C
130 Md. 454, 100 A. 770

Court of Appeals of Maryland.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE**
v.
MARYLAND PAVEMENT CO. et al.
No. 39.

March 13, 1917.

Appeal from Baltimore Court of Common Pleas; H. Arthur Stump, Judge.

"To be officially reported."

Suit by Mayor and City Council of Baltimore against the Maryland Pavement Company and another. Judgment on demurrer for defendants, and plaintiffs appeal. Reversed, and new trial ordered.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

West Headnotes

Appeal and Error 30 870(5)
30k870(5) Most Cited Cases
Where demurrer to the original declaration was sustained and plaintiff granted leave to amend, which he did, and demurrer was again sustained, the appeal from final judgment entered thereon raised for review the issue whether either of the declarations or both together was sufficient.

Municipal Corporations 268 348
268k348 Most Cited Cases
In action by city on bond of paving contractor, a count, alleging breach of the bond, held insufficient.

Municipal Corporations 268 348
268k348 Most Cited Cases
In action by city on bond of paving contractor, a count, alleging defective work, held sufficient.

Edw. J. Colgan, Jr., Asst. City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellants.
Charles F. Harley, of Baltimore, for appellees.

THOMAS, J.
This appeal is from a judgment of the court of common pleas of Baltimore city in favor of the defendants on a demurrer to the declaration. The mayor and city council of Baltimore brought suit against the Maryland Pavement Company, a body corporate, and the Title Guaranty & Trust Company of Scranton, Pa., a body corporate-

"for that the defendants signed, sealed, delivered, and became bound by a certain writing obligatory, bearing date the 15th day of February, 1905, to secure the performance of a certain contract and specifications between the defendant the Maryland Pavement Company and the plaintiff, in relation to the grading, curbing, and paving with asphalt blocks Evergreen terrace from the north side of Fulton avenue to the south side of Orem's lane, in accordance with Ordinance No. 174, approved December 17, 1904, copies of which said writing obligatory, contract, and specifications are herewith filed, and are hereby referred to as part hereof. The defendant the Maryland Pavement Company entered upon the performance of said contract and specifications, and graded, curbed, and paved the street or terrace aforesaid, but has not fulfilled or performed the terms and provisions of said contract and specifications in respect to the maintenance of said pavement for a period of five years, from its completion and acceptance by the city authorities, although duly notified by the plaintiff of its failure to perform said contract and specifications in that respect. By reason of the failure of said defendant the Maryland Pavement Company to perform the provisions of said contract and specifications in

respect to the maintenance of said pavement, the plaintiff was compelled, at its own cost, to expend in repairing said pavement and maintaining the same a large sum of money, to wit, the sum of $819.23, which said sum the said defendant the Maryland Pavement Company has refused, and still refuses, to pay to the plaintiff in whole or in part. And the plaintiff further says that by reason of the premises and the said breaches of the conditions of said writing obligatory, a right of action has accrued to it to have and demand the sum of $819.23 from the said defendants. And the plaintiff claims $2,000."

The defendants demurred to the declaration, and the court sustained the demurrer. Thereafter the plaintiff filed the following amended declaration, which is designated in the record:

