IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS,

BEAUMONT DIVISION.

FILED
DEC 3 1968
James R. [illegible], Clerk
By Virginia K. Lowe DEPUTY

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

FIRST AMENDED ORIGINAL ANSWER OF DEFENDANTS, COMBUSTION ENGINEERING, INC., AND R & I REFRACTORY AND INSULATION CORPORATION TO PLAINTIFF'S THIRD AMENDED COMPLAINT.

Now come the defendants, Combustion Engineering, Inc., and R & I Refractory and Insulation Corporation, in the above-entitled and numbered cause, and make and file this, their First Amended Original Answer to the Plaintiff's Third Amended Complaint, leave of the Court being first had and obtained, and would show unto the Court the following:

1.

As to the allegations of paragraph 1 of said Complaint, these defendants do not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof, inasmuch as they do not have knowledge as to the citizenship of the parties other than these defendants.

2.

These defendants admit the allegations of paragraph 2 to the effect that the amount in controversy herein exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs, but denies that the plaintiff is entitled to any recovery herein against these defendants in any amount.

3.

These defendants do not have sufficient knowledge or information upon which to base a belief as to the truth or falsity of the allegations of paragraph 3 of the Amended Complaint.

4.

Defendants admit the allegations of paragraph 4 of the Amended Complaint.

5.

Defendants admit the allegations of paragraph 5 of the Amended Complaint.

6.

With reference to the allegations of paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Amended Complaint, the matters therein alleged pertain to parties defendant other than these defendants, and these defendants do not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof.

7.

With reference to the allegations of paragraph 13 of said Amended Complaint, defendants deny the same in entirety as to the defendant, Combustion Engineering, Inc.

As to the defendant, R & I Refractory and Insulation Corporation, defendants admit only that the defendant, R & I Refractory and Insulation Company has been and is now engaged in the manufacture of materials used for insulation which were and are placed on the market to be purchased and used by the public, but defendants deny that such materials are in the compounds alleged by the plaintiff. These defendants do not have sufficient knowledge or

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information upon which to base a belief as to what products, if any, the other defendants in this cause manufactured or what such products, if any, contained.

Defendants deny all other allegations of paragraph 13 of said Amended Complaint and deny that any of the insulation materials manufactured by the defendant, R & I Refractory and Insulation Corporation caused any injury to the plaintiff.

8.

Defendants deny the allegations of paragraph 14 of the Amended Complaint.

9.

With reference to the allegations of paragraphs 15 through 36, inclusive, of the Amended Complaint, these defendants do not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof.

10.

With reference to the allegations of paragraph 37 reading, "That at all times herein mentioned, the plaintiff was employed as an insulator", defendants do not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof.

Defendants deny the remainder of the allegations of paragraph 37 of said Amended Complaint.

11.

Defendants deny the allegations of paragraph 38 of said Amended Complaint.

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12.

These defendants deny the allegations of paragraph 39 of the Amended Complaint, the first unnumbered paragraph thereof, and subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) and each of them.

13.

These defendants deny the allegations of paragraph 40 of the Amended Complaint.

14.

These defendants deny the allegations of paragraph 41 of the Amended Complaint.

15.

These defendants deny the allegations of paragraph 42 of the Amended Complaint.

16.

These defendants deny the allegations of paragraph 43 of the Amended Complaint, and deny that the plaintiff is entitled to any recovery therein sought against these defendants.

17.

These defendants deny the allegations of paragraph 44 of the Amended Complaint, and deny that the plaintiff is entitled to any recovery therein sought against these defendants.

18.

These defendants deny the allegations of paragraph 45 of the Amended Complaint, and deny that the plaintiff is entitled to any recovwry therein sought against these defendants.

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19.

These defendants deny the allegations of paragraph 46 of the Amended Complaint, and deny that the plaintiff is entitled to any recovery therein sought against these defendants.

These defendants deny the allegations of the last unnumbered paragraph of said Amended Complaint, being the prayer thereof, and deny that the plaintiff is entitled to any recovery herein or to any of the relief sought by him in this cause against these defendants or either of them.

AFFIRMATIVE DEFENSES.

20.

Further answering, and by way of affirmative defense, defendants say that the products which these defendants manufactured and sold were at all times reasonably fit and suitable for the purposes for which manufactured and sold, and the defendants deny that the same were in anywise defective.

21.

Defendants deny that any product or products which they manufactured and sold in anywise caused or brought about any injury or illness, if any, to the plaintiff; and defendants further say 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.

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22.

Further answering herein, if need be, and by way of further affirmative defense, these defendants specially deny that the plaintiff sustained any injury as a result of contact or use with or of any product manufactured by the defendants herein, and specially deny any fault or breach of warranty on the part of these defendants, and specially deny that they or either of them, their servants, agents or employees, were guilty of any negligence proximately causing or contributing to cause the plaintiff's alleged injuries and damages, if any; but on the contrary these defendants allege that the plaintiff himself was guilty of various acts, wrongs and omissions, each and all amounting to negligence, which, acting together or separately, were the sole proximate cause of his alleged injuries and damages, if any, or in the alternative, were a proximate cause thereof.

