

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
M. JUN 24 1969
James R. Cooney, Clerk, U. S. Court
By Margaret Stiver DEPUTY

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

FIRST AMENDED ANSWER OF DEFENDANT, FIBREBOARD PAPER PRODUCTS CORPORATION, TO PLAINTIFF'S THIRD AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Fibreboard Paper Products Corporation, and files this, its first amended answer to plaintiff's third amended complaint, and for such answer this defendant would show the Court:

1.

In reply to Paragraphs 1 through 12 inclusive, this defendant admits that it is a foreign corporation organized under the laws of a foreign state with a permit to do business in the State of Texas; it likewise admits, assuming that each of the corporate defendants are non-residents of Texas, that this Court has jurisdiction of the alleged claim.

2.

In answer to Paragraph No. 13, it is admitted that Fibreboard Paper Products Corporation has been and is now engaged in the manufacture of materials for insulation, but defendant denies that it was engaged in the manufacture of such materials during all times mentioned in plaintiff's petition and for a long time prior thereto.

It is denied that the materials manufactured by defendant contained a combination of fiber glass, rock wool, foam glass, magnesium insulation, mineral wool, calcium silicate and asbestos.

It is admitted that insulation materials manufactured by this defendant beginning in 1925 contained a combination of magnesium and asbestos; a combination of diatomaceous earth and asbestos; a combination of lime, diatomaceous earth, and asbestos; and in addition to the insulating materials as noted, a powdered cement was manufactured in each of the three types for mixing with water as a cementing material.

This defendant does not have knowledge as to products manufactured by other defendants such that the undersigned counsel can answer under oath.

Defendant denies that any of the insulation materials manufactured by this defendant caused any injury to the plaintiff.

3.

In answer to Paragraph 14, this defendant denies that the insulation manufactured by it contains chemicals, minerals and deleterious substances and matter which are highly poisonous, dangerous and harmful to human beings and to the health of man. It likewise denies that such materials were defective and not suitable for the purposes for which they were intended, but to the contrary, such materials were not defective and were suitable for the purposes of the types of insulation and insulation work for which they were intended.

The remainder of the allegations are denied.

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4.

In reply to the allegations contained in Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, this defendant can neither admit or deny the allegations contained in each separate paragraph for the reason that it is without information or knowledge.

This defendant denies that it supplied any of the insulating materials for each of the said jobs mentioned in said Paragraphs 15 through 36, inclusive, and denies that plaintiff worked with its product on said jobs.

5.

In reply to the allegations contained in Paragraph 37, this defendant has filed a motion to strike said allegations.

Subject to the motion to strike, and in the event the motion is overruled, this defendant in answer to the allegations contained in Paragraph 37, says that it is without knowledge as to whether the plaintiff handled any insulation or any quantity of insulation mentioned in plaintiff's petition; however, it denies that plaintiff was required to handle any insulation product manufactured by this defendant. This defendant likewise denies that it compounded, manufactured and prepared the insulation materials referred to in Paragraphs 15 through 36, inclusive.

It likewise denies that the plaintiff at any time was exposed to insulation products manufactured by this defendant, and denies that its materials were dangerous.

6.

In answer to the allegations contained in Paragraph 38, this defendant denies that during the time the plaintiff was employed as an insulator he was caused to come in contact

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with insulation and materials produced by this defendant due to the negligence and carelessness of this defendant, and this defendant denies that it was negligent and careless, and it denies that plaintiff sustained any injury or damage as a result of any negligence and carelessness of this defendant; but to the contrary, this defendant says that if plaintiff sustained any injury in the course of his employment as a result of working with insulation materials over a number of years, it was due to the nature of his occupation and was also due to his failure to exercise ordinary care for his own safety in failing to wear the proper, usual and customary safety devices which are used by employees in the trade working with such insulation materials, or was due to his negligence in continuing to work with insulation materials after his physician had advised him to discontinue this type of employment, or his injury was due to the negligence of his various employers in failing to furnish him with a reasonably safe place to work and with reasonable safe equipment.

7.

In reply to the allegations contained in Paragraph 39, this defendant answers only for itself, but it denies that any injury and damage complained of by the plaintiff was directly and proximately caused by any negligence or carelessness of this defendant.

This defendant says that each of the allegations in this paragraph are too vague, general and indefinite and do not apprise this defendant of any date or dates on which the plaintiff worked with any materials manufactured by this defendant, and he does not specify what the materials were. Under this state of

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facts, this defendant cannot answer such questions as to its product.

Defendant has moved to strike Subdivisions (h), (i) and (j) of said Paragraph 39.

Subject to the foregoing comment and objection, the allegations of Subdivisions (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) are denied.

8.