"Amended Declaration. Additional Count. The mayor and city council of Baltimore, a municipal corporation, by S. S. Field, its attorney, sues the Maryland Pavement Company, a body corporate, and the Title Guaranty & Trust Company of Scranton, Pa., a body corporate. For that the defendants the said the Maryland Pavement Company and the Title Guaranty & Trust Company of Scranton, Pa., a body corporate, by their certain writing obligatory, signed, sealed and delivered, and bearing date the 15th day of February, 1905, and which is the same said writing obligatory heretofore filed by the plaintiff in this cause, acknowledged themselves to be justly indebted to the mayor and city council of Baltimore in the sum of $14,110 to the payment of which they bound themselves, their and each of their heirs, executors, and administrators, successors, and assigns, jointly and severally to secure the performance of a certain contract and specifications between the defendant the said the Maryland Pavement Company and the plaintiff, for furnishing all labor and material and doing all the work necessary to grade, curb, and pave, with asphalt blocks, Evergreen terrace, from the north side of Fulton avenue to the south side of Orem's lane, in accordance with Ordinance No. 174 of the mayor and city council of Baltimore, approved December 17, 1904, and in accordance with a certain contract and specifications attached to said writing obligatory as part thereof, and which have been heretofore filed by the plaintiff in this cause and are herewith referred to as part of this declaration. And the plaintiff in fact says that the said the Maryland Pavement Company entered upon the performance of said contract and specifications, and did work and furnished materials in connection therewith, but did not do said work and furnish said materials in accordance with the terms of said contract and specifications, but, on the contrary, the said the Maryland Pavement Company did defective work and furnished defective, inferior, and faulty materials, so that said work so done and said materials so furnished did not, in fact, conform to the character and standard of work and materials contemplated by and provided for in said contract and specifications. And for that by the doing of such defective work and the furnishing of such defective, inferior, and faulty materials, the said work, so done, fell into a state of dangerous disrepair, which the said the Maryland Pavement Company expressly refused to make good and restore, although duly notified by the ***772** plaintiff so to do, and the plaintiff was compelled in repairing said work, and in restoring the same, to expend a large sum of money, to wit, $819.23, which said sum, the said the Maryland Pavement Company has refused and still refuses to pay the plaintiff in whole or in part. And the plaintiff further says that by reason of the premises and the said breaches of the said writing obligatory, a right of action has accrued to it to have and demand the sum of $819.23 from the said defendants. And the plaintiff claims $2,000."

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The defendants also demurred to the amended declaration, and, the court having sustained the demurrer, a judgment was entered in favor of the defendants, from which the plaintiff has appealed.

[1] The first question presented by the record is whether the appeal brings up for review the ruling of the court below on the demurrer to the original declaration, and the answer to that question must depend upon whether the plaintiff must be held to have abandoned and withdrawn his original declaration from the case. It is said in 2 Poe's P. & P. § 189:

> "Where the application is for leave to plead de novo, and under leave granted, new pleas are filed, the former pleas will be held to be withdrawn. But where leave is granted to amend the declaration by filing additional counts, or to amend the pleas by filing additional pleas, the original pleadings will not be thereby withdrawn."

In the case of Ellinger v. Baltimore City, 90 Md. 696, 45 Atl. 884, Judge Jones, speaking for this court, said:

> "The amendment by way of the 'amended declaration' was pleading de novo which withdraws from the case the pleadings for which the new pleading is substituted, according to repeated decisions of this court."

In that case, however, the learned judge, in reviewing what had been done, as the basis of the conclusion stated above, said:

> "From what is disclosed by the record the plaintiffs must be held to have abandoned their case as made by the original narr. and to have waived their right of appeal, or rather not to have put themselves in a position to appeal from the adverse ruling of the court upon the demurrer thereto. They did not submit to judgment upon the demurrer, nor did they simply amend the original narr. as to the matter which the court had found obnoxious to the demurrer, nor did they attempt to incorporate new matter into the original pleading by way of adding additional counts thereto, but proceeded upon the leave of the court which accompanied its ruling, here in question, to file an entirely new declaration complete in itself," etc.

In the case at bar the amendment made by the plaintiff was filed as an "additional count" to the original declaration. It was not filed in the place of, but as a part of and as an addition to, the original narr. An amendment by the filing of an additional count cannot be treated as pleading de novo, for in order to be an additional count it must, of necessity, be a part of the previous pleading, and must be given the same effect as if it had been incorporated in a declaration containing both counts. The demurrer to the original declaration having been sustained, judgment for the defendants would have been entered but for the leave granted to the plaintiff to amend. The plaintiff amended by filing an additional count to the declaration, and, the defendants having again demurred, and the demurrer having been sustained, final judgment was entered for the defendants. This judgment could not have been entered except upon the theory that both counts were defective, and the appeal from this final judgment brings up for review the rulings of the court on demurrers to the pleadings adverse to the party appealing. 2 Poe's P. & P. § 826, p. 1072, and cases cited in note 4; Kendrick v. Warren, 110 Md. 76, 72 Atl. 465. We must therefore, on the present appeal, determine the sufficiency of both of the counts of the declaration.

