2-1-1950

Motion to Strike and Motion for Compulsory Amendment in Florida

Jack A. Falk

COMMENT

MOTION TO STRIKE AND MOTION FOR COMPULSORY AMENDMENT IN FLORIDA

Prior to the adoption of the new common-law rules in this state, troublesome questions arose as to the use and application of the motion to strike and the motion for compulsory amendment. Although those difficulties in practice and pleading may be obviated by the adoption of the new rules, nevertheless a discussion of the old procedure may be of aid for a better understanding of the rules. With this in mind, the present comment is an attempt to briefly survey the history and use of the compulsory amendment and motion to strike and their status under the recently adopted rules.

At common law the demurrer arose as a method of attacking any defect (except duplicity) in the pleadings of the opposing parties.[1] The court exercised its jurisdiction in its use of the demurrer as one of its inherent powers. Thereafter, because of abuses that arose in the manner in which the court upheld the application of a demurrer, procedures were adopted under the statute of 27 Eliz. C. 5 and 4 and 5 Anne (1705) which required that the grounds the demurrer was predicated upon be specified and used only as a means of attack against certain enumerated defects.[2] The effect of these various statutes gave rise to two demurrers, namely, the general demurrer and the special demurrer. The function of the general demurrer was to admit the facts well pleaded and to test their sufficiency in setting forth a cause of action or defense. The special demurrer was to test the form of the pleadings and such procedural matters that did not go to the substance of the cause of action. The English law remained as such until the adoption of the common law procedure act of 1852, which abolished special demurrers.[3] Since the common law of England was adopted in Florida both general and special demurrers were recognized until the enactment of chapter 1096, p. 28, laws 1861.[4]

This law, which abolished special demurrers, embodied provisions for the use of the motion to strike and compulsory amendment in its stead. The pertinent section of the statute is:

"If any pleading be so framed as to prejudice or embarrass or delay the fair trial of the action the opposite party may apply *to the court to strike out*

---

1. Atlantic Coast Line R.R., v. Benedict Pineapple Co., 52 Fla. 165, 42 So. 529 (1906) (concurring opinion of Chief Justice Shackleford).
2. *Supra.*
3. *Supra.*
4. §§ 14 and 15 of this law, based upon §§ 50 and 51 of the common law procedure act had the effect of abolishing special demurrers.

or amend such pleading, and the court shall make such order respecting the same, and also respecting the costs, as it shall see fit." [5] (Emphasis added).

The office of the motion to strike was to test the form of the pleadings; therefore, the motion to strike grew out of and replaced the special demurrer.[6] In discussing the motion to strike, Justice Kirkpatrick in a memorandum opinion remarked that, "From time immemorial, courts have stricken false pleas from the record . . . in order to prevent the records from being unnecessarily encumbered." [7] Thus, it is seen, that in its inherent power the court permitted pleadings to be attacked first by way of demurrer and later by motion to strike.

The functions of the motion to strike were set forth by statutory enactment. The similarity between the English Statute [8] and the Florida Statute is noteworthy. The English law provides that the court or judge may strike out any matter in any indorsement of pleading which is unnecessarily scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; as compared to the Florida Statute, which states that if the pleading be framed to prejudice or embarrass the fair trial of the action, the opposite party may apply to the court to strike out or to amend such pleading.

The principles of the common law general demurrer and special demurrer are found in Florida in the functions performed by the demurrer and motion to strike, since the motion to strike grew out of and replaced the common law special demurrer.[9] A general demurrer goes to the pleading as an entirety for insufficiency, while a motion to strike, which is the equivalent of the special demurrer, is applicable where the pleading either as an entirety or in part is wholly irrelevant or for any reason improper.[10]

Since this comment is limited to the distinction between a motion to strike and a motion for compulsory amendment, a further discussion of the general demurrer is not included.

A motion to strike fulfills many functions and purposes. It is the proper cure for redundancy or repetition,[11] as well as sham pleas.[12]

Another use is for frivolous pleas, i.e. those having no place in the particular pleading wherein they are contained.[13]

---

5. This section was brought forward into the Revised Statutes of 1892, § 1043; likewise carried forward into the General Statutes of 1906, § 1433; again forward into the Revised General Statutes of 1920, § 2630; also carried forward into the Compiled General Laws of 1927, § 4296; and finally in FLA. STAT. 1941, § 50.21.