This defendant has moved to strike the allegations contained in Paragraph 40, for the reason that the doctrine of res ipsa loquitur does not apply.

Subject to this defendant's motion to strike, the allegations of Paragraph 40 are denied.

9.

In reply to the allegations of Paragraph 41, this defendant denies that the plaintiff sustained any injury as a result of any act or omission on the part of this defendant; this defendant has no knowledge or information at this time as to the cause or causes of plaintiff's disability, if any, except that it does have knowledge through investigation that plaintiff made a claim in 1961 that he was disabled as a result of an occupational disease known as asbestosis and silicosis, as a result of which he claimed he was totally disabled, and he recovered a judgment in said cause on September 16, 1964.

This defendant does know from investigation that the plaintiff was advised in July, 1961, to discontinue his work with insulation materials because it was injurious to his health, and that he should seek other employment, but despite this drastic

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warning, the plaintiff continued to subject himself to dust emanating from the use of various insulation materials, including asbestos and foam glass.

Except as admitted, this defendant denies the allegations in said paragraph, and it denies that plaintiff's alleged disability and condition has resulted from any act or omission of this defendant or from the use of any product manufactured by this defendant.

10.

The allegations of Paragraph 42 are denied.

11.

The allegations of Paragraph 43 are denied.

12.

The allegations of Paragraph 44 are denied, and it is denied that plaintiff is entitled to any recovery of any sum against this defendant.

13.

This defendant has moved to strike Paragraph No. 45.

Subject to the action of the Court on the motion to strike, this defendant denies the allegations contained in Paragraph 45, and denies that plaintiff is entitled to recover any sum against this defendant.

14.

This defendant has moved to strike Paragraph No. 46.

Subject to the action of the Court on the motion to strike, this defendant denies the allegations contained in Paragraph 46, and denies that plaintiff is entitled to recover any sum against this defendant.

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AFFIRMATIVE DEFENSES

First Affirmative Defense

This defendant denies that the plaintiff sustained any injury as a result of contact or use of any product manufactured by this defendant.

Second Affirmative Defense

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 purposes for which they were manufactured and sold, and defendant denies that the same were in anywise defective for the use for which they were manufactured.

Third Affirmative Defense

If plaintiff did sustain any injury as a result of the use of any product manufactured by this defendant, which is expressly denied, then such injury was sustained as a result of the occupation of the plaintiff, in that he had been engaged as an insulator or worker in the insulation field for a number of years, and at all times knew that he was working in dust laden air which contained asbestos dust, as well as other dust particles, part of which were created by his own work and the work of other insulators, and by the failure of his employer or the owner of the buildings to provide facilities for the elimination of dust laden air, and therefore such injury as he may have sustained was either asbestosis or silicosis or some occupational disease resulting from his long continued occupation as an insulator and not as a result of any isolated incident or contact with any product manufactured by this defendant. This defendant says that

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it is not legally liable or responsible for any occupational disease which was suffered or sustained by plaintiff in the course of his various employment over a number of years; and further, that the plaintiff did not work with products manufactured by this defendant.

Fourth Affirmative Defense

This defendant denies that any product or products which it manufactured and sold in anywise caused or brought about any injury or illness, if any, to the plaintiff, and this defendant says that the physical conditions of which plaintiff complains was in no wise caused or brought about by any product manufactured and sold by this defendant, but that such condition was due solely to disease and other causes, or to the acts and omissions of third persons.

Fifth Affirmative Defense

Further answering herein, and while denying that the plaintiff sustained any injury as a result of contact or use of any product manufactured by this defendant, if he did sustain injury or did sustain an occupational disease as a result of the use of any insulation product manufactured by this defendant, separately or in conjunction with products manufactured by other defendants, then this defendant says that plaintiff was guilty of various acts, wrongs and omissions, each and all of which amounted to negligence in the performance of his work, which acting together or separately, was a proximate cause of his injury. In this connection, this defendant would show that the plaintiff failed to use and utilize any safety devices such as gloves, protective clothing, masks and respirators for breathing;

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he worked in dust laden air with full knowledge that he was inhaling such dust laden air; and he continued to work with insulation materials after he knew, or in the exercise of ordinary care should have known, that it was affecting his health; further, he continued to work with insulation materials after he was fully advised as to his susceptibility to injury from insulation products in the year 1960 or 1961, when his physician diagnosed his condition and advised him to seek other employment where he would not come in contact with insulation materials. Nevertheless, the plaintiff, knowing of his susceptibility to insulation materials, and having been fully advised by his physician to get out of said employment, failed to seek other employment and failed to remove himself from contamination with insulation materials in the air; but to the contrary, continued to work with such insulation materials with full knowledge that such was harmful to his health.

