

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

TROY SHANE SMITH and ALLYSON JANE SMITH,

Plaintiffs,

vs.

84 LUMBER COMPANY, *et al.*,

Defendants.

VERIFIED ANSWER

Index No.: 814633/2023

**VERIFIED ANSWER OF BW/IP, INC. and
Its Wholly-Owned Subsidiaries TO THE VERIFIED COMPLAINT**

Defendant, BW/IP and its wholly-owned subsidiaries, formerly known as Borg Warner Industrial Products Inc. a Former subsidiary of and successor to Borg Warner Corp. and Byron Jackson Pumps, hereinafter “BW/IP”, by its attorneys, Barclay Damon LLP, as and for its verified answer to the Plaintiffs’ Complaint, respectfully alleges upon information and belief, as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraphs 1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 114, 115, 116, 117, 118, 119, 120, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 166, and 183 of the verified complaint.

2. Denies each and every allegation, and all subparts thereto, contained in paragraphs 2, 5, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112,

122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 163, 164, 165, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 181, and 184 of the verified complaint as it relates to defendant, BW/IP, INC., and denies knowledge or information sufficient to form a belief as to the truth of the allegations as to the co-defendants.

3. Admit so much of Paragraph 16 that, BW/IP was a duly organized foreign corporation doing business in the State of New York and denies the rest and remainder of said paragraph.

4. As and for its response to paragraphs 70, 79, 84, 94, 113, 121, 137, 151, 167, 180, and 182, defendant BW/IP repeats, reiterates and realleges the responses previously interposed to the allegations contained in paragraphs 1 through 184 as if fully set forth herein.

5. Denies each and every other remaining allegation of the verified complaint not hereinbefore specifically admitted or otherwise denied.

First Affirmative Defense

6. The verified complaint fails to state a cause of action against BW/IP, INC.

Second Affirmative Defense

7. This Court lacks jurisdiction over the subject matter of this action.

Third Affirmative Defense

8. The claims of plaintiffs are barred by the doctrine of laches.

Fourth Affirmative Defense

9. The damages allegedly sustained by the plaintiffs were caused, in whole or in part, by the negligence or other culpable conduct to the plaintiff and/or co-defendants, which conduct constituted a supervising cause of plaintiffs' alleged injuries.

Fifth Affirmative Defense

10. Insofar as the verified complaint and each cause of action considered separately allege a cause of action occurring before September 1, 1975, each such cause of action is barred by reasons of the culpable conduct attributable to plaintiffs, including contributory negligence and assumption of the risk.

Sixth Affirmative Defense

11. Any damages allegedly sustained by the plaintiffs were the proximate result of an unforeseen and/or unforeseeable negligent, grossly negligent, wanton, reckless, omission or conduct of intervening third parties superseding parties.

Seventh Affirmative Defense

12. The damages allegedly sustained by the plaintiffs were caused, in whole or in part, by the negligence or other culpable conduct of one or more persons or instrumentalities over which BW/IP, INC. had no control and with whom it had no legal relationship.

Eighth Affirmative Defense

13. The damages allegedly sustained by the plaintiffs were caused, in whole or in part, through the operations of nature.

Ninth Affirmative Defense

14. If the plaintiffs' sustained damages as alleged, such damages occurred while plaintiff engaged in activities into which he entered, knowing the hazard, risk and damages of the activities and he assumed the risks incidental to and attendant to the activities.

Tenth Affirmative Defense

15. The lawsuit was not commenced by the plaintiffs within the time prescribed by law and the plaintiffs' claim, therefore, is barred from recovery pursuant to applicable statutes of limitations.

Eleventh Affirmative Defense

16. All claims brought under New York Law, L. 1986 c. 682 Section 4 (enacted July 31, 1986) are time-barred in that said statute is in violation of the Constitution of the United States and the Constitution of the State of New York.

Twelfth Affirmative Defense

17. This action cannot be maintained, as there is another action pending for the same relief.

Thirteenth Affirmative Defense

18. To the extent that any injury relating to the named plaintiff occurred in the context of an employer-employee relationship, claims for said injuries are barred by the Workers' Compensation Act.

Fourteenth Affirmative Defense

19. No acts or omissions of this defendant proximately caused any damages.

Fifteenth Affirmative Defense

20. Any asbestos-containing product of this answering defendant that may be present at plaintiff's job locations were placed in any such buildings upon specification, approval or at the instruction of governmental or legislative agencies or bodies.

Sixteenth Affirmative Defense

21. The damages allegedly sustained by the plaintiffs' which allegedly arose from plaintiffs' alleged exposure to asbestos-containing products while he was working on or about the equipment allegedly manufactured by this defendant (the "Equipment"), were caused, in whole or in part, by the improper use and operation of the Equipment, rather than any defect in the design, manufacture, production, assemblage, installation, testing, labeling, marketing, distribution, sale or inspection of the Equipment by BW/IP, INC.

Seventeenth Affirmative Defense

22. The damages allegedly sustained by the plaintiffs' which allegedly arose from the Equipment are caused by the alteration, misuse and/or improper maintenance of the Equipment by one or more persons or instrumentalities other than BW/IP, INC., rather than any defect in the design, manufacture, production, assemblage, installation, testing, labeling, marketing, distribution, sale or inspection of the Equipment by BW/IP, INC.

Eighteenth Affirmative Defense

23. This defendant is not liable for the damages allegedly sustained by plaintiffs' because plaintiff was not in privity of contract with BW/IP, INC. at any time and the Equipment was not inherently dangerous.

Nineteenth Affirmative Defense

24. The Equipment was not defective or dangerous at any time when defendant, BW/IP, INC. had possession or control of it.

Twentieth Affirmative Defense

25. All implied warranties, including the warranties of merchantability and fitness for a particular purpose, were excluded at the time of the sale of the Equipment.

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