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Pleadings--Kentucky Rules of Civil Procedure--Rule 8.01--Does Pleading an Express Contract Permit Recovery Upon an Implied Contract?

Carl R. Clontz
University of Kentucky

to serve all and still require him to serve at his risk. Some courts have based their adherence to this rule on the fact that, like a public carrier, he is a mere conduit, not asserting any right. Others say that he is excused because it would not be in the interest of the trade and the steady flow of commerce to burden the warehouseman or commission merchant with the duty of carefully checking the title of each and every consignor, and additionally, force him to bear the risk that the consignor will state his true name and address which would be necessary to such a check. Any one of these or all together would be adequate justification of the rule of the *Abernathy* case. It is a good rule, and it is still the law in Kentucky. Judge H. Church Ford recognized this in a case which came before him on the Frankfort Docket, U. S. District Court, Eastern District of Kentucky as recently as Feb. 1, 1954. In that case[23] the facts were basically the same as in the principal case. The defendant warehouse company filed a motion to dismiss for failure to state a claim and in that motion relied solely on the *Abernathy* case. The court, considering the brief sustained the motion and dismissed the case as to the warehouse company.

It must be concluded from this evidence that the court in the principal case failed to follow the law of Kentucky due to a misconception as to what that law was. It would be desirable if the *Abernathy* case were reaffirmed to preserve a well-reasoned and just exception to the harsh rule of liability which was established when all agents and factors selected whom they would serve and when the relationship was purely personal, not public. The exception would do no violence to the present recording statute.

JAMES H. BYRDWELL

PLEADINGS—KENTUCKY RULES OF CIVIL PROCEDURE—RULE 8.01—DOES PLEADING AN EXPRESS CONTRACT PERMIT RECOVERY UPON AN IMPLIED CONTRACT?—The plaintiff brought an action to recover on an oral contract for services performed for decedent. The complaint alleged that the decedent promised "to pay to her or to will or convey to her" certain real property in consideration of personal services rendered by the plaintiff to the decedent. The complaint set out in detail the nature of the services rendered, the circumstances surrounding the agreement, and the plaintiff's performance. There was a demand for a judgment of $6,500, the alleged reasonable value of the land. The

[23] U.S. v. Tilley, Tilley, and Kentuckiana Tobacco Warehouse Co., Civ. Action 117, Frankfort Docket, Feb. 1, 1954.

defendant executor made a motion for a judgment on the pleadings.[1] Plaintiff conceded that the oral contract was within the statute of frauds and therefore unenforceable, but contended that the pleading disclosed an implied contract to pay for services rendered, and that recovery for the reasonable value of the services should be allowed upon a quantum meruit basis. The Fayette County Circuit Court granted defendant's motion for a judgment on the pleadings, and the plaintiff appealed. *Held:* affirmed. One who relies solely upon an express contract cannot recover on an implied contract not pleaded, and the complaint did not contain sufficient allegations of an implied contract since there was nothing therein to notify the defendant that recovery was being sought on a quantum meruit. *Pryor* v. *York's Executor,* 305 S.W.2d 775 (Ky. 1957).

This case presents a question requiring the construction of Rule 8.01 of the Kentucky Rules of Civil Procedure for a determination of the sufficiency of a complaint with regard to the plaintiff's theory of the case. That Rule provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

This Rule, as well as the rest of the Kentucky Rules, finds its basis in the Federal Rules of Civil Procedure.[2] The Civil Code Committee, at the instance of the judges and practicing attorneys of Kentucky,[3] considered and substantially adopted the entire body of Federal Rules. The Committee considered each Federal Rule individually, and research was done in order to determine its meaning and effect;[4] it was then either adopted verbatim or altered to conform with Kentucky's

[1] The statement of the procedural facts of the case in the opinion is incomplete. Under Ky. R. Civ. P. 12.03, a motion for judgment on the pleadings may be made after the pleadings are closed and within such time as not to delay trial. The defendant, therefore, must have filed an answer, or his motion would have been premature. The probable procedure was: The defendant filed an answer setting up the affirmative defense of the statute of frauds, and the plaintiff, thinking that his complaint sufficiently alleged a quantum meruit, elected to stand on his pleadings; the defendant then made a motion for a judgment on the pleadings, and his motion was granted. The plaintiff then appealed, claiming error in the granting of the motion for judgment.

