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PLEADINGS, RULES 7 TO 25

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Proper pleading is an art. It is no less so under the Rules than under the Code. The difference in the pleadings under the Rules and under the Code is that under the Code the real object of pleading was lost sight of. Under the Rules, purpose of pleading, which is to inform parties of the issues to be tried, is primary.

Rules governing pleadings are found in Rules 7 to 25. They will be discussed in their order:

RULE 7. There are only three pleadings: a complaint, an answer, and a reply. A reply is not required or allowed, except by order of court. Applications to the court for orders are to be made by written motion, which can be incorporated in the notice of hearing of the motion or the notice of application to set the same for hearing. This Rule is not used enough. It is possible under it to have the motion and the notice in one document, with a saving of repetition in several ways. Motions during a hearing or trial can be made orally, but this is intended to cover the usual trial motions, such as motions to strike, motions for directed verdict, mistrial, for judgment, etc. Some cases indicate that a motion made even during a trial, which is not of this kind, should be made in writing, and, in such event, the requirement of notice would probably apply.

There is provision made for the submission of a controversy to a court without pleadings and upon an agreed statement of facts. This provision is little used, but could provide a ready and inexpensive means of submitting a simple dispute.

RULE 8. The prime rule of all pleading under the Rules is stated in the requirement that pleadings set forth "a short and plain statement of the claim." The principle of this Rule is that it provides for notice pleading and is, as now well settled, that it is not necessary to spell out in minute detail the theory of the action as it was in Code pleading. But it is still necessary that the complaint aver (not allege) facts which, if true, entitle plaintiff to relief. The "claim" must be set out so that the court can know what is involved, so that the counsel for the defendant can know the issues presented, and so that the doctrines of stare decisis and res judicata can be applied. The elements essential to entitle the pleader to relief must appear. The pleader must ask for the relief to which he thinks he is entitled, but it may be done in the alternative or it may be of several different types. Moreover the cases hold that the pleader is not bound by the relief prayed for, but will be granted that to which the facts entitle him.

Defenses are required to set forth likewise in "short and plain

terms." If the pleader is without knowledge or information sufficient to form a belief as to the truth of an averment, a statement to that effect is a denial of the averment. Pleaders are required by the Rule to admit all matters averred in the complaint which in good faith the pleader does not intend to controvert. And the obligations of Rule 11 relating to the good faith of the pleader are specifically made to apply to answers.

The pleadings, as clarified, abridged, or enlarged at the pre-trial conference and as amended to fit the proof under Rule 15, must set forth a claim and must controvert the claims made and thus define the issues to be be tried. It is upon these issues so defined that the decision of the court or jury is to be had, and it is these pleadings and pre-trial orders to which one must look to decide the issues which were determined. Pleadings are still important.

It is suggested that the avoidance of the phrase "cause of action" and, instead, the use of the word "claim" will be helpful in keeping in mind the distinction which now exists. There is no longer a "cause of action". This is true, even though the Supreme Court sometimes talks of "causes of actions" in discussing the sufficiency of complaints under the Rules.

Subsection (c) requires that affirmative defenses be set forth in pleading to a preceding pleading. In addition to the affirmative defenses set forth in the Rule, it has been held that last clear chance, laches, mitigation of damages, statute of frauds, and lien waiver must be affirmatively pleaded.

I think that, in order to be safe, a plaintiff should secure an order permitting him to reply if he wishes to raise any affirmative defense to a matter set forth in the defendant's answer. Rule 7 (d) states that averments in a pleading to which no responsive pleading is "required or permitted" are taken as denied or avoided. It does not seem to me that a reply setting up an affirmative defense is required by 7 (c). Rule 12 (b) seems to carry that idea forward in providing that defenses "shall be asserted in the responsive pleading thereto if one is required." But our Supreme Court has in three cases cast doubt on this point. (See *Trustee Co. v. Bresnahan,* 119 Colo. 311; *Markley v. Hilkey Bros.,* 113 Colo. 562; *Rice v. Farmers State Bank,* 221 P. (2) 378.)

The averments of pleadings are required to be simple, concise, and direct. If the pleader is without direct knowledge of the fact, averments may be made upon information and belief; and it is sufficient if it is said, "upon information and belief," and then set out the fact. It is not necessary that pleadings set forth ultimate facts, but they may include conclusions of law. Neither claims nor defenses need to be consistent one with another.

RULE 9. It is no longer necessary to aver capacity or authority of one suing in a representative capacity or the legal existence of organized associations. So, an executor need not set forth his

right to bring suit or defend, nor need the incorporation of a corporation be averred.

An averment that all conditions precedent have been performed or have occurred is sufficient. A denial of such an averment of performance must be with particularity, and the burden of proof is upon the party pleading performance. It is not upon the one averring with particularity that a performance has not been made. I am not sure just how this works in practice. Apparently the one pleading performance would be obliged to establish performance in the particulars denied, but not otherwise. Provision relating to burden of proof is not found in the Federal Rules, and there does not appear to have been any State court construction of it.