The bond sued on, the contract between the Maryland Pavement Company and the city, and the specifications are filed with the declaration as a part thereof. By the contract the Maryland Pavement Company agreed "to furnish all of the material and do all the work necessary to pave Evergreen terrace from N. S. Fulton avenue to S. S. Orem's lane with asphalt blocks under the

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authority of Ordinance No. 174, etc., and in accordance with attached specifications," etc., which were made a part of the contract, and which provided that:

> "None but the best materials of the several descriptions shall be used, and all materials shall be equal in every respect to the requirements of the specifications and the samples furnished."

The condition of the bond is as follows:

> "Now the condition of this obligation is such, that if the said the Maryland Pavement Co. shall comply in all respects with the terms of said contract and shall maintain the pavement for five (5) years after its completion and acceptance by the city engineer, and shall defend, indemnify and save harmless the mayor and city council of Baltimore against any claim due to using any form of material or method of manufacture or machinery which is patented or claimed to be patented, and against any suit or suits, loss, damage or expense to which the said mayor and city council of Baltimore may be subjected by reason of any default or negligence, want of skill or care on the part of said Maryland Pavement Co. its agent, or employés, or any subcontractor, in or about the performance and execution of said work; then this obligation is to be null and void, otherwise to be and remain in full force and virtue in law."

The only objection urged by the appellees to the declaration is that neither of the counts assign the breaches of the bond relied on with sufficient certainty and precision. One of the conditions of the bond is that:

> "The Maryland Pavement Co. shall comply in all respects with the terms of said contract and shall maintain the pavement for five (5) years after its completion and acceptance by the city engineer."

And the breach assigned in the first count is that:

> "The defendant the Maryland Pavement Company entered upon the performance of said contract and specifications, and graded, curbed, and paved the street or terrace aforesaid, but has not fulfilled or performed the terms and provisions of said contract and specifications in respect***773** to the maintenance of said pavement for a period of five years, from its completion and acceptance by the city authorities."

It is said in 1 Chitty's Pleading, page 332, that an averment that:

> "The defendant 'did not perform the said agreement,' is insufficient, because 'did not perform his agreement' might involve a question of law, and also because the object of pleading is to apprise the defendant of the cause of complaint, so that he may prepare his plea and defense and evidence in answer. And yet, as the defendant must know in what respects he has or not performed his contract, any great particularity, it should seem, ought not, in principle, be required. Where the contract was specific to do or forbear some particular act, it is in general sufficient to assign the breach in the words of the contract."

In 2 Chitty's Pleading, 559a, it is said:

> "Breaches of different covenants * * * may readily be framed, according to the particular circumstances of each case, and in general may be in the negative of the words of the covenant."

It is said in 3 Ency. of Plea. Prac. 656:

> "An assignment of a breach by merely negativing the words of the condition is good on general demurrer, whenever such assignment necessarily shows a breach."

Mr. Poe says in volume 2 of his work on Pleading and Practice, § 556:

> "After the proper statement of the contract and its consideration should come an averment of the breach or breaches complained of. These should be stated with certainty, and may generally be assigned, in the words of the

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contract, either negatively or affirmatively, or in words which are coextensive with the import and effect of it."