[2] Ky. R. Civ. P. 8.01 uses the exact language of Fed. R. Civ. P. 8(a), except for the Federal Rule's requirement for "a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it . . ."

[3] Fowler and Catlett, "Report of the Civil Code Committee," 16 Ky. S.B.J. 23 (1951).

[4] Sims, "The Work of Kentucky's Civil Code Committee," 40 Ky. L.J. 7, 8-9 (1951).

needs. Thus, in order to ascertain the intended construction for the Kentucky Rule, it is necessary to look at the construction given its federal counterpart.

The majority[5] of federal courts have taken the position that a "generalized summary of the case that affords fair notice is all that is required" of a complaint.[6] It matters not whether the complaint states "conclusions" or "facts" so long as the adversary is given fair notice, and the statement of the claim is short and plain.[7] And although it is not enough for the complaint merely to expose a grievance,[8] or create only a suspicion that the plaintiff might be able to state grounds for relief,[9] a complaint is sufficient if it gives the opposing party fair notice of the claim asserted and gives a general indication of the type of litigation involved.[10] There is no necessity to state a "cause of action" in the technical sense,[11] for technicalities are no longer of their former importance;[12] nevertheless, the complaint still must state a cause of action in that it must show that the pleader is entitled to relief.[13]

As against a motion which tests its sufficiency, a complaint is construed liberally,[14] and in a light most favorable to the plaintiff, with all doubts resolved in his favor.[15] It is not to be dismissed unless it appears certain that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim asserted.[16]

[5] 2 Moore, Federal Practice, 1649 (2d ed. 1948).

[6] Securities and Exchange Commission v. Timetrust, Inc., 28 F. Supp. 34, 41 (N.D. Cal. 1939).

[7] 2 Moore, op. cit. supra note 5, at 1650.

[8] Id. at 1653.

[9] Hays v. Hercules Powder Co., 7 F.R.D. 599 (W.D. Mo. 1947).

[10] Continental Collieries, Inc. v. Shober, 130 F. 2d 631, 635 (3d Cir. 1942); Turkish State Railways Administration v. Vulcan Iron Works, 153 F. Supp. 616, 617 (M.D. Pa. 1957).

[11] Dioguardi v. Durning, 139 F. 2d 774, 775 (2d Cir. 1944); Swenson v. Suhl, 19 F.R.D. 517, 520 (D. Neb. 1956).

[12] Continental Collieries, Inc. v. Shober, 130 F. 2d 631, 634 (3d Cir. 1942).

[13] 2 Moore, op. cit. supra note 5, at 1653.

[14] Dioguardi v. Durning, 139 F. 2d 774 (2d Cir. 1944); Reliable Machine Works v. Unger, 144 F. Supp. 726, 728 (S.D. N.Y. 1956); Welcher v. United States, 14 F.R.D. 235, 237 (E.D. Ark. 1953); Tobin v. Chambers Const. Co., 15 F.R.D. 47, 48-49 (D. Neb. 1952); Gay v. E. H. Moore, Inc., 26 F. Supp. 749, 750 (E.D. Okla. 1939).

[15] Cool v. International Shoe Co., 142 F. 2d 318 (8th Cir. 1944); Swenson v. Suhl, 19 F.R.D. 517 (D. Neb. 1956); Boerstler v. American Medical Ass'n, 16 F.R.D. 437 (N.D. Ill. 1954); United States Guarantee Co. v. Mountaineer Engineering Co., 12 F.R.D. 520 (W.D. Pa. 1952); Smedley v. Guy F. Atkinson Co., 12 F.R.D. 355 (D. Neb. 1951).

[16] Seymour v. Union News Co., 217 F. 2d 168 (7th Cir. 1954); United States v. Farina, 153 F. Supp. 819 (D. N.J. 1957); Wilson v. United States, 144 F. Supp. 851 (W.D. Pa. 1956); Welcher v. United States, 14 F.R.D. 235 (E.D. Ark. 1953); Smedley v. Guy F. Atkinson Co., supra note 16; Howell v. Gray, 9 F.R.D. 544 (D. Neb. 1949); Porter v. Elliott, 5 F.R.D. 223 (W.D. Pa. 1946).