6. Hall v. O'Neil Turpentine Co., 56 Fla. 324, 47 So. 609 (1908); Florida East Coast R.R., v. Peters, 72 Fla. 311, 73 So. 151 (1916).

7. Anonymous, 7 N.J.L. 160 (Sup. Ct.) (1824).

8. Vol. XXV, Halsbury's Laws of England 418, § 4 (1937 ed.).

9. See note 6 *supra.*

10. Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 So. 922 (1909).

11. Hubbard v. Anderson, 50 Fla. 219, 39 So. 107 (1905) (where there was a plea to the general issue and additional pleas amounting to the general issue were interposed, such additional pleas were stricken).

12. Rhea v. Hackney, 117 Fla. 62, 157 So. 190 (1934) (when it appeared that a pleading had been interposed for delay or other unworthy motive with no reasonable expectation that it could be sustained at trial of issue, it was stricken).

13. In an action on a contract, a plea of set-off of damages arising out of a tort

Where a plea contains two defenses to a declaration, one of which is inapplicable, it may be attacked by a motion to strike.[14] And, equitable pleas, founded upon wholly equitable grounds, while they are proper in courts of equity have no place in a court of law and are properly removed by a motion to strike.[15]

Moreover, while a simple objection can be used to prevent a response to an improper question, where the answer is not responsive a motion to strike the answer should be made.[16] Also, testimony conditionally received on assurance that a foundation will later be laid, which condition is not fulfilled, should be stricken either by a motion of the court or the opposing party.[17] The motion to strike is also used when the pleading is scandalous as in a case where a declaration alleged that "the defendant, by perjury, procured a verdict against this plaintiff, and had a judgment entered thereon." [18]

The compulsory amendment,[19] along with the motion to strike,[20] stemmed from the abolished common law special demurrer. The statute, which created these motions, is silent as to when the motion to strike is the appropriate procedure or when the motion for compulsory amendment should be used. What is equally significant is the fact that it appears as though Florida is the only state that uses a "compulsory amendment" for the purpose of attacking a defective pleading. Generally, the common practice among other states is to attack the defective pleading by demurrers, motions to strike or motions to dismiss.

The uses and application of a motion for compulsory amendment are varied. In the case of *Cooney-Eckstein Co. v. King*,[21] the court stated that when a good defense is defectively made, or a plea that is only wanting in explicitness or fullness, it should not be stricken out, but a motion for compulsory amendment should be filed. It also said, that when the description of an object involved is insufficient to enable you to plead with certainty, a compulsory amendment is proper.

A second use for the compulsory amendment is in instances of duplicity, which arises when two distinct causes of action are joined in the same count.[22] The motion is also appropriate where there are defects in matter of form or

---

action is purely frivolous and properly stricken on motion. Brash v. Eheman, 56 Fla. 153, 47 So. 937 (1908).

14. Armstrong v. Seaboard Air Line R.R., 85 Fla. 126, 95 So. 506 (1923).

15. Bacon v. Green, 36 Fla. 325, 18 So. 870 (1895). Pleas interposed on equitable grounds in an action at law which present no defense cognizable on such ground, may be attacked by a motion to strike.

16. Jacksonville Electric Co. v. Sloane, 52 Fla. 257, 42 So. 516 (1906).

17. Wilson v. Journigin, 57 Fla. 277, 49 So. 44 (1909).

18. Ropes v. Stewart, 54 Fla. 185, 45 So. 31 (1907).

19. Seaboard Air Line R.R., v. Rentz, 60 Fla. 429, 54 So. 13 (1910); Atlantic Coastline R.R., v. Wallace, 61 Fla. 93, 54 So. 893 (1911). (The authority for the compulsory amendment and motion to strike is found within F.S.A. § 50.21).

20. See note 6 *supra*.

21. 69 Fla. 246, 67 So. 918 (1915).

22. E. A. Strout Farm Agency v. Hollingsworth, 92 Fla. 673, 110 So. 267 (1926).

in the manner of stating a cause of action which makes the declaration insufficient in substance.[23]

Where there is a misnomer in a declaration, a plea in abatement in a personal action is not allowed, but a correct result is reached upon defendant's motion for compulsory amendment, which requires the plaintiff to insert the proper name in his declaration.[24] If a declaration contains allegations that are irrelevant, redundant, or framed in such form as to unduly prejudice the other party, though otherwise appropriate and relevant, and this declaration doesn't wholly fail to state a cause of action, the proper remedy for this situation is a motion for compulsory amendment.[25]

