South Carolina Law Review

Volume 13 | Issue 1 Article 11

Fall 1960

Pleading

Isadore S. Bernstein

PLEADING

ISADORE S. BERNSTEIN*

Amendments

Gary v. Jordan[1] was an action in fraud and deceit based upon alleged misrepresentations by the defendant to the plaintiff in the sale of twenty cows from his herd that the cows were "clean" and free from disease. The question of pleading raised upon appeal was the propriety of the ruling of the trial judge permitting the plaintiff to amend his complaint at the close of his case to conform to the proof. It appeared from the evidence that these twenty cows were selected from a group of thirty-one cows which were tested for Bang's disease, and that the results of the test showed that a number of these were "suspects," although this information was not disclosed to the plaintiff when the twenty cows were delivered. At the close of his case plaintiff was permitted by the trial judge to amend the language of paragraph 11 of this complaint reading "that the results of such tests showed the presence of Bang's disease in the cows sold to plaintiff," by changing the last three words to read "tested by plaintiff," and this ruling was the basis of an exception upon defendant's appeal. The Supreme Court held that this amendment effected no substantial change in plaintiff's claim and that it was, therefore, allowable under the appropriate code section.[2]

Wood v. Hardy[3] was an action to foreclose a mechanic's lien. The contractor for the erection of a dwelling to whom plaintiff had first furnished materials abandoned construction of the project and plaintiff thereafter furnished additional materials under a contract directly with the owner. The mechanic's lien included charges for materials furnished to the contractor as well as for labor and materials furnished pursuant to the new contract with the owner. The complaint contained an allegation that the labor and materials were furnished pursuant to a contract between the plaintiff and the owner who was named as defendant. Upon appeal from an adverse judg-

*Attorney at Law, Columbia, S. C.

1. 236 S. C. 730, 113 S. E. 2d 730 (1960).
2. CODE OF LAWS OF SOUTH CAROLINA § 10-692(d) (1952).
3. 235 S. C. 131, 110 S. E. 2d 157 (1959).

ment defendant contended that the statement in the mechanic's lien and in the complaint that the materials and labor were furnished pursuant to a contract between the plaintiff and defendant was fatal since it included a claim for materials furnished to the contractor; defendant contended further that the allowance of an amendment to the complaint by the Special Referee, deleting the allegation that the materials were furnished pursuant to a contract between the owner and the plaintiff, was in error.

The Supreme Court held that the allegations in the complaint to the effect that the plaintiff furnished labor and materials in the construction of defendant's dwelling for which he had not been paid, and that he had a mechanic's lien on the property, were appropriate allegations for the foreclosure of a mechanic's lien, and the allegation as to the existence of a contract between the plaintiff and the defendants could be disregarded as mere surplusage. As to the allowance of the amendment, it was held that the lower court could properly allow an amendment to conform the pleading to the facts proved provided such amendment did not materially change the claim of the party seeking the same. Since the allegation as to the existence of the contract between plaintiff and defendant was considered as surplusage, the court concluded that the allowance of the amendment deleting this allegation did not result in prejudice to defendant. The case was, however, reversed in part on other grounds and remanded to the trial court for determination of the amount the defendant owed the contractor at the time of abandonment of the project, since the plaintiff's claim as to materials furnished the contractor could not exceed the amount due him by the owner.

Motions to Strike

The appeal in *Thomas v. Colonial Store, Inc.*[4] was based entirely upon the pleadings. The trial judge granted defendant's motion to strike certain allegations from the complaint and refused plaintiff's motion to strike the second defense of defendant's answer. The action was brought for false imprisonment, the pertinent allegations being that plaintiff was detained by defendant's agents after leaving defendant's store, was arrested and confined to the city jail, and was required to furnish bond and to employ an attorney in order to

4. 236 S. C. 95, 113 S. E. 2d 337 (1960).

obtain a release. In its second defense, defendant alleged that the plaintiff was observed by its store manager to pick up a jar of coffee and conceal it on her person and for that reason was detained and turned over to the police authorities. Although recognizing that an order refusing a motion to strike allegations in a pleading is not ordinarily subject to interlocutory appeal, the Supreme Court nevertheless considered the appeal from the order refusing to strike this defense. The motion in this instance was considered to be in the nature of a demurrer involving the merits and going to the heart of the defense. The court noted that the essence of false imprisonment consists in depriving the plaintiff of his liberty without lawful justification. The facts alleged in the second defense were held to be relevant on the question as to whether or not the plaintiff's arrest and detention were lawful, and were properly pleaded in justification of her arrest.

