[Cite as *Betz v. Penske Truck Leasing Co., L.P.* , 2012-Ohio-3472.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Florence Betz,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-982 (C.P.C. No. 10CVH-05-7932)
Penske Truck Leasing Co., L.P.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 2, 2012

Steve J. Edwards, for appellant.

Ice Miller, LLP, Robert M. Robenalt and *Jennifer McDaniel*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiff-appellant, Florence Betz ("Betz"), appeals the decision of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Penske Truck Leasing Co., L.P. ("Penske"). Betz also appeals the trial court's denial of her motions for discovery sanctions and leave to file an amended complaint.

{¶ 2} This case is a dispute over a supplemental life insurance policy purchased by Betz's deceased husband as part of his employment benefits. Betz brought claims for breach of contract and breach of an oral agreement against Penske. Penske claimed that the life insurance policy was governed by the federal Employment Retirement Income and Securities Act, 29 U.S.C.A. 1001 et seq. ("ERISA"), and that it was not the proper

party defendant. The trial court granted summary judgment in favor of Penske on the grounds that Betz sued the wrong party. Additionally, the trial court refused to sanction Penske for alleged discovery violations and denied Betz's motion to file an amended complaint. For the following reasons, we affirm the trial court's decision not to issue discovery sanctions, we reverse the trial court's denial of Betz's motion to file an amended complaint, and we reverse the trial court's summary judgment decision.

{¶ 3} On appeal, Betz assigns the following as error:

> 1. The trial court erred to the prejudice of Plaintiff-Appellant in granting Penske's Motion for Summary Judgment because there were genuine issues of material fact and because the trial court drew inferences in favor of the moving party.
>
> 2. The trial court erred to the prejudice of Plaintiff-Appellant in denying her motion for discovery sanctions.
>
> 3. The trial court erred to the prejudice of Plaintiff-Appellant in denying her motion to file a First Amended Complaint.

I. Factual and Procedural Background

{¶ 4} Betz is the surviving spouse of Charles Betz, who was employed as a truck driver for Penske and died in September 2009. In 2006, Penske adopted a Group Insurance Contract ("the Plan") which was issued by Prudential Insurance Company of America ("Prudential") as the insurance provider. Under the Plan, Penske is designated as the plan administrator and delegate its fiduciary duties to Prudential, the claims administrator.

{¶ 5} In 2006, Penske offered the decedent employment benefits which he elected to accept. One of these benefits included life insurance. This offer was renewed each year, and each year the decedent elected to purchase life insurance. All written information concerning life insurance was given to the decedent in a yearly Associate Benefit Guide. This Associate Benefit Guide was prepared by Penske, not Prudential, and indicated what level of insurance the decedent had elected with an asterisk. Charles Betz had elected life insurance marked at "3 x Pay." (R. 47; exhibit A.) The meaning of the term "Pay," which determined what amount the decedent's spouse was entitled to receive under this agreement, is at the heart of the dispute.

{¶ 6} After Charles Betz's death, Prudential deposited $119,000 plus $120.41 in interest in an account for Betz. Prudential interpreted the term "Pay" in the Associate Benefit Guide to mean the same thing as "Benefits Compensation as of 06/30/2008: $39,697.84," which resulted in, according to Prudential's calculations, a $119,000 payout. (R. 47; Exhibit A.) Betz, however, claims that "Pay" meant the amount the decedent received on his 2008 W-2, which was $73,885.40. This would result in "3 x Pay" meaning a $221,656.20 payout.

{¶ 7} Betz filed a complaint for breach of contract and breach of an oral agreement on May 25, 2010. Discovery issues arose during litigation and Betz filed a motion for sanctions. Penske filed a motion for summary judgment on March 1, 2011. The first deposition of a Penske representative occurred on May 2, 2011. On July 5, 2011, Betz filed a motion to amend her complaint adding claims for negligent misrepresentation, promissory estoppel, fraud, and equitable estoppel. The trial court issued its decision on September 8, 2011 denying sanctions and denying Betz's motion to file an amended complaint. The trial court granted Penske's motion for summary judgment. Betz timely appealed.

II. Summary Judgment

{¶ 8} In her first assignment of error, Betz asserts that the trial court erred in granting Penske's motion for summary judgment because there are genuine issues of material fact and because the trial court improperly drew inferences in favor of Penske.

{¶ 9} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

> [T]he pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

{¶ 10} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621,

629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978). In the summary judgment context, a "material" fact is one that might affect the outcome of the suit under the applicable substantive law. *Turner v. Turner*, 67 Ohio St.3d 337, 340, (1993). When determining what is a "genuine issue," the court decides if the evidence presents a sufficient disagreement between the parties' positions. *Id*. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. *Id*. Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992).

{¶ 11} De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party are found to support it, even if the trial court failed to consider those grounds. See *Dresher*; *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 12} As noted above, Betz presented two claims in her complaint. First was a claim for a breach of a written contract. Betz contends that the Associate Benefit Guide was a written agreement for life insurance, that Betz performed all conditions of the agreement and that Penske breached by failing to pay three times the decedent's pay of $73,885.40 or $221,656.20. Second was a claim for a breach of an oral agreement in which Betz alleges there was an oral agreement between Betz and Penske with the same terms as those set forth in the first claim. Again, Penske was alleged to have breached the contract.