As concerns the procedural aspects of both the motion to strike and compulsory amendment, the following discussion may cast some light. A plaintiff may ignore the motions and ask that a default be entered when the motion is frivolous and without merit, and such that a determination of the motion either on behalf or in opposition to the plaintiff would not affect his right to proceed. The clerk of the court is also justified in entering default and judgment if the motion is frivolous upon its face. However, if the defendant's motion is not frivolous upon its face and presents questions affecting the plaintiff's right to proceed with the cause, then the clerk's power is suspended and he cannot enter a default against the defendant for failure to plead or demur.[26]

To justify a compulsory amendment or motion to strike, the defendant must state in his motion that the plea complained of was framed so as to prejudice, embarrass, or delay the fair trial of the case,[27] as the absence of these elements in the pleader's motion or plea complained of negatives the use of this remedy.[28] However, even though the opposition has not so moved, the court upon its own motion may require the submission of an amended plea.[29] The granting of the compulsory amendment is discretionary and the court's ruling will not be disturbed upon appeal unless there is a clear abuse of judicial discretion.[30] Whenever a plea is defective and needs reformation, the motion and the order of the court granting the motion should point out in what particulars the plea is defective.[31]

The court could not make an order striking defendant's plea without

---

23. Atlantic Coast Line R.R., v. Wallace, 61 Fla. 93, 54 So. 893 (1911).
24. 30 F.S.A. 209 (1941) Common Law Ct. Rules 24.
25. Williams v. Atlantic Coast Line R.R., 56 Fla. 735, 48 So. 209 (1908) (if the allegations are wholly irrelevant then the proper remedy would be for a motion to strike).
26. Cobb v. Trammell, Governor, 73 Fla. 574, 74 So. 697 (1917).
27. Tampa Shipbuilding and Engineering Co. v. Thomas, 131 Fla. 650, 179 So. 705 (1938) (compulsory amendment); Zorn v. Britton, 112 Fla. 579, 150 So. 801 (1933) (motion to strike).
28. Seaboard Air Line R.R., v. Rentz, 60 Fla. 429, 54 So. 13 (1910).
29. Florida East Coast R.R., v. Knowles, 68 Fla. 400, 67 So. 122 (1914).
30. See note 28 *supra*.
31. See note 11 *supra*.

notice to the defendant.[32] Failure of the compulsory amendment to set a time within which to amend will not prevent a dismissal of the cause.[33] However, if the other party has no notice, the court generally will not dismiss the action.

Both the motions to strike and compulsory amendment arose from the common law special demurrer,[34] and are used to attack pleadings which are defective in form. Although the statute creating these motions is ambiguous as to whether or not they are one and the same, the courts have implied that they are distinct remedies and have noted the following characteristics.

(1) *Motion to strike* except for frivolous pleas has been used to eliminate excessive materials from the pleading while the *compulsory amendment* has been used not only to eliminate excessive material from the pleading, but to compel the inclusion of essential facts which were omitted.

(2) The motion to strike has been used for "major" defects in the pleadings whereas the compulsory amendment is used for "minor" defects.

(3) The relief allowed to the movant when the motion to strike is granted may be fatal to the party whose pleadings are defective, in that he may be out of court. On the other hand, the relief allowed under a compulsory amendment seems to be no more drastic than the allowance of costs to the maker of the motion.

The real or fancied distinction between the motion to strike and the compulsory amendment seems to disappear due to the fact that the court is authorized to make an order granting the proper relief respecting the pleading, even though the motion is not entirely appropriate in its terms.[35]

Notwithstanding the fact that the courts by their various decisions have differentiated between the uses and functions of the motion to strike and compulsory amendment, their distinction seems to be predicated upon no real or substantial ground, unless the compulsory amendment were to be considered as a motion for a more definite statement.

There is no clearly defined area between a motion to strike and a compulsory amendment. Florida appears to be the only state which allows a "motion for compulsory amendment." An examination of the statutory language which purportedly created this additional pleading indicated that it might just as readily have been construed to allow a single remedy, namely, a motion to strike with the alternative possibilities of either amending the defective pleading or having the defective pleading stricken. The actual language of the statute is

> . . . the opposite party may apply to the court to strike out or amend such pleading . . .[36]

---

32. See note 12 *supra.*
33. Allen v. Noland, 82 Fla. 301, 89 So. 806 (1921).
34. See note 6 *supra.*
35. See note 10 *supra.*
36. FLA. STAT. § 50.21 (1941).