As to the order striking from the complaint the allegation that plaintiff was required to furnish bond in order to be released from the jail and to employ an attorney, the Supreme Court held that this language was improperly stricken. The plaintiff could properly plead and show the circumstances under which she was released from custody and could claim any reasonable expenses incurred in procuring her release.

In *Vanderford v. Smith*[5] action was brought for damages arising out of an automobile collision in the City of Union. The defendant interposed a counterclaim alleging that plaintiff's automobile was in use as a taxicab at the time of the collision, and that plaintiff was covered by liability insurance pursuant to the ordinances of the town, and moved for an order impleading the alleged insurer as a party defendant to the counterclaim. The lower court refused the motion and by a companion order granted plaintiff's motion to strike from the answer and counterclaim all references to the insurance company and to the policy. On appeal both orders were reversed under the authority of *Brown v. Quinn*.[6] The recent case of *Watts v. Baker*[7] was distinguished as involving an ordinance different from the case at hand.

The refusal of the trial judge to strike from the complaint the language that plaintiff has been damaged in his livelihood of operating a taxicab was affirmed. Defendant argued in his

5. 235 S. C. 448, 111 S. E. 2d 777 (1960).
6. 220 S. C. 426, 68 S. E. 2d 326 (1951).
7. 233 S. C. 446, 105 S. E. 2d 605 (1958).

brief that loss of use of a demolished automobile was not an element of damages. The Supreme Court did not construe the language as alleging damages for loss of use and found it unnecessary to pass upon the question raised by defendant.

Swift & Co. v. Griggs[8] involved an appeal from the order of the trial judge striking certain defenses from the answer. The complaint alleged that two of the defandants agreed to sell plaintiff's plant food on a commission basis and to guarantee payment of all accounts to plaintiff, and that a third defendant agreed in writing to guarantee performance of the agreement by the other two. The answer contained three defenses: (1) a general denial, (2) plaintiff's failure to perform an alleged contemporaneous oral agreement, (3) failure of consideration by reason of non-delivery of the plant foods. Upon plaintiff's motion, the lower court struck the entire second defense as sham, irrelevant and redundant and as an attempt to vary the terms of the written instrument, and that portion of the third defense which alleged failure of consideration. The Supreme Court affirmed, holding that the second defense and the stricken language of the third defense were attempts to plead the defense of failure of consideration based upon the alleged breach of a contemporaneous oral agreement inconsistent with the terms of the written agreement to the extent of rendering it meaningless. This the defendants could not do in the absence of a plea of fraud, accident or mistake.

Separate Statement

The appeal in *Hopkins v. Shuman*[9] was from the order of the trial judge denying defendants' motion to state separately the causes of action alleged in the complaint. Defendants contended that two causes of action were stated: (1) false imprisonment, and (2) inducing the discharge of plaintiff from his former employment. Plaintiff's position was that the complaint stated only one cause of action for false imprisonment and that the other allegations were of aggravating circumstances. The pertinent facts alleged in the complaint were that plaintiff was the driver of the truck of an independent contractor engaged to pick up packages from the warehouse of the defendant's railway; that he was approached by a special agent of the company and was taken to the police

8. 235 S. C. 60, 109 S. E. 2d 710 (1959).
9. 235 S. C. 191, 110 S. E. 2d 713 (1959).

station for questioning with respect to certain articles which were missing; that he was kept in custody for two days and given lie detector tests; that his family were questioned and he was accused of being a thief and that upon his release from custody the defendants procured his discharge from his employment.

The Supreme Court adopted defendants' contention that two causes of action were alleged, *i.e.*, false imprisonment and wrongful interference with plaintiff's employment, and concluded that defendants were entitled to a separate statement of the causes of action. The court noted that under applicable provisions of the code and circuit court rules specified causes of action may be joined in the same complaint but must be separately stated.[10] The defendants' procedure in requiring a separate statement of the causes of action was held to be proper.