23.

Further answering herein, and in the alternative, defendants say that the plaintiff's alleged injuries and damages, if any, were caused solely, or in the alternative, were proximately caused by acts, wrongs, omissions and negligences of third parties or a third party, for whose acts these defendants are in nowise liable or responsible; or, in the alternative, the physical condition of which plaintiff complains was due solely to causes other than any negligence, fault or breach of warranty, none of which are admitted but denied, on the part of these defendants or either of them.

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24.

Further answering herein, in the alternative, defendants allege that the plaintiff's claimed injuries and damages, if any, were the result of an unavoidable accident.

25.

Further answering herein, and in the alternative, defendants would show unto the Court that all situations and conditions of which the plaintiff complains, and the danger, if any, arising from the continued use of insulating materials of which he complains, were open and obvious, and if any dangers existed as claimed by him, which are not admitted but denied, same, if existing, were apparent and were easily discernible, and the plaintiff knew as much about same as did the defendants, and same were well known to the plaintiff, or should have been known to him, and he appreciated any dangers arising therefrom, and said conditions, if existing, were not such that these defendants would be legally liable to the plaintiff therefor.

26.

Further answering herein, in the alternative, defendants say that the plaintiff voluntarily assumed the risk of performing the work in which he was engaged at the time and on the occasions in question, and he had actual notice and knowledge of all conditions and situations surrounding the work which he was

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performing and of any dangers, if any, arising therefrom, and fully appreciated the same, and he had been specifically and directly warned as to any dangers in connection with such insulation materials, and had been instructed and directed by a physician of his own choice to cease working with and around insulating materials, but nevertheless he voluntarily proceeded and continued over a period of years to work with and around insulating materials, and voluntarily exposed himself to any conditions, dangers or hazards incident to such work, and these defendants plead the doctrine of volenti non fit injuria herein.

27.

Further answering herein, in the alternative, defendants would show that there is and was no legal liability on the part of these defendants, 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 the plaintiff was doing, and ordinarily incident thereto, the plaintiff using his and his employers' own manner, method and means of doing the work, and defendants owed no duty with respect thereto.

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27-A.

For further affirmative defense herein, this defendant says, in the alternative, that in 1961, plaintiff was instructed and directed by a physician of his own choice to cease working with and around insulating materials but that plaintiff nevertheless, in the face of such instructions, directions and warnings, continued over a period of several years thereafter to work with and around insulating materials, and voluntarily exposed himself to any conditions, dangers or hazards incident to such work, and this defendant pleads such facts in bar of plaintiff's right, if any he has, to recover.

28.

Further answering herein, in the alternative, these defendants say that any cause of action, if any, which the plaintiff has or may ever have had against these defendants, which is not admitted but denied, accrued more than two years prior to the commencement of this suit against these defendants, and is barred by the Texas Two-Year Statute of Limitations, Article 5526, Vernon's Texas Civil Statutes, and defendants plead same in bar to this suit.

29.

Further answering herein, in the alternative, these defendants say that any cause of action, if any, which the plaintiff has or may ever have had against these defendants, which is not admitted but denied, accrued more than four years prior to the commencement of this suit against these defendants, and is barred by the Texas Four-Year Statute of Limitations, Article 5529, Vernon's Texas Civil Statutes, and defendants plead same in bar to this suit.

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For further grounds of relief, these defendants say that if any judgment is entered herein jointly and severally against them or either of them and the other defendants, then in such event these defendants are entitled to contribution against such other defendants in accordance with the provisions of Article 2212 of Vernon's Civil Statutes of Texas.

WHEREFORE, these defendants pray judgment of the Court that plaintiff take nothing against them or either of them, by his suit, and that these defendants go hence,without day, with their costs; and in the alternative that they have judgment for contribution as set forth above.

ATTORNEYS FOR DEFENDANTS, COMBUSTION ENGINEERING, INC., AND R & I REFRACTORY AND INSULATION CORPORATION;
1014 San Jacinto Bldg.,P.O.Box 1632,
Beaumont,Texas.

CERTIFICATE OF SERVICE.

A true and correct copy of the above and foregoing Amended Answer was on this 27th day of November, 1968, served upon counsel for the plaintiff by depositing the same in the United States Mail, postage prepaid, addressed to Honorable Ward Stephenson, Attorney at Law, Stephenson Building, Orange,Texas, and also a true copy was served on all other interested counsel of record.

ATTORNEY FOR DEFENDANTS, COMBUSTION ENGINEERING, INC., AND R & I REFRACTORY AND INSULATION CORPORATION.

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