Florida courts might have, with greater justification, construed that clause to mean that, consonant with the procedure in other jurisdictions, the remedy for attacking pleadings ". . . so framed as to prejudice or embarrass or delay the fair trial of an action . . . ."[37] should be by motion to strike.

The courts have used the compulsory amendment for other purposes as well as its use for a more definite statement, and their failure to rigorously distinguish the basis of their decisions in the use of this motion from the motion to strike has created a situation of vagueness and confusion to the members of the Florida bench and bar. In the opinion of this writer, the distinctions made between a compulsory amendment and a motion to strike are illusory and a result of statutory misinterpretation. As said before, the difficulties that were inherent in the procedure on this point may now be obviated by the adoption of the new rules.

In conclusion, it is to be noted that the general and special demurrer grew out of the common law demurrer; that the special demurrer gave rise to the motion to strike and compulsory amendment; and that today under the new rules those various pleadings have been replaced by Rule 13[38] motion to dismiss, motion for more definite statement, and motion to strike as well as Rules 14[39] and 17[40] which cover sham pleadings and misjoinder and non-joinder. Generally, the motion to dismiss replaces the general demurrer. When a pleading is vague instead of filing a motion for compulsory amendment, you would file a motion for a more definite statement. And as far as the other grounds for compulsory amendment, they would fall within the provisions of the new motion to strike along with the grounds for motion to strike as it formerly existed.

The recent adoption of the Florida Common Law Court Rules, as applied to the motion to strike and motion for compulsory amendment, necessitates an examination of the Federal Rules of Civil Procedure, upon which most of the new rules are based. Rule 13[41] includes motion to dismiss, motion for more definite statement and motion to strike while Rule 14[42] covers sham pleadings. These rules have replaced the demurrer, compulsory amendment and the old motion to strike.

Subsection (e) of Rule 13 deals with a motion for a more definite statement. One of the purposes for the compulsory amendment was to remove the ambiguities that existed in the pleadings, which is in effect the office of the motion for a more definite statement. Rule 13 (e) states:

---

37. *Supra.*
38. 41 So.2d No. 4 (advance sheets Aug. 25, 1949).
39. *Ibid.*
40. *Ibid.*
41. *Ibid.*
42. *Ibid.*

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a reply, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.[43]

The federal courts in interpreting this rule have attempted to define the bounds for its use. In the case of *Slusher v. Jones*,[44] the court said that except where pleadings are so vague or ambiguous as to preclude a fair understanding of the nature of the claims asserted or the relief sought, parties should resort to written interrogatories for securing detailed or particular information in regard to claims asserted against them, rather than the more cumbersome procedure under Rule 12 (e)[45] (motion for more definite statement). Relief under this rule should be limited to allegations in a complaint which are so ambiguous that a defendant is unable to determine the issues he must meet.[46] Where matters relied on in a complaint were averred with sufficient definiteness to enable the defendant to properly prepare a responsive pleading, and the information sought by the motion for more definite statement was peculiarly within the defendant's knowledge, the motion was denied.[47]

In *Westland Oil Co. v. Firestone Tire & Rubber Co.*,[48] the complaint sought to recover for the destruction of property and injury to a business as a result of fire. It alleged that certain gasoline ignited as a result of defendant's failure to perform its obligations preparatory to and during the course of unloading railroad tank cars. These allegations were deemed insufficient and defendant's motion for a more definite statement or for a bill of particulars was granted.

It is seen, therefore, that the motion for more definite statement is properly presented only where the complaint is so vague or ambiguous or contains such broad generalizations that the defendant cannot frame an answer or understand the nature and extent of the charges so as to prepare for trial.[49]

In a 1943 case,[50] the court said that a motion for more definite statement was no longer a court favorite and other methods of obtaining pre-trial dis-

---

43. *Supra* note 38.
44. 3 F.R.D. 168 (E.D. Ky. 1943)
45. Federal Rule 12 (e) is the equivalent of our Rule 13 (e).
46. Wisconsin Alumni Research Foundations v. Vitamin Technologists, 1 F.R.D. 8 (S.D. Cal. 1939); Best Foods v. General Mills, 3 F.R.D. 275 (D.C. Del. 1943). *But cf.* Koss v. Plymouth Rubber Co., 9 F.R.D. 58 (D.C. Mass. 1949).
47. Collins v. C. W. Whittier & Bros., 3 F.R.D. 20 (D.C. Mass. 1942); *cf.* Townsend v. Boston & Maine Railroad, 35 F. Supp. 935 (D.C. Mass. 1940).
48. 3 F.R.D. 55 (D.C.N.D. 1943).
48. 3 F. R. D. 55 (D. C. N. D. 1943).
49. Brinley v. Lewis, 27 F. Supp. 313 (M.D. Pa. 1939); Baker v. Rose, 8 F.R.D. 193 (M.D. Pa. 1948).
50. See note 46 *supra; accord,* Bank of Nova Scotia v. San Miguel, 9 F.R.D. 171 (D.C. Puerto Rico 1949).

