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The Bill of Particulars in Virginia

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THE BILL OF PARTICULARS IN VIRGINIA*

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BILL OF PARTICULARS IN MODERN PROCEDURE

If a plaintiff under the older systems of pleading before notice pleading stated a cause of action but stated it too indefinitely or generally, the defendant could require amplification of the allegations by a motion to make definite and certain, or by a motion to require the plaintiff to file a bill of particulars. The plaintiff could secure a clarification of the defendant's answer in the same way.

The adoption of notice pleading with provisions for pretrial procedure, discovery, and summary judgment has largely dispensed with the need for an attack upon a pleading which states a claim, but is too general and for that reason not fully informative.[1] As the bar and the judges become familiar with and use these new procedures, it is very likely that the bill of particulars will fall into disuse, or that the information insisted upon at the pleading stage by judges, in view of the other available procedures, will not be burdensome.

Because of its limited function in modern procedure, the Federal Rules of Civil Procedure do not provide for a bill of particulars. They do provide for a motion for more definite statement where a pleading " . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. . . . "[2] There is no motion to make definite and certain in use in Virginia. A pleading deficient in detail in this state is made more explicit by a bill of particulars.

Judge Clark is of the view that the motion for a more definite statement should be eliminated as well as the bill of particulars, leaving the party only

*EDITOR'S NOTE: The work from which this discussion was taken will appear soon in a manual on Virginia procedure.

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1. See CLARK, CODE PLEADING § 54 (2d ed. 1947).

2. FED. R. CIV. P. 12(e).

the fundamental objection that no claim or defense is stated.[3] The dropping of these antiquated procedures should cause little concern to practitioners because a most effective weapon has been substituted to provide for the speedy elimination of light and frivolous claims and defenses through the use of pretrial procedure and summary judgment.

Pretrial procedure[4] does not relate solely, as in the case of bills of particulars, to a clarification of allegations in a pleading. It involves as well a full stipulation of the facts the party reasonably expects to prove, supported where necessary by affidavits. The defendant can in turn by stipulation challenge such matters as he wishes to contest. If a plaintiff's claim or a defendant's defense is so insubstantial that he should be stopped at the threshhold, either because he has no case in law or can indicate no satisfactory development of the evidence which would justify his claim or defense, the court can speedily, effectively, and justly bring the case to a close by use of pretrial procedure combined with Rule 3:20[5] providing for summary judgment.

The abolition of general issue by Rule 3:5[6] by which the defendant would plead generally that he denied each and every allegation of the plaintiff, goes far towards making it unnecessary for a plaintiff by a bill of particulars to require the defendant to be more specific. One of the main purposes of the legislative provision on bills of particulars[7] was to give the plaintiff a method by which he could confine the operation of general issue and confine the introduction of evidence to the particular defenses disclosed in the statement.[8]

Necessity for Bill of Particulars

A Virginia Rule provides in part as follows:

> Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense. . . . On motion made promptly, a bill of particulars may be ordered to amplify any pleading that does not, in the opinion of the court, comply with this Rule.[9]

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3. Clark, *op. cit. supra* note 1.

4. See Va. Rules of Court 4:1. For a thorough discussion of pretrial procedure in Virginia, see Murray, *Pre-Trial Practice in Virginia*, 1 Wm. & Mary L. Rev. 157 (1953).

5. Va. Rules of Court 3:20.

6. Va. Rules of Court 3:5.

7. Va. Code Ann. § 8-111 (1950).

8. *See* Duncan v. Carson, 127 Va. 306, 318, 103 S.E. 665, 669 (1920); City Gas Co. v. Poudre, 113 Va. 224, 226, 74 S.E. 158, 159 (1912).

9. Va. Rules of Court 3:18(d).

The rule further provides specifically with respect to pleading negligence or contributory negligence that an allegation of negligence or contributory negligence is "sufficient" without specifying the particulars of negligence.

It is clear from this rule that what is meant is that a pleading shall be *sufficient against demurrer* if it clearly informs the party of the true nature of the claim or defense. Since one of the tests for purposes of demurrer is whether the party is informed of the true nature of the claim or defense, it is clear that this cannot also be the test of whether a bill of particulars should be ordered. A recent Virginia case[10] has recognized this, but nowhere except in the committee comments on the Rules[11] has the test to be applied in determining whether a bill of particulars shall be ordered been clearly stated. In commenting upon the necessity of a bill of particulars in a negligence action, the committee has stated that the test is whether the moving party knows the grounds of the claim *in sufficient detail* to prepare his defense.