Waiver

In *Edwards v. Great American Insurance Co.*[11] the Supreme Court followed the rule that waiver of a condition subsequent in an insurance policy need not be pleaded in order for evidence of waiver to be admissible. That case involved an action to recover the face amount of a policy insuring plaintiff's dwelling against loss by fire. Among other defenses, defendant plead that the plaintiff had procured additional insurance on the property in excess of its agreed valuation and that this was in violation of the policy provisions, thereby relieving defendant of liability on the policy. The testimony of plaintiff that he had informed defendant's agents of the additional insurance was held admissible on the issue of waiver of the forfeiture provisions of the policy even though waiver had not been plead, because the plaintiff was not required to allege waiver of a condition subsequent in his complaint. The court held further that the plaintiff did not need to reply to new matter in the answer alleging breach of a condition subsequent unless ordered to do so by the court on defendant's motion, under the applicable Code section.[12]

10. CODE OF LAWS OF SOUTH CAROLINA § 10-701 (1952); Circuit Court Rule 18.
11. 234 S. C. 404, 108 S. E. 2d 582 (1959).
12. CODE OF LAWS OF SOUTH CAROLINA § 10-661 (1952).

Special Damages

In *Corley v. S. C. Highway Dept.*[13] action was brought for damages to plaintiff's building resulting from the moving of the same by the defendant in violation of defendant's agreement that the building would be in as good condition as before it was moved. Plaintiff contended that the building was damaged beyond repair and sought recovery for the fair market value before removal. The question on appeal revolved around the refusal of the trial judge to charge defendant's request that the jury not be permitted to consider future damages to the building. The Supreme Court found no error in the charge and held that it was unnecessary to determine whether future settling of the building would constitute damages as may be proved under a general allegation of damages or whether this would constitute special damages which must be specially pleaded, since it did not appear that the jury considered any damages other than those naturally resulting from the acts complained of.

Demurrer-Sufficiency

The sufficiency of the allegations of the complaint was tested by demurrer in *Strong v. Winn Dixie Stores, Inc.*[14] The plaintiffs were property owners in a residential area of the Town of York and sought to enjoin the erection of a large supermarket in the neighborhood, alleging that the operation would deprive them of the quiet enjoyment of their home and would be injurious to their health. In reversing the sustention of demurrer by the lower court, the Supreme Court reiterated the well settled rule that the facts properly pleaded must be taken as true when attacked by demurrer and the pleadings must be construed liberally in favor of the pleader. The court refused to say as a matter of law that the operation of the supermarket under all of the circumstances would not amount to a private nuisance and held that the factual issues raised could not be decided on the pleadings.

In *Jackson v. Hobbs*[15] the order of the trial judge sustaining a demurrer to the complaint was adopted as the judgment of the Supreme Court. The complaint sought a recovery of damages allegedly sustained by reason of the acts of the defend-

13. 234 S. C. 504, 109 S. E. 2d 164 (1959).
14. 235 S. C. 552, 112 S. E. 2d 646 (1960).
15. 234 S. C. 497, 109 S. E. 2d 161 (1959).

ants in reducing the amount of fire insurance on plaintiff's store in violation of an alleged fiduciary relationship. The court concluded that the allegations in the complaint that the acts of the defendants were fraudulent and that they acted in a fiduciary relationship to the plaintiff were merely conclusions unsupported by the facts alleged and such conclusions were not admitted on demurrer.

Demurrer-Capacity

In *Sloan v. City of Greenville*[16] an action was brought by plaintiff as "taxpayer, citizen, resident and user of the streets of the city of Greenville on behalf of himself and all others in like situation" to enjoin the city from granting a permit for the construction of a parking building which would overhang and encroach upon the public streets. Upon the appeal by plaintiff from the order of the trial judge denying the injunctive relief prayed for, the respondent raised the question as to the right of plaintiff to bring the action in the absence of an allegation that he had sustained or would sustain special damages different in degree and kind from that of the general public. In dismissing this contention, the Supreme Court noted that the complaint showed upon its face the capacity in which plaintiff brought the action and held that the question should have been raised by demurrer under the appropriate Code section.[17] Since the respondent did not demur, the objection would be considered waived under authority of *Bramlett v. Young*.[18] The order denying injunctive relief was reversed because the proposed use of the street was inconsistent with its dedication for public purposes.