Sixth Affirmative Defense

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 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 air which was laden with insulation materials, and if he did use products manufactured by this defendant after having been advised that he had asbestosis and/or silicosis and should not continue work as an insulator, then he assumed any risk in connection with the

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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 involved in working with insulation materials and in working in dust laden air where insulation materials were in use, and he continued to use and to work with such materials and under such conditions 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.

In the further 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 had 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 insulation 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 owing to the plaintiff.

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Seventh Affirmative Defense

If plaintiff did sustain any injury as the result of use of any product manufactured by this defendant, which is denied, then such occurred more than two (2) years prior to the filing of this suit on December 23, 1966, and such cause of action for personal injury is barred by the two (2) year statute of limitation of the State of Texas.

Eighth Affirmative Defense

If plaintiff did sustain any injury as the result of use of any product manufactured by this defendant, which is denied, then such occurred more than four (4) years prior to the filing of this suit on December 23, 1966, and such cause of action for personal injury is barred by the four (4) year statute of limitation of the State of Texas.

Ninth Affirmative Defense

Further answering, this defendant says that plaintiff was an experienced insulation worker and knew at all times that he was working with asbestos and asbestos products, as well as other products, which were harmful to him; or in the alternative, if he did not know this, his employers at all times knew that they were working with insulation materials which contained asbestos or magnesium or other products, and said employers had knowledge of the fact that particles of said products could enter the air when said product was cut or applied, and the employer likewise had knowledge that if blowers or fans were not in use in the area, that their employees would be subject to the dust hazard and inhalation of dust; and, further, it is common knowledge that if an individual works in an area where

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the air is laden with dust that the individual will breathe this dust into his nose and body system unless the employee uses some mask, respirator or some protective device, or unless the employer provides some means whereby the dust is removed from the air as a safety measure.

Tenth Affirmative Defense

Further answering herein, this defendant says that from and after August 1, 1961, the plaintiff continued to work with insulation products which contained asbestos and foam glass, or other glass asbestos products, with full knowledge that such products were causing him harm and would further aggravate and compound his existing condition, whether it was caused by asbestosis, silicosis or emphysema, and since he continued to work with said products with full knowledge, he cannot recover because he incurred further injury and exposure with full knowledge and appreciation of the danger; and further, he failed to mitigate the damages, if any, accruing from any prior contact with any of said products.

Eleventh Affirmative Defense

This defendant denies the existence of any warranty on the part of these defendants, and denies any fault or breach of warranty on the part of these defendants, but to the contrary, says that the insulation product or products manufactured by it were at all times reasonably fit and suitable for the purposes for which they were manufactured and sold, and the plaintiff's injury, if any, did not result from any defect in said product. Further, any and all dust conditions which resulted from the use of the product were created during the application thereof, at which time the product was cut or changed from the original form in which it was manufactured by this defendant.

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Twelfth Affirmative Defense

Further answering herein, and in the alternative, this defendant says that the plaintiff's alleged injuries and damages, if any, were caused solely, or in the alternative, were proximately caused, by acts, wrongs and omissions and negligence of third parties, or a third party, for whose acts this defendant is in no wise liable or responsible; or in the alternative, if plaintiff sustained an injury from the use of any product or from any breach of warranty, none of which are admitted, but denied, then such was the result of the fault or breach of warranty of third parties other than this defendant.

Thirteenth Affirmative Defense

Further answering herein, and in the alternative, this defendant says that the plaintiff's claimed injury and damage, if any, were the result of an unavoidable accident.

Fourteenth Affirmative Defense

Further answering herein, and in the alternative, this defendant would show that there is and was no legal liability on the part of this defendant, because of the fact that the alleged happenings in question were brought about or caused by transitory conditions arising in the course of the work which the plaintiff was doing, and ordinarily incident thereto; the plaintiff and his employers used their own manner, method and means of performing the work, and this defendant owed no duty with respect to such work, nor was there any relationship as between plaintiff and this defendant which created any duty on the part of this defendant as to the manner or method in which the work was done or the conditions under which the plaintiff performed said work.

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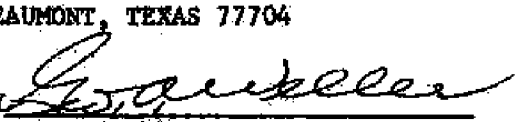
Fifteenth Affirmative Defense

As a further grounds for relief, and pleading in the alternative, this defendant says that if any judgment is entered herein jointly and severally against it and the other defendants, then in such event this defendant is entitled to contribution against such other defendants in accordance with the provisions of Article 2212 of Vernon's Annotated Civil Statutes of Texas.

WHEREFORE, premises considered, this defendant prays that upon trial hereof the plaintiff take nothing against this defendant and that this defendant be discharged with its costs.

Respectfully submitted;

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BY 
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