It was not intended under this test that the court should freely order a bill of particulars. According to the committee the bill would ouly be required where the court is satisfied that the moving party does not *know* the grounds of the claim in sufficient detail to prepare his defense. The theory is that since the defendant or his agent would ordinarily have been present at the accident, he would have the requisite knowledge in a negligence case.

It is a well known principle of pleading that actions for fraud and deceit are disfavored actions, and the pleadings for this reason in code pleading jurisdictions must be clear and concise on every element constituting the cause of action. Nevertheless, the Virginia court has correctly recognized that in pleading by motion, as long as the party has general notice of the claim, meticulous adherence to the elements of a cause of action will not be insisted upon. In *Alexander* v. *Kuykendall*,[12] the pertinent allegations as reported in the case were:

> On the 8th day of March, 1944, defendant *fraudulently* went through a marriage ceremony with plaintiff and represented to . . . plaintiff that said marriage was valid when said defendant well knew that said marriage was *fraudulent*, . . . and that by virtue of said representations to . . . plaintiff that said marriage was valid . . . plaintiff married the defendant, and that said marriage was *subsequently held to be* invalid, . . . and as a result of said fraudulent marriage, . . . plaintiff was caused to be embarrassed, humiliated. . . .

10. Alexander v. Kuykendall, 192 Va. 8, 63 S.E.2d 746 (1951).

11. JUDICIAL COUNCIL FOR VIRGINIA, PROPOSED MODIFICATIONS OF PRACTICE AND PROCEDURE 28 (1949).

12. 192 Va. 8, 13, 63 S.E.2d 746, 749 (1951).

The motion further alleged that a child was born to the parties and that as a result of the marriage the plaintiff lost a substantial position.

The court noted that a fundamental principle of fraudulent representation is that the false statement must be believed and relied on by the party to whom it is addressed. It was nowhere expressly alleged that the plaintiff believed or relied on the representations. The court nevertheless said:

> The sentence is not clear, positive and certain as allegations in all pleadings should be. However, the unmistakable impression conveyed is that defendant made false representations to plaintiff; that plaintiff believed the false representations and acted thereon to her detriment.
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> . . .
>
> Plaintiff's motion is defective. . . . Defective as it is, it informs defendant of the true nature, though not the particulars, of plaintiff's claim.
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> . . .
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> The substance of this and other decisions of this court is that even though a declaration or motion for judgment may be imperfect, if it is so drafted that the defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer, and, if defendant desires more definite information, or a more specific statement of the grounds of the complaint, he should request the court to require plaintiff to file a bill of particulars.[13]

A very broad test will therefore be used in determining whether a claim or defense is sufficiently stated against demurrer. To determine, however, whether a bill of particulars will be required, the court will decide whether the party is informed in sufficient detail of the true nature of the claim or defense to prepare his case. This detail may involve more definite information or a more specific statement of the grounds of the claim, but does not include matters of evidence.[14]

Defects in Bill of Particulars: *Demurrer*

In a recent case[15] decided after the adoption of the new Virginia Rules of Procedure, the notice and affidavit served on the defendant stated that the plaintiff's claim was based upon work done and materials furnished for which defendant had agreed to pay. The plaintiff, however, failed to attach an itemized account as required by the Virginia Code.[16] It was argued that the statement for this reason did not inform the defendant of the true nature of the claim, and therefore a demurrer to it should be sustained.

13. Alexander v. Kuykendall, 192 Va. 8, 14, 63 S.E.2d 746, 749 (1951).
14. Kelley v. Schneller, 148 Va. 573, 139 S.E. 275 (1927).
15. Miller v. Grier S. Johnson, Inc., 191 Va. 768, 62 S.E.2d 870 (1951).
16. Va. Code Ann. §§ 8-510, 8-720 (1950).

