Building, Orange, Texas, by mailing a copy to said address by certified mail on the 11th day of July, 1968, and a copy was likewise served on all other attorneys of record by regular mail.

_____
GEO. A. WELLER

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