A. The Impact of ERISA

{¶ 13} In its motion for summary judgment, Penske characterized Betz's complaint as a claim for additional life insurance benefits under an ERISA governed plan. Penske stated in the first sentence of its motion for summary judgment that "[t]his case involves Plaintiff, Florence Betz's, claim for additional life insurance benefits under an ERISA governed insurance plan." (R. 25.) The full significance of this statement was not argued by Penske before the trial court. Penske asserted that a claim under an ERISA plan must be pursued against the claim administrator, not Penske. Penske reasoned that because it had expressly delegated its fiduciary responsibilities to Prudential, only Prudential had the discretion under federal law to interpret the terms of the plan and calculate the benefits. Thus, Penske argued, Prudential was therefore the proper defendant in this litigation. Alternatively, Penske argued Betz was not entitled to additional monies because Prudential, as claims administrator, had the sole discretion to interpret the terms of the group contract and to determine eligibility for benefits, and that its decision was neither arbitrary nor capricious.

{¶ 14} In response to Penske's motion for summary judgment, Betz argued ERISA had no applicability because she was not seeking additional benefits from Prudential. She was not challenging Penske in its role as plan administrator. Nor was she challenging Prudential for breach of the insurance policy. She argued that her state law claims were simply for breach of contract between Penske, who offered life insurance at three times the decedent's pay, and her husband, who purchased the insurance from Penske. Betz contended that she had no involvement in any dispute Penske might have against Prudential for providing a lesser amount of insurance.

{¶ 15} The trial court adopted Penske's characterization of Betz's claims, and looked to the substantive law governing claims under ERISA. The issue of whether ERISA pre-empted Betz's state law claims was not included in Penske's answer to the complaint. Nor was it part of the motion for summary judgment, and it was not part of the trial court's analysis. The trial court simply concluded that Betz was ultimately challenging the calculation of the benefit amount she received from Prudential as claims administrator of the subject plan. Since Penske delegated its fiduciary responsibilities

relating to claims for benefits and appeals to Prudential, the trial court found that Penske was not a proper party, was not liable for additional insurance benefits, and that Penske was entitled to judgment as a matter of law.

{¶ 16} In order to determine if summary judgment should have been granted, we must determine whether the life insurance agreement between the decedent and Penske is governed by ERISA, and whether Betz's state law claims exist independently of ERISA. Penske asserts that all of the insurance benefits offered to its employees are covered by ERISA. Penske introduced a copy of the insurance plan, a summary plan description, and an informal benefits summary to support its position that the Plan was governed by ERISA and that Penske was not the proper party defendant. The trial court relied on these documents and the Associate Benefit Guide in concluding that Penske was not a proper party defendant and that Prudential's calculations of the benefit due Betz were accurate.

{¶ 17} Betz, on the other hand, argued that there were two separate agreements; one between the decedent and Penske, based on the Associate Benefit Guide, and a separate agreement between Penske and Prudential to cover the cost of the first agreement. Betz argued that the agreement between Penske and the decedent was a separate contract not covered by ERISA. Betz also presented evidence that the decedent never received any documents prepared by Prudential. Instead, the only document he received in connection with his supplemental life insurance was the Associate Benefit Guide prepared by Penske.

{¶ 18} The question of whether a set of employee benefits is a plan properly governed by ERISA is not easily answered. Under federal law, the existence of an ERISA plan is a question of fact, to be answered in light of all the surrounding circumstances and facts from the point of view of a reasonable person. *Thompson v. Am. Home Assur. Co.*, 95 F.3d 429, 434 (6th Cir.1996).

{¶ 19} ERISA, 29 U.S.C.A. 1001 et seq., is a comprehensive federal law governing employee benefits. In pertinent part, ERISA defines an employee benefit welfare plan as "any plan * * * established or maintained by an employer * * * for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) * * * benefits in the event of * * * death." 29 U.S.C.A. 1002(1). If a policy is

an ERISA plan, than many state law claims are pre-empted, and federal common law of ERISA applies.

{¶ 20} A three-part test set forth in *Thompson* is normally used to determine if there is an ERISA plan. *Kolkowski v. Goodrich Corp.*, 448 F.3d 843, 848 (6th Cir.2006). First, the court must apply the so-called "safe harbor" regulations established by the Department of Labor to determine whether the program was exempt from ERISA. Second, the court must look to see if there was a "plan" by inquiring whether "from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Internatl. Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 297 (6th Cir.1991). Finally, the court must ask whether the employer "established or maintained" the plan with the intent of providing benefits to its employees. *Thompson* at 434-35.

{¶ 21} First, the Department of Labor regulations set out a "safe harbor" provision that excludes an employee insurance policy from ERISA coverage if: (1) the employer makes no contribution to the policy; (2) employee participation in the policy is completely voluntary; (3) the employer's sole functions are, without endorsing the policy, to permit the insurer to publicize the policy to employees, collect premiums through payroll deductions and remit them to the insurer; and (4) the employer receives no consideration in connection with the policy other than reasonable compensation for administrative services actually rendered in connection with payroll deduction. *See* 29 C.F.R. 2510.3-1(j).

{¶ 22} In the case at bar, Penske does not qualify under the safe harbor regulations because it cannot meet the first criterion. The summary plan description states that Penske pays the full premium cost of the basic life and AD&D insurance, and supplemental insurance up to 1.5 times the annual benefits compensation. Thus, Penske contributes to the policy and is not exempt under ERISA by means of the safe harbor regulations.

{¶ 23} For the second prong of the *Thompson* test, we must look to see if there was a "plan" by inquiring whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, the class of beneficiaries, the source of financing, and procedures for receiving benefits. *Thompson* at 434-35.

{¶ 24} Looking to the case