Demurrer-Jurisdiction

The appeal in *Brother International Corporation v. Southeastern Sales Company*[19] was from the order of the lower court over-ruling plaintiff's demurrer to counterclaims imposed in an amount in excess of the jurisdiction of the Richland County Court and granting defendant's motion to transfer the action to the court of common pleas. The plaintiff sought recovery of the balance due on an account in the amount of about $3,000.00 and defendant filed counterclaims

16. 235 S. C. 277, 111 S. E. 2d 573 (1959).
17. CODE OF LAWS OF SOUTH CAROLINA § 10-642 (1952).
18. 229 S. C. 519, 93 S. E. 2d 873 (1956).
19. 234 S. C. 573, 109 S. E. 2d 441 (1959).

in the sum of $55,000.00, and simultaneously moved to transfer the cause to the court of common pleas. The decision reversing the county court rested solely upon the proposition enunciated in *DuPre v. Gilland*[20] that a set off or counterclaim in excess of the jurisdictional amount will not be permitted to oust the jurisdiction with respect to the claim asserted in the complaint where such is within the jurisdiction of the court. The court, however, failed to discuss the interesting question posed in respondent's brief as to the power and authority of the county court to transfer an action to the court of common pleas in order to promote the due administration of justice. Respondent's counsel (the writer herein) contended that such power in the county court rested both upon statutory authority and the court's inherent power to do all things reasonably necessary for the due administration of justice.[21] The opinion does not dwell upon this feature of the case.

Filing Answer

The refusal of the trial judge to permit defendant to file an answer to the complaint after the expiration of the twenty day period was held to be an abuse of discretion in *McGee v. one Chevrolet sedan.*[22] The action was commenced by the service of a summons and a writ of attachment on the defendant automobile as the result of a collision between it and an automobile owned by the plaintiff. On the nineteenth day after service, defendant's attorney telephoned attorney for plaintiff advising him that he had just been employed to represent the defendant and inquired as to the status of the proceeding. In reply, plaintiff's attorney stated that he did not know how much time remained for answer. Two days later, on the twenty-first day after service of the summons, defendant's attorney delivered to plaintiff's attorney a notice of appearance and a demand for a copy of the complaint which was refused. The trial judge denied defendant's motion

20. 156 S.C. 109, 152 S. E. 873 (1930).
21. Respondent contended that CODE OF LAWS OF SOUTH CAROLINA § 15-730 (1952), provides statutory authority for the transfer. Although this Act as originally passed was limited to Orangeburg County, the Act as adopted in the 1952 Code deletes all reference to Orangeburg County and would seem to be of general application by its terms. Respondent argued that the provisions of the Code section would control over the original Act where substantial changes were made, relying upon the authority of State v. Conally, 227 S. C. 507, 88 S. E. 2d 591 (1955).
22. 235 S. C. 37, 109 S. E. 2d 713 (1959).

for permission to file an answer to the complaint and granted plaintiff's motion for judgment by default, from which ruling the appeal followed. In reversing, the Supreme Court held that the Act providing that the court may in its discretion allow an answer to be filed after the expiration of the time limit is in furtherance of justice and should be construed liberally.[23] The ruling of the trial judge would not be disturbed unless there was a clear showing of abuse of discretion; but when a party makes a showing of mistake, inadvertence, surprise or excusable neglect and applies promptly for relief and makes a showing of a meritorious defense, he should be permitted to answer. Since defendant's attorney had been employed prior to the expiration of the twenty day period after service and was acting in good faith, he should have been advised upon his inquiry that only one more day remained for answer. In view of these circumstances, the refusal of defendant's motion that it be permitted to file an answer was deemed to be an abuse of discretion requiring reversal.

Waiver and Estoppel

The question of pleading in *Douglas v. Threadgill*[24] was whether or not the allegations of defendant's answer sufficiently alleged estoppel so as to require a charge by the trial judge of the law applicable thereto. The action was based upon the alleged breach of a sales contract to convey certain real estate by "good warranty deed," by reason of the insertion in the deed of a reference to a joint easement of an 18 foot driveway. The answer alleged that plaintiff's attorney examined the title prior to consummation of the sale, knew of the existence of the easement, and prepared the deed in which the provision relating to the easement was inserted; and that plaintiff was estopped from maintaining the action by reason of having accepted the deed with knowledge actual, constructive and imputed of the existence of the easement. The trial judge refused defendant's request to charge the law applicable to estoppel and error was charged on appeal.

In ordering a new trial, the Supreme Court noted that defendant did not specifically plead waiver but such could be proved without doing so under the authority of *Devore v. Pied-*

23. CODE OF LAWS OF SOUTH CAROLINA § 10-609 (1952).
24. 235 S. C. 169, 110 S. E. 2d 169 (1960).

mont Insurance Company[25]; and that estoppel was specially pleaded. The court held that a reasonable inference might be drawn, in light of the pleadings and the testimony, that the purchaser bought the property with full knowledge of the existence of the driveway and defendant's inability to convey title free of the easement, and this would make a jury question as to estoppel by plaintiff to maintain the action.

25. 144 S. C. 417, 142 S. E. 592 (1928).