The court held that the failure to attach the account was merely a deficiency in detail, the remedy for which was by a bill of particulars and not by demurrer. The court said:

> This is a substantial compliance with the fundamental rule of pleading—that is, the facts must be so stated as to fairly apprise the court and the defendant of the nature of the cause of action upon which plaintiff relies. *If the facts are sufficient in substance, but deficient in detail, the defendant's remedy is not by demurrer, but by motion for a bill of particulars.*[17]

Prior to the Rules, in an action on a note where the defense was forgery, the court said broadly that "A bill of particulars . . . being no part of the pleadings, defects therein cannot be reached by demurrer, or as is true here, objections equivalent to a demurrer."[18] This case was followed by *Kalor* v. *Quality Bread & Cake Co.*,[19] involving a specific statute with respect to negligence which still provides: " . . . nor shall a demurrer be sustained to a declaration alleging negligence of the defendant because the particulars of the negligence are not stated, but such particulars may be demanded by the defendant under § 8-111."[20] It was said that under this statute, if the bill of particulars was insufficient the defendant should move the court to strike the bill of particulars and exclude plaintiff's evidence.[21] Thus, in effect, the case would be dismissed for failure of the party to obey an order of the court.

Motion to Strike

It is now quite clear that a case may be dismissed by the court where a party fails to file a proper and complete bill of particulars. The Rule states:

> If the amended bill of particulars fails to inform the opposite party fairly of the true nature of the claim or defense, the *pleading* not so amplified and the bill of particulars may be stricken.[22]

If the pleading is a notice of motion, the plaintiff has lost his basis for further proceedings in the case. If it is a defense, the defendant may be in default under Rule 3:7.[23] Instead of dismissing the case, the court may

17. Miller v. Grier S. Johnson, Inc., 191 Va. 768, 776, 62 S.E.2d 870, 874 (1951). (Emphasis added).
18. Ely v. Gray, 25 Va. 708, 714, 100 S.E. 660, 661 (1919).
19. 155 Va. 156, 154 S.E. 572 (1930).
20. VA. CODE ANN. § 8-109 (1950).
21. *See* Kalor v. Quality Bread & Cake Co., 155 Va. 156, 164, 154 S.E. 572, 575 (1930).
22. VA. RULES OF COURT 3:18(d). (Emphasis added).
23. VA. RULES OF COURT 3:7.

prefer to apply the statute[24] and exclude evidence of any matter not described in the notice.[25]

Similarity of Motion to Strike and Demurrer

While it may be argued that in Virginia a demurrer is not sustained where the particulars are not stated, the procedure of striking the pleading accomplishes the same result. Allegations related to the statement of a claim will almost without exception be the core of the debate on the motion to strike.

While other reasons for providing changes in the bill of particulars have been advanced which were operative,[26] the committee also must have intended the bill of particulars to become, as it should and often will of necessity be, integrated with the question of whether the party has or can reasonably be expected to be able to state a claim or defense. In order to accomplish this it is provided:

> All bills of particulars and motions in writing are pleadings.[27]

While it can be correctly stated that the sufficiency of the bill of particulars was not intended to be tested by demurrer, it should not be overlooked that by reason of the provisions of Rule 3:18(a) the basic sufficiency of all the allegations in the motion and in the bill of particulars, taken together, can be tested by the motion to strike. The question then is whether the motion or defense as particularized states a claim or defense and secondly whether it is stated in sufficient detail to inform the opposite party of the true nature and extent of the claim or defense.

This procedure should be satisfactory for the purposes, provided it is recognized that under the notice system of pleading the concept of informing the party in sufficient detail of the true nature of the claim or defense tends to be substantially the same thing as stating a claim. Except in cases of real hardship, or where a statute has a specific requirement, reliance should be placed on the readily available procedures of discovery, pretrial procedure, and summary judgment, where mature consideration can be given to all sincere objections. The court should not listen to tenuous argument that the party does not have sufficient information to prepare his case. Discovery procedures[28] are available to him and he should be required to use these in most instances.

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24. VA. CODE ANN. § 8-111 (1950).
25. See BURKS, PLEADING & PRACTICE § 253 (4th ed., Boyd, 1952).
26. See BURKS, *op. cit. supra* note 25, § 188.
27. VA. RULES OF COURT 3:18(a).
28. VA. CODE ANN. §§ 8-304 to 8-327 (1950).