In general, the federal courts have followed the spirit and purpose of the Federal Rules, and have applied them "with the flexibility and liberality that their framers intended."[17]

Perhaps the best illustration of what is meant by "a short and plain statement of the claim showing that the pleader is entitled to relief," is found in the Official Forms. These Forms "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."[18] The Form for a complaint for money lent is:

> Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1950.
> Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.[19]

Notwithstanding the success of the liberal construction of Federal Rule 8 (a),[20] there were, prior to any court decision, indications that Kentucky might not desire as liberal an interpretation of its Rule.[21] Typical of this attitude toward Rule 8.01 is the following statement of two members of the Civil Code Committee:

> The proposed rules make no fundamental change in the content of pleadings, although they do adopt a new terminology. . . . In one sense the present and the proposed requirement are identical, since a stated claim which gives rise to a legal or equitable relief is the essence of what we term a "cause of action." The real difference is one of emphasis. . . .[22]

This change of emphasis was designed to do away with the technicalities associated with a "cause of action."[23] In other words, the new Rule was adopted with the intention of liberalizing the formal requirements for stating a cause of action, without abandoning the underlying substantive principles.[24]

This proposed construction was seemingly accepted by the court in the first case to test the sufficiency of a complaint drawn under Rule 8.01.[25] While holding that a complaint was insufficient if it failed to allege a fact essential to the plaintiff's right of action, the court said:

> We may agree with the appellants' argument as to the liberality of the new Rules of Procedure with respect to stating a cause of action.

[17] Holtzoff, "Federal Civil Procedure—A Challenge to the States," 40 Ky. L.J. 11, 14 (1951).
[18] Ky. R. Civ. P. Rule 84.
[19] Form 5, Ky. R. Civ. P., Appendix of Official Forms.
[20] See Clay, Kentucky Civil Rules, Pocket Part, 14-15 (1957).
[21] Fowler and Catlett, supra note 3, at 27.
[22] Fowler and Catlett, supra note 3, at 27.
[23] Clay, Kentucky Civil Rules 88, 90 (1954).
[24] Id. at 90.
[25] Johnson v. Coleman, 288 S.W. 2d 348 (Ky. 1956), 45 Ky. L.J. 367 (1957).

> . . . But the simplification and liberality extend to the *manner* of stating a case and are not so great as to obviate the necessity of stating the elements of a cause of action. . . .[26] (Emphasis added).

These words appear to imply that a meritorious claim would not be held insufficient because of a formal error. Thus it seemed that the court would construe the Rule according to the intent of the Civil Code Committee,[27] and in accordance with the manifested purpose of the new Rules.[28]

The principal case appears to have dispelled that illusion. The court held (1) that one who relied solely upon an express contract could not recover on a quantum meruit, and (2) that the complaint did not contain a sufficient plea on the implied contract to warrant recovery, since it did not notify the defendant that recovery was being sought on a quantum meruit basis. It is submitted that the basis of the court's first conclusion is an inapplicable technical rule, and that the Rules themselves do not require any more notice than was contained in the plaintiff's complaint.

It is true, as Judge Bird stated, that the court had not departed from its 1948 holding in *Cheatham's Ex'r* v. *Parr*[29] that one who relies on an express contract could not recover on an implied contract which was not pleaded. However, there had heretofore been no actual occasion to abandon such a holding, since this is the first case to test the issue after the adoption of the new Rules. The rationalization of the past decisions forming the basis of this rule was that the variance between the pleadings and the proof was fatal.[30] Even the most cursory study of the new Rules would make it superfluous to cite reasons for saying that what was previously considered a fatal variance would not necesarily be considered such under the new Rules. It therefore becomes necessary to inquire into the nature of this technical,[31] but fatal, variance in order to determine its present applicability.

[26] Id. at 349.

[27] See Fowler and Catlett, supra note 3, at 27.

