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Pleading and Practice - Variance Pleadings Differing from Evidence

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PLEADING AND PRACTICE

Variance Pleadings Differing from Evidence

In a recent Virginia case,[1] an employer sought a declaratory judgment that he was entitled to payment of one-half the amount due on notes made payable to him and a former employee jointly as a result of their employment agreement. The notes represented commissions earned by the employee. The employee counterclaimed that he was induced to enter the contract of employment by fraud on the part of the employer. A pre-trial stipulation was made that the judge, acting as a Chancellor, should enter judgment in his discretion. At the trial the employer made a motion to strike the defendant's evidence because of a variance, since the defendant alleged fraud and proved a breach of contract of employment, but the trial court overruled the motion. The Supreme Court of Appeals held that there was no error, since the plaintiff had waived his objection to the variance by not objecting to the evidence. Furthermore, by the stipulation of the parties, the judge was to enter whatever judgment seemed right and proper, if the verdict of the jury was for the employee, because of his equitable counterclaim.

The Virginia variance statute[2] was applied. The Court held that if the plaintiff had objected to the evidence and made a motion to exclude it, the defendant could have amended the pleading to conform with the evidence, with the permission of the trial court unless the plaintiff was prejudiced thereby. Since the defendant had not been given the opportunity, the plaintiff could not bring the variance to the attention of the Supreme Court of Appeals. The variance was deemed to have been waived.[3]

The basic rule of procedure is that the evidence and the judgment must substantially conform to the pleadings, since the

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[1] Culmore Realty Co. v. Caputi, 203 Va. 403, 124 S.E.2d 7 (1962).

[2] VA. CODE ANN. § 8-217 (1950); (Repl. Vol. 1958).

[3] Burruss v. Suddith, 187 Va. 473, 47 S.E.2d 546 (1948); Kennedy v. Mullins,155 Va. 166, 154 S.E. 568 (1930); Morriss v. Peyton, 148 Va. 812, 139 S.E. 500 (1927); Southern Ry. Co. v. May, 147 Va. 542, 137 S.E. 493 (1927); Du Pont Engineering Co. v. Blair, 129 Va. 423, 106 S.E. 328 (1921); Newport News I. O. P. Ry. & Electric Co. v. McCormick, 106 Va. 517, 56 S.E. 281 (1907); BURKS, PLEADING AND PRACTICE, § 334 (4th ed., Boyd, 1952).

parties, the jury, and the judge must be informed of the issues that are to be decided.[4] The amendment statutes allow a party to amend his pleadings so that they conform to the evidence brought out at the trial, and thus he can correct any defects in his pleading. A vestige of the older, stricter rule still remains, since one may not amend to a new cause of action or, as it is said, a new case.[5] Applying this rule to the variance statutes, it seems that one may not waive, by his failure to object to evidence, the right to challenge the pleadings when they are inconsistent with the evidence, if the evidence proves a different cause of action. The party presenting the varying evidence could not have amended the pleading to conform to it if an objection had been made.

The question arises whether the variance in the instant case does come within the terms of the variance statutes. There appears to be a vast difference between a counterclaim alleging fraudulent inducement and a claim alleging breach of contract. The Supreme Court of Appeals has repeatedly stated the right to amend will be liberally granted.[6] An amendment for a variance such as in the instant case, could perhaps be justified under the line of cases following *New River Mineral Co.* v. *Painter*,[7] where it is said:

> If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as a new cause of action.[8]

One of the tests that has been applied is that if a judgment on the original declaration could have been pleaded in bar of

[4] Lee v. Lambert, 200 Va. 799, 108 S.E. 356 (1959). Greenbriar Farms Inc. v. Clarke, 193 Va. 891, 71 S.E.2d 167 (1952); Eckles v. Norfolk & Western Ry. Co., 96 Va. 69, 25 S.E. 545 (1896); 14 M. J. *Pleading* § 62 (1951).

[5] Federal Land Bank v. Buchfield, 173 Va. 200, 3 S.E.2d 405 (1939); Aaron & Co. v. Chesapeake & Ohio Ry. Co., 153 Va. 691, 151 S.E. 126 (1930); BURKS, *op. cit. supra* note 3.

[6] Provident Life Ins. Co. v. Walker, 190 Va. 1016, 59 S.E.2d 126 (1950); Dillow v. Stafford, 181 Va. 483, 25 S.E.2d 330 (1943); Russell Lumber Co. v. Thompson, 137 Va. 386, 119 S.E. 117 (1923); Conrad v. Ellison Harvey Co., 120 Va. 458, 91 S.E. 763 (1917).

[7] 100 Va. 507, 42 S.E. 300 (1902).

[8] *Id.* at 301. See also Dillow v. Stafford, 181 Va. 483, 25 S.E.2d 330 (1943); Lorillard Co. v. Clay, 127 Va. 734, 104 S.E. 384 (1920); Wise Terminal Co. v. McCormick, 107 Va. 376, 58 S.E. 584 (1907).

the cause of action set up by the amendment, then a new cause has been pleaded.[9] By applying this standard, amendments have been permitted to allow a new plaintiff to be substituted in an action on a note,[10] and to allow an additional ground of negligence.[11] The court has also allowed amendment to a specific defense setting up fraud after an original answer which, although including an allegation of the fraudulent representations, was based on breach of express warranty. The court stated that there was no substantial inconsistency in the answers, that there was nothing to indicate a purpose to cause delay on the defendant's part, and that complainant suffered no prejudice. This decision appears to be one of the most liberal permitting amendment.[12]

Within the fields of tort and contracts, amendments have been granted on an ever-widening basis. The theory of defendant's pleading in the counterclaim was based on a fraudulent inducement to enter into a contract. Depending upon whether the contract was void or not, the pleadings are substantially different from that of breach of contract which was proven. Since the evidence shows the existence of the contract and subsequent breach thereof, however, it is susceptible to amendment and waiver within the Virginia decisions. This view conforms with the modern trend of the law in the United States and is based on the idea that in the interest of justice, the parties should not be bound by paper pleadings, but, the real issues between the parties should be resolved.[13]

The Supreme Court of Appeals did not fully discuss the question of variance, since it leaned upon the stipulation of the parties that if the jury verdict was in favor of the defendant, the trial judge acting as Chancellor might enter whatever judgment he deemed proper. However, it appears reasonable to believe, that the Court would have reached the same conclusion without the stipulation. While this is a most liberal decision permitting a variance, it does not reach the point of allowing a new cause of action.

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[9] Lorillard Co. v. Clay, *supra* note 8.

[10] Dillow v. Stafford, 181 Va. 438, 25 S.E.2d 330 (1943).

[11] Lorillard Co. v. Clay, 127 Va. 734, 104 S.E. 384 (1920).

[12] Transit Corp. v. Auto Co., 151 Va. 865, 145 S.E. 331 (1928).

[13] S.E.C. v. Rapp, 304 F.2d 786 (1962); FED. R. CIV. P.15(b); 71 C.J.S. *Pleading* § 71 (1951).