covery should be used. However, in 1948 in the case of *McComb v. Hardy*,[51] the court felt that discovery was not always the proper remedy, and that the motion for more definite statement was an immediate and direct way of getting the particulars the party needed to answer the complaint.

The motion to strike in the new rules takes over many of the functions of the compulsory amendment, as well as being used in the same manner as the old motion to strike.[52] Rule 13 (f) deals with the motion to strike and states:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.[53]

The federal rule has been interpreted to hold that any pleading of redundant, immaterial, impertinent, or scandalous matter, or any plea which is not germane to the issues may be stricken on a motion by the adverse party.[54] In *Schenley Distillers Corp. v. Renken*,[55] in an action for debt, the defendant set up a counterclaim which rested solely in tort. The plaintiff's defense to the counterclaim said there was no written agreement and the contract was in violation of the Statute of Frauds. The court said that the plaintiff's defense stated matter which in law constituted no bar to the counterclaim and as regards the issues in controversy, it was irrelevant, immaterial and not responsive to the issues and should be stricken on proper motion. However, although a pleading is redundant, immaterial, impertinent, and literally susceptible to a motion to strike, such motion will not be granted in the absence of some showing of prejudicial harm resulting to the adversary.[56]

The motion to strike is still the proper course of action to remove sham pleas which are defined in Rule 14 [57] as follows:

> (a) If a party deems any pleading or part thereof filed by the other party to be a sham, he may, before the cause is set for trial, move to strike said pleading or part thereof and the court shall hear said motion, taking evidence of the respective parties, and if the motion be sustained, the pleading to which the motion is directed shall be stricken. Default and summary judgment on the merits may, in the discretion of the court, be entered, or he may, for good cause shown, permit additional filings to be filed. (b) The motion

51. 8 F.R.D. 28 (D.C. Mont. 1943). *But cf.* Vernor's Ginger Ale Bottling Corp. of Boston v. Hires-Ideal Bottling Co., 8 F.R.D. 240 (D.C. Neb. 1948).
52. See note 38 *supra*.
53. *Ibid.* The comment by the committee is that Rule 13 will replace Common Law Rule 22, and is taken largely from the Federal Rule 12, 28 U.S.C.
54. Best Foods v. General Mills, 3 F.R.D. 459 (D.C. Del. 1944).
55. 34 F. Supp. 678 (E.D.S.C. 1940); *cf.* Teiger v. Oderwald, 31 F. Supp. 626 (S.D.N.Y. 1940).
56. Vernor's Ginger Ale Bottling Corp. of Boston v. Hires-Ideal Bottling Co., *supra* (where complaint was replete with immaterial allegations); Sinkbeil v. Handler, 7 F.R.D. 92 (D.C. Neb. 1946).
57. 41 So.2d No. 4 (Advance Sheets Aug. 25, 1949).

to strike shall be sworn to and shall set forth fully the facts on which the movant relies and may be supported by affidavit. No traverse of the motion shall be required.[58]

In the case of *Rhea v. Hackney*,[59] the defendant sought to delay final judgment on promissory notes by various pleas so that other collusive judgments could be entered against him which would have priority over the present sought judgment. In holding these pleas to be sham the court said that a plea is considered "sham" when it is inherently false, and from plain conceded facts must have been known to the party interposing it to be untrue. Also, it was said that a plea appearing to be good on its face, may be declared "sham" if it is in fact known to be untrue. The power to strike sham pleadings is indispensable to the court.[60]

In conclusion, with the adoption of the new rules, the technicalities, as illustrated by the distinctions made between a motion to strike and a compulsory amendment, should become non-existent.

JACK A. FALK

58. *Ibid.*
59. 117 Fla. 62, 157 So. 190 (1934).
60. Guaranty Life Ins. Co. of Fla. v. Hall Bros. Press, 138 Fla. 176, 189 So. 243 (1939).