[28] Ky. R. Civ. P. 1 provides: "They [the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

[29] 308 Ky. 175, 214 S.W. 2d 91 (1948).

[30] Fowler v. Thompson, 193 Ky. 593, 236 S.W. 1047 (1922); Smith v. Robinson, 185 Ky. 76, 214 S.W. 771 (1919); Newton's Ex'r v. Field, 98 Ky. 186, 32 S.W. 623 (1895).

[31] Meem Haskins Coal Corp. v. Pratt, 299 Ky. 767, 187 S.W. 2d 435 (1945). In this case, the plaintiff alleged only an express contract, but the court permitted recovery on quantum meruit. There was a misunderstanding between the parties as to the price to be paid for the labor, and therefore, no contract existed. But the court said the rule that one could not plead only an express contract and recover on a quantum meruit should not apply to situations where the plaintiff performed services under what was intended to be an express contract, but failed to be such for lack of agreement on an essential element. While so holding, the court said: "The general rule is that where only an express contract is pleaded, recovery cannot be had on proof of an implied contract. . . . At best, the rule is technical, and

A variance is defined as a divergence between a party's allegations and his proof.[32] A party is not required to prove all that he pleads, unless it is essential to his claim or defense,[33] but he cannot prove anything not pleaded, for to permit him to do so would allow him to surprise the other party.[34] Therefore, a fatal variance occurs when a fact esential to a pleader's cause of action is proved, but not pleaded.

The Kentucky cases holding that recovery on a quantum meruit cannot be had when only an express contract is pleaded do not explain the variance; they simply hold that there is a fatal variance, and then drop the matter. These cases were all decided under the Code, and the pleading of an implied contract in quantum meruit under the Code was substantially the same as at common law.[35] The essential allegations of a quantum meruit count of general assumpsit at common law were (a) the plaintiff's performance of personal services for the defendant at the defendant's request, (b) the defendant's fictional promise, in consideration of the services rendered, to pay the reasonable value of the services, (c) the defendant's breach of this promise, and (d) the plaintiff's damage as a result of this breach.[36] Since the fictional promise and breach could not be proved, the only proof required to sustain such an action was the proof of the services rendered under circumstances implying a promise to pay there for and the reasonable value of those services.

A complaint on an express contract necessarily included an allegation of the plaintiff's performance, and a prayer for damages in the sum of the agreed contract price, but it did not include an allegation under which proof of the *reasonable* value of the services performed could be offered. Therein was the fatal variance—the difference between the damages prayed for in a complaint on an express contract, and the proof of the reasonable value of the services rendered, which was essential to recovery on a quantum meruit. However, this difference does not exist under the Rules. There is no need for the complaint expressly to demand judgment for the reasonable value of the services rendered before evidence of that value can be introduced.[37]

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it should not be applied to facts like those in the present case." Id. at 771, 187 S.W. 2d at 438. It should not be applied in this type of case, one wonders how it can be applied in the principle case, where there was an actual contract, but it could not be enforced because of the statute of frauds.

[32] 41 Am. Jur., Pleading, sec. 370 (1942).

[33] Id. sec. 369.

[34] Id. sec. 368.

[35] Clark, Code Pleading 292 (2d ed. 1947).

[36] Shipman, Common Law Pleading, 254-257 (3rd ed. 1923).

[37] See Form 4, Ky. R. Civ. P., Appendix of Official Forms. This form is actually what was a quantum valebant count, but it does not require that the plaintiff expressly state that he is demanding the reasonable value of the goods.

All that is required is a demand for a judgment for the damages to which the plaintiff deems himself entitled.[38] Thus the variance, which was the basis of the rule upon which the court predicted its first holding, no longer exists, and it would seem that the court has used an inapplicable precedent as the basis of this part of the decision.