In the case of Le Strange v. State, 58 Md. 26, Judge Alvey, speaking for the court, said:

"The breach of the condition of the bond is certainly assigned in very general terms. It is alleged that the injunction was not prosecuted with effect, but that the same had been dissolved by order of the court. The truth of this allegation is admitted by the demurrer, and this, of course, constituted a breach of the condition of the bond. And this short form of assigning a breach of the condition of an appeal or an injunction bond has been expressly sanctioned by this court, in Karthaus v. Owings, 6 Har. & J. 134, same case on second appeal, 2 Gill & J. 430, 441, and Burgess v. Lloyd, 7 Md. 178, 195. In Karthaus v. Owings, as reported in 2 Gill & J. 430, the court said, 'We think the breach was properly assigned by a negative averment that he [the defendant] had not, in the language of the condition of the bond, "prosecuted his suit with effect." In assigning breaches the general rule is that they may be assigned by negativing the words of the covenant. The exception to this rule is that when such general assignment does not necessarily amount to a breach, the breach must be specially assigned.'"

See, also, Am. Bonding & Trust Co. v. Milwaukee Co., 91 Md. 733, 48 Atl. 72; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775; Canton Bank v. Am. Bonding Co., 111 Md. 41, 73 Atl. 684, 18 Ann. Cas. 820.

[2] If the plaintiff in the first count of the declaration had negatived the words of the bond, and alleged that the Maryland Pavement Company did not "maintain the pavement for five years after its completion and acceptance by the city engineer," it would, under the authorities cited, have been a sufficient assignment of the breach of that condition of the bond. But the first count of the declaration does not contain such an averment. It alleges as the breach of that condition of the bond that the Maryland Pavement Company "has not fulfilled or performed the terms and provisions of said contract and specifications in respect to the maintenance of said pavement for a period of five years, from its completion and acceptance by the city authorities." This is a departure from the terms of the bond, which required the contractor to maintain the pavement for five years after its completion and acceptance by the city engineer.

[3] One of the conditions of the bond was that the contractor "shall comply in all respects with the terms of said contract," and the contract required the contractor to furnish all the material and to do all the work in accordance with the attached specifications, which specified, among other things, that none but the best materials of the several descriptions therein contained should be used. The second count alleges as the breach of the bond relied on that:

The contractor "did not do said work and furnish said materials in accordance with the terms of said contract and specifications, but on the contrary, the said the Maryland Pavement Company did defective work, and furnished defective, inferior, and faulty materials, so that said work so done and said materials so furnished did not, in fact, conform to the character and standard of work and materials contemplated by and provided for in said contract and specifications."

In United Surety Co. v. Summers, supra, the contract provided:

"That the said contractor does hereby covenant, promise and agree to furnish good and satisfactory materials in and upon said building and to do the work in a good, workmanlike, substantial and efficient manner, and that all of said materials and work shall be satisfactory to the said owners, architects and builders, J. H.

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> Walsh & Brother, it being understood that said work and materials shall be conditioned absolutely upon the satisfaction of said owners, said architects and builders."

The first count in the declaration alleged the breach of the contract as follows:

> "And the plaintiff in fact says that the said Engelbert C. Lawrence entered upon the performance of his said hereinbefore recited contract with the plaintiff of the 17th of May, 1906, and did work and furnish materials in and about the building therein mentioned, but did not well and truly keep and perform his said contract, but on the contrary broke the same in the particulars following, to wit, that he did not do his work in a good, workmanlike, substantial and efficient manner, nor did he furnish good and satisfactory material in and upon said building, and that the work and materials, so far as the same were done and furnished by him, were not satisfactory to J. H. Walsh & Brother, the architects and builders named in said contract," etc.

In that case the narr. did not allege in what respect the materials were unsatisfactory or the work was defective, but this court, on appeal from the judgment of the court below, held that the first count was good. It is true, in that case the narr. also ***774** alleged that the work and materials furnished by the contractor were not satisfactory to the architects and builders, but it did not allege in what respect they were not satisfactory. In the case at bar we think the breach assigned in the second count of the declaration is fairly within the terms of the bond, and equally as definite and certain as the breach alleged in the first count of the declaration in United Surety Co. v. Summers, supra.

It follows from what has been said that the first count in the declaration was bad, but that the second count was sufficient. We must therefore reverse the judgment of the court below.

Judgment reversed, with costs, and new trial awarded.

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