

NEW YORK STATE SUPREME COURT
COUNTY OF ERIE

TROY SHANE SMITH and ALLYSON JANE SMITH,

Plaintiff,

vs.

GREENE TWEED'S
ANSWER TO THIRD
AMENDED COMPLAINT

84 LUMBER COMPANY, *et al*, including GREENE
TWEED & CO., INC.,

Index No.: 814633/2023

Defendants.

Defendant, GREENE TWEED & CO., INC., Individually (hereinafter "Greene Tweed") appearing by its attorneys, Jordan DiPalma PLLC, for its Answer to the Third Amended Complaint, answers and alleges upon information and belief as follows:

As to the new allegations contained in the Third Amended Complaint, Greene Tweed answers and alleges as follows:

1. In response to the allegations in plaintiff's Third Amended Complaint that Greene Tweed, repeats, reiterates, realleges and incorporates herein by reference, all allegations, denials, defenses and cross-claims raised in its Verified Answer to plaintiff's original Complaint dated January 24, 2024, as if fully incorporated herein.
2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 4 and 6 through 8 of the Third Amended Complaint.
3. Denies the allegations as to Greene Tweed and denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Third Amended Complaint.
4. Denies each and every other allegation of the Third Amended Complaint not hereinbefore specifically admitted, denied or otherwise controverted.

AS AND FOR ITS FIRST SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

5. All claims are time-barred by the applicable statute of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

6. The causes of action pleaded in the Third Amended Complaint have not been maintained in a timely fashion and have been neglected and should be barred by the doctrine of laches.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

7. All claims brought under the New York statute of limitations enacted July 31, 1986 are time-barred in that the statute is unconstitutional.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

8. In the event it should appear that the plaintiff was employed by the answering defendant, then plaintiffs' sole and exclusive remedy is under the Worker's Compensation Law of the State of New York.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

9. Insofar as the Third Amended Complaint, and each cause of action considered separately, may allege a cause of action accruing before September 1, 1975, each such cause of action is barred by reason of the culpable conduct attributable to plaintiff, including contributory negligence and assumption of the risk.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

10. Insofar as the Third Amended Complaint, and each cause of action considered separately, alleges a cause of action to recover damages for personal injuries which accrued on or after September 1, 1975, the amount of damages recoverable thereon must be diminished by reason of the culpable conduct attributable to each plaintiff, including contributory negligence and assumption of the risk, in the proportion which the culpable conduct attributable to either plaintiff bears on the total conduct which caused the alleged damages.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

11. While this answering defendant denies plaintiffs' allegations with regard to liability, to the extent that plaintiffs may be able to prove same, such liability was the result of intervening or interceding acts of superseding negligence on the part of third-parties, over which the answering defendant had neither control, nor right of control.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

12. At all times the answering defendant used proper methods in manufacturing its products in conformity with the available knowledge and research of the defendant and the scientific and industrial community.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

13. If it should be proven at the time of trial that any of the products of the answering defendant were furnished to the employer of plaintiff, or to the United States government, and that the plaintiff thereafter came into contact with those products, which is specifically denied, then any such product was furnished in strict conformity to the conditions specified, or to the specifications furnished, by the United States government and/or the employer/employers of plaintiff.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

14. Should it be proven at the time of trial that the answering defendant is subject to market share liability, then this answering defendant's share of such liability would be of such a *de minimus* amount as to make its contribution for damages negligible and speculative and this answering defendant would be entitled to contribution, whether in whole or in part, from the co-defendants.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

15. Upon information and belief, the plaintiffs failed to mitigate or otherwise act to lessen or reduce the injuries and disability alleged in the Third Amended Complaint.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

16. Plaintiffs' causes of action seeking punitive damages are barred because such damages are not recoverable and not warranted in this action against this answering defendant.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

17. The plaintiffs contributed to the claimed illness and injury, either in whole or in part, by the use of other substances, products, medications, and drugs.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

18. Upon information and belief, the plaintiffs have commenced other actions for the same injuries and damages alleged in this action, and should plaintiffs recover damages in those other actions, the defendant will be entitled to a reduction of damages herein or a proportional offset pursuant to General Obligations Law §15-108 as may be appropriate.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

19. The defendant claims limitation of liability pursuant to CPLR Article 16.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

20. Upon information and belief, the plaintiff, his co-workers, employees, and others, misused, abused, mistreated and misapplied the product designated as "asbestos material" as alleged in the Third Amended Complaint herein.

21. If the Court finds that any misuse, abuse, mistreatment and/or misapplication of the product caused and/or contributed to the alleged damages or injuries of the plaintiff, then the answering defendant requests that the amount of damages which might be recoverable shall be diminished by the proportion which the same misuse, abuse, mistreatment and/or misapplication attributed to the plaintiff, his co-workers, employees, and others bears to the conduct which caused the alleged damages and/or injuries.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

22. As to the causes of action pleaded in plaintiffs' Third Amended Complaint which are based upon express or implied representations and/or warranties, such causes of action are legally insufficient, as against the answering defendant, by reason of their failure to allege privity of contract between the plaintiff and the answering defendant.

AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT ALLEGES:

23. The plaintiff did not directly or indirectly purchase any asbestos containing products or materials from the answering defendant and plaintiffs neither received, nor relied upon any representations allegedly made by the answering defendant.

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