The court's second holding; i.e., that the complaint was insufficient in that it failed to give the defendant notice that the plaintiff intended to proceed on the theory of implied contract,[39] is based upon equally tenuous grounds. Even if the distinction between the forms of the demands for judgment between a complaint on an express contract and one on an implied contract in quantum meruit still exists, it is difficut to understand how a plaintiffs failure to make such a distinction could be prejudicial to the defendant. It is true that a complaint based on an express contract alleges more than a common count, and that the defendant may prepare his defense accordingly, but wherein is the lack of notice? The allegation of the plaintiff's performance is the same in both types of complaints. The only possible lack of notice would be concerned with the proof of damages. Since an action on an express contract demands damages for the contract price, and recovery on a quantum meruit gives damages in accordance with the benefit conferred upon the defendant, the defendant possibly would not be prepared to submit evidence on the reasonable value of the services rendered. But how could this be considered a lack of notice which would render a pleading insufficient? The Rules themselves

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He demands only a specific sum, regardless of whether the sum was agreed upon, or whether it is for the reasonable value of the goods. Since these forms are set forth as examples, and since the only difference between a quantum valebant count and a quantum meruit count is that one is for goods sold and delivered and the other is for services rendered, it is clear that this same form would be sufficient for a complaint in quantum meruit, and it need not allege that the plaintiff is seeking the reasonable value of the services.

[38] Ky. R. Civ. P. 8.01. See also Rule 54.03, infra, note 41.

[39] In discussing this point the court said:

> "The plaintiff's pleadings in this case disclose a set of circumstances which may possibly have given rise to an implied contract authorizing a recovery upon quantum meruit. However, to meet the requirements of the *rule* regarding notice to the adversary, a pleading must do more than merely expose a right of recovery or a right to rely upon a certain defense. The pleadings must show clearly that action is being taken on that right of recovery, or that the right to a defense is being asserted as such." (Emphasis added).

Pryor v. York's Ex'r, 305 S.W. 2d 775, 777 (Ky. 1957). This was said after stating that one of the purposes of pleadings is to give notice to the other party of the claim or defense. Even though this may be (and undoubtedly is) a purpose of pleading, it does not necessarily follow that a pleading which does not give such notice is insufficient as against a motion for a judgment on the pleadings. It is also doubtful that this statement of purposes of pleadings has attained the status of a rule since it was not included in the Kentucky Rules of Civil Procedure. Under the Fed. R. Civ. P., one is not required to plead the theory of his case. 2 Moore, supra note 5, at 1656-58.

have provided that, except in cases of a default judgment, every final judgment shall grant the relief to which the successful party is entitled, *even* if such relief *has not* been demanded in the pleadings.[40] As stated by Clay, "The question is not whether the plaintiff has asked the proper remedy but whether his pleadings shows him entitled to any remedy."[41] The complaint under discussion alleged the plaintiff's performance of services for the defendant, at his request, for which there has been no payment. This alone would seem to be sufficient to show that the plaintiff is entitled to some remedy.

Through the use of the Official Forms both as guides for formulation and criteria for sufficiency, one is led conclusively to believe that the plaintiff's complaint would have been sufficient if it had been stated thusly:

> Defendant owes plaintiff six thousand, five-hundred dollars for services rendered by plaintiff to defendant between (the dates of employment). Wherefore plaintiff demands judgment against the defendant for the sum of six thousand, five-hundred dollars, interest, and costs.

After comparing this complaint, which is sufficient, with the one in the principal case, it becomes exceedingly difficult to understand how the latter could be said to be insufficient in that it fails to give the defendant adequate notice.

Conclusion

Thus it appears that the Court of Appeals has brushed aside the federal decisions as precedent, as well as Rule 1 of the Kentucky Rules of Civil Procedure, the intent of the Civil Code Committee, the purpose of the new rules, and the unequivocal dictum in *Johnson* v. *Coleman,* and has permitted a technical and purely formal error in the statement of a claim for relief to defeat what is a seemingly meritourious basis of action.

It is certainly hoped that this is not the construction of Rule 8.01 that is to be followed in the future, for if it is, the efficacy of the entire body of Rules seems seriously impaired and both the spirit and purpose of the Rules rendered nugatory.

Carl R. Clontz

[40] Ky. R. Civ. P. 54.03 provides:
"Except as to a party against whom a judgment is entered by default for want of appearance, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party had not demanded such relief in his pleadings."

[41] Clay, Kentucky Civil Rules 93 (1954).