A requirement of some importance is that of 9 (g), which is that items of special damage must be specifically stated. It has frequently been held that this can be compelled by a motion under Rule 12 (e). The other provisions of the Rule are clear and cover special situations.

RULE 10. Rule 10 relates to the names of the parties and in (b) requires the numbering of paragraphs. This is not always done, but should be, because the Rule provides that a paragraph may be referred to by number in all succeeding pleadings, which is a great convenience. It is a requirement that each claim founded upon a separate transaction or occurrence and each defense shall be stated in a separate count or defense. The practice seems to be to designate such separated claims as "First Claim, Second Claim, etc.," rather than as "First Count, Second Count, etc." The Rule allows the accepted practice of adopting parts of a pleading by reference in the same pleading, in other pleadings, or in motions. It also makes an exhibit to a pleading a part thereof for all purposes.

RULE 11. Rule 11 is important in that it makes the signature of an attorney to a pleading a certificate by him that he has read the pleading, that there is good ground to support it, and that it is not interposed for delay. The Rule is not as broad as it ought to be, because seldom are pleadings interposed for delay, but, quite often, motions are.

RULE 12. Rule 12 is an important rule. It provides that defenses and objections may be presented by the responsive pleading if one is required. Since a motion is not a pleading, the Rule provides that certain defenses *may* be presented by motion. They include: insufficient or improper venue, service or process or lack or jurisdiction, and failure to state a claim or to join an indispensable party. All such motions available must be made together and before pleading. Otherwise, they are waived, except that failure to state a claim may be raised at almost any stage of the proceedings. Filing any such motion changes the time for filing a

responsive pleading. It should be noted that it is only the motions permitted by Rule 12 that have such effect. For example, a motion for a physical examination does not change the pleading time.

It is not required that any of the defenses set out in Rule 12 must be presented by motion. They may be all joined together in the responsive pleading without waiver of any of them. But if any of the objections, except that of failure to state a claim, is made the subject of a motion, then such objections as are not included within the motion are waived and cannot be raised by pleading. This is requisite, because some objections must be made on the ground that the responsive pleading cannot be prepared without the information required. Therefore, such objection must be available by motion. But if the pleading is prepared and filed without this information, it would, of course, be absurd to have such a motion included in the responsive pleading. Many pleaders include in their responsive pleading a motion raising the point of failure to state a claim, even though that same point has been made and ruled upon adversely by motion.

Provision is made for what amounts in effect to a speaking motion, in which, if the court sees fit, matters outside of the pleading may be presented and considered. In such event, the motion is considered to be a motion for summary judgment with all the incidents thereof.

A motion to dismiss on the ground that the complaint fails to state a claim raises the question of the legal sufficiency of the complaint. To withstand such attack, the complaint must set forth facts, together with legal conclusions if desired, which facts, if taken as true, together with the correctly stated legal conclusions, would entitle the pleader to some relief. Though no case has been found, it seems that this statement must necessarily be true and that not only the facts, but the legal conclusions, must be favorably considered in determining the quality of the complaint.

Some Federal cases have held that a motion to dismiss a complaint for insufficiency must set out wherein the pleading is defective. This is based on the requirement of Rule 7 that motions "shall state with particularity the grounds thereof." There seems to me to be merit in this position, and certainly it would save counsel much time and labor in preparing for argument in opposition to such a motion if the court were to require the particular grounds to be made known.

The Rule provides that a motion for a separate statement or bill of particulars may be filed. The motion for separate statement and for bill of particulars has been eliminated from the Federal Rules, though still retained in the State Rules. The office of this motion is most doubtful, in view of the discovery provisions of the Rules. If the requirement were adhered to that the motion shall point out the defects complained of and the details desired,

the motion would seldom be used. Its chief present use probably is a dilatory one.

Note that a responsive pleading to which no motion under 12 (b) is available may be attacked for insufficiency by a motion to strike under this Rule. Thus an answer or a reply may be attacked for insufficiency.

RULE 13. Rule 13 relates to counterclaims and cross-claims. These are divided into two catagories: permissive and compulsory. And any claim arising out of the transaction which is the subject of the complaint must be pleaded or is waived. The recent amendment excepts counterclaims which were the subject of a pending action at the time the suit was begun. Other claims may, at the pleader's option, be pleaded. A counterclaim, of course, is a claim set up by a defendant against a plaintiff. A cross-claim is a claim set up by one party against a co-party (i.e., plaintiff against plaintiff or defendant against defendant). Cross-claims are entirely permissive. They must, however, either arise out of the transaction which is the subject of the original action or relate to property which is the subject of the action. They may be contingent in that they may depend on the liability of the party to his opposing party, which liability is to be determined in the action. So defendant C may cross-claim against defendant D on the ground that, if defendant C is liable to plaintiff, defendant D is liable to defendant C for all or part of such claim.

Additional parties may be brought in, if necessary, to a determination of a counterclaim or a cross-claim, and separate judgments can be rendered.

RULE 14. Rule 14 relates to third party practice. This is designed to permit complete disposition of a controversy between several parties whose rights and liabilities are bound up in the transaction, but which may vary between the parties.

