

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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NICOLINA SIRECI, as Executrix of the :  
Estate of JOSEPH E. SIRECI, Deceased, :  
Plaintiff, :

-against- :

CHEMCO, INC., ROMAN HASS, INC., :  
MONSANTO, INC., UNION CARBIDE, INC. :  
and AMERICAN CYANAMID, INC., AMERICAN :  
CYANAMID MONSANTO, INC., :

Index No. 13411/83

Defendants. :

-----X  
ROHM & HAAS COMPANY s/h/a ROMAN HAAS, :  
INC., :

Defendant and Third-Party :  
Plaintiff, :

AFFIDAVIT IN SUPPORT  
OF DEFENDANT UNION  
CARBIDE CORPORATION'S  
MOTION FOR SUMMARY  
JUDGMENT

-against- :

ELM COATED FABRICS, INC., a Division :  
of KALEX CHEMICAL, INC., :  
Third-Party Defendant. :

-----X  
MONSANTO COMPANY, INC., :  
Third-Party Plaintiff, :

-against- :

ELM COATED FABRICS, INC., and ELM :  
COATED FABRICS, INC. d/b/a ELM COATED :  
FABRICS DIV. OF KALEX CHEMICAL :  
PRODUCTS, INC., :  
Third-Party Defendants. :

-----X  
UNION CARBIDE CORPORATION, :  
Defendant and Third-Party :  
Plaintiff, :

-against- :

ELM COATED FABRICS, INC., ELM COATED :  
FABRICS, INC. d/b/a ELM COATED :  
FABRICS DIV. OF KALEX CHEMICAL :  
PRODUCTS, INC., ELM COATED FABRICS :  
DIV. OF KALEX CHEMICAL PRODUCTS, :  
INC., and KALEX CHEMICAL PRODUCTS :  
INC., :

Third-Party Defendants. :

UCC 087595

STATE OF NEW YORK     )  
                                  ss:  
COUNTY OF NEW YORK    )

James V. O'Gara, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice before the Courts of this state and am associated with the firm of Kelley Drye & Warren, attorneys for defendant Union Carbide Corporation ("Union Carbide") herein. I am fully familiar with the pleadings and proceedings heretofore had herein.

2. I make and submit this affidavit in support of Union Carbide's motion for summary judgment dismissing the complaint on the ground that plaintiff's causes of action are time-barred by the applicable statutes of limitations.

3. This action was commenced by plaintiff, as executrix of the estate of Joseph E. Sireci, deceased, to recover compensatory and punitive damages for personal injury sustained by the decedent based upon allegations of negligence and strict products liability. Plaintiff also seeks damages for the decedent's wrongful death. According to the complaint Mr. Sireci died of cancer on May 31, 1981. Plaintiff alleges that Mr. Sireci's personal injury and wrongful death were caused by his exposure during the course of his employment to polyvinyl chloride resins manufactured by the defendants. Prior to his death Mr. Sireci was employed by Elm Coated Fabrics, Inc., d/b/a Elm Coated Fabrics Division of Kalex Chemical Products, Inc. (hereinafter referred to as "Kalex" or "Elm Coated"). At one time Kalex was a division of W.R. Grace & Co. Inc.

UCC 087596

4. Plaintiff commenced this action against Union Carbide by filing a summons and verified complaint with the Clerk of the Court, New York County (the "Clerk of the Court") on May 31, 1983, two years to the day after Mr. Sireci's death on May 31, 1981. (A copy of this summons and verified complaint is annexed hereto as Exhibit "A".) A summons dated July 15, 1983 and a verified complaint were subsequently received by Union Carbide on July 18, 1983. (A copy of this summons and complaint is annexed hereto as Exhibit "B".)

6. Union Carbide's verified answer dated August 8, 1983, asserts, inter alia, the affirmative defense that plaintiff's causes of action are barred by the applicable statutes of limitations. (A copy of the verified answer is annexed hereto as Exhibit "C".)

7. Plaintiff's causes of actions seeking to recover damages for personal injury based upon allegations of negligence or strict products liability are governed by the three year statute of limitations set forth in CPLR §214. Where personal injury allegedly results from exposure to a deleterious or toxic substance, the three-year limitations period begins to run at the time of exposure to the substance. (See Union Carbide's Memorandum of Law submitted in support of the instant motion, hereinafter referred to as "Memorandum in Support"). Therefore, plaintiff's causes of action seeking damages for decedent's personal injury would be timely only if Mr. Sireci was exposed to polyvinyl chloride resin manufactured

by Union Carbide within the three year period immediately preceeding the filing of the summons and complaint with the Clerk of the Court on May 31, 1983. In short, plaintiff's causes of action for decedent's personal injury are timely only if Mr. Sireci was exposed after May 31, 1980.

8. As set forth in the accompanying affidavit of R.N. Wheeler, Jr. (the "Wheeler Affidavit") submitted herewith, Union Carbide has not sold polyvinyl chloride resins or products containing polyvinyl chloride resins to Kalex or Elm Coated at any time since August, 1977. Mr. Sireci's last exposure, if any, to Union Carbide's polyvinyl chloride resins occurred almost six years prior to the commencement of this action. Thus, plaintiff's claims for damages for personal injury based upon negligence and strict products liability are clearly time barred and must be dismissed as a matter of law.

9. Similarly plaintiff's causes of action to recover for the alleged wrongful death of her decedent are equally time-barred.

10. EPTL §5-4.1 states that the representative of a decedent's estate may commence an action for wrongful death up to two years after the decedent's death, provided the decedent could have timely commenced a cause of action on his own behalf at the time of his death. (See Union Carbide's Memorandum in Support.)

11. Although plaintiff here commenced a wrongful death action exactly two years after the decedent's death, the decedent himself could not have commenced a timely cause of action against Union Carbide at the date of his death.

12. Mr. Sireci died on May 31, 1981 without having commenced an action for damages against Union Carbide. However, pursuant to CPLR §214 a three year limitations period would have applied to any cause of action asserted by Mr. Sireci against Union Carbide. As discussed at Point I of the accompanying Memorandum in Support, where injury is alleged to have occurred as a result of exposure to an allegedly deleterious or toxic substance, the cause of action accrues and the limitations period begins to run at the time of exposure.

13. As noted earlier, Mr. Sireci's last exposure, if any, to polyvinyl chloride resins or products containing polyvinyl chloride resins manufactured by Union Carbide occurred in 1977, nearly four years before his death. Therefore, at the date of his death, Mr. Sireci's causes of action for personal injury were already time-barred pursuant to CPLR §214. Because Mr. Sireci himself could not have commenced a timely cause of action against Union Carbide at the time of his death, EPTL §5-4.1 precludes plaintiff from maintaining a wrongful death action against Union Carbide.

14. Therefore, plaintiff's causes of action for wrongful death must be dismissed as untimely as a matter of law.

WHEREFORE, defendant Union Carbide respectfully requests that its motion for summary judgment dismissing plaintiff's complaint on the ground that the causes of action alleged therein are time-barred as a matter of law be granted in all respects.

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James V. O'Gara

Sworn to before me this  
th day of May, 1985.

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Notary Public