The procedure is made clear from the amended Rule. If a defendant considers another non-party to be liable to him for all or part of any claim asserted by the plaintiff against him, that defendant may bring into the case such other person and make him a third party defendant. This can, also, be done by the third party defendant bringing in another whom he, in turn, considers to be liable for any claim established against such defendant. Third party defendants can assert against the original plaintiff any claims they may have arising out of the transaction, as well as any defenses the third party plaintiff may have against the plaintiff's claim. Also, plaintiff may assert against third party defendants any claims he may have against them. Thus, the ultimate liable person is determined in one action.

RULE 15. Rule 15 relates to the amendment and supplement to pleadings. It is a principle of the Rules that the issues presented by the pleadings, as affected by the pre-trial conference, shall be the ones tried.

Amendments or supplements to pleadings are allowed freely. When parties have, by express or implied consent, tried issues not raised by the pleadings or set up at the pre-trial, this Rule provides for amendment of the pleadings to include such issues. The answer to the question as to whether the unpleaded issue was or was not tried by implied consent must depend upon the facts of each case. It must, it seems, appear clearly that such unpleaded issue was recognized by the court and parties and presented by evidence deliberately included for the purpose of supporting or denying that issue. It is certainly not within the intention of this Rule that evidence not so introduced should be considered as bearing upon an unpleaded issue to which it accidentally relates. Provision is made for supplementing pleadings to set forth transactions or occurrences or events happening since the filing of the pleadings.

RULE 16. Rule 16 provides for pre-trial procedure. Much has been said in favor of, and something has been said in opposition to, pre-trial procedures. I am convinced that its merits are great and its faults are minor. It seems to me that no case of any importance should be tried until after a pre-trial conference has been held. Pre-trial should be held after all pleadings are closed, after the discovery procedures have been utilized, and at the time when a trial date is about to be set. The court should not view pre-trial as a perfunctory procedure to be gotten over as quickly as possible, but as a valuable time- and expense-saving device. Counsel should be encouraged to eliminate issues upon which no real difference exists, to admit authenticity of documents, and to identify proposed exhibits. Pre-trial orders should be prepared by the court, and not by counsel, and should set forth the matters determined at pre-trial. A proper use of pre-trial has been proved to be a means of saving a tremendous amount of time, effort, and expense in the trial. Properly used, it should be a further means of avoiding surprise at the trial.

RULE 17. "Parties Plaintiff and Defendant" is the subject of Rule 17, which is substantially the same as under the Code.

RULE 18. Rule 18 makes it clear that a party may join in an action as many claims as he has against another party. They do not need to have arisen out of the same transaction or be in any way related. All controversies between the parties may thus be settled in one action. Further, a party need not prosecute one claim to conclusion before proceeding upon a claim based upon the prior claim. So, a claim need not be reduced to judgment before an action is brought to set aside a conveyance averred to be fraudulent.

RULE 19. Rule 19 is intended again to facilitate the full settlement in one action of an entire controversy; so, parties having a joint interest are (subject to Rule 23) made indispensable parties, for the Rule says that they "shall" be made parties. "Desirable"

or "proper" parties are those who ought to be joined if complete relief is to be accorded between those already parties. They are to be joined if feasible. If a person who should be a plaintiff declines to join, he may be made a defendant; or, "in a proper case," he may be made an involuntary plaintiff. Such a proper case might be where A is one of a group who are benefited by an agreement made by X with Y; X declines to enforce the contract against Y, which it is in A's interests to enforce. I think A could commence an action against Y, joining X as an involuntary plaintiff.

RULE 20. Rule 20 permits joinder of all persons as plaintiff or defendant if they assert or have asserted against them "any right to relief jointly, severally, or arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all of them will arise in any action." It is not necessary that any plaintiff or any defendant be interested in all of the relief demanded. Judgment may be given for such plaintiffs against such defendants as the proof requires. Separate trials may be had. It is possible, under this Rule, to sue joint or several obligees jointly or severally.

RULE 21. Rule 21 relates to misjoinder and non-joinder of parties. Misjoinder of parties is not ground for dismissal. Misjoinder, of course, is the inclusion of an improper person as a party. Under Rule 19, failure to join an indispensable party would appear to be ground for dismissal.

RULE 22. Rule 22 provides the procedure relating to interpleading. There is little change from that provided by the Code. Coming from the Federal Interpleader Statute, the Rule is short and clear and requires no comment.

RULE 23. The rule relating to class actions, as set forth in Rule 23, is substantially a restatement of the Code provision. Note that it is provided in (b), relating to representative suits, that such an action can now be maintained only by one who was a shareholder at the time the transaction complained of occurred or whose share devolved upon him by operation of law.

RULE 24. Rule 24 relates to intervention and provides for permissive and mandatory intervention. The recent amendments have enlarged the area of permissive intervention, particularly in that changes have been made to permit the intervention of governmental officers or agencies in proper cases.

RULE 25. The provisions of Rule 25 for substitution of parties is clear and little used. It brings nothing new into the practice beyond the provision for dismissal of the action as to a deceased party if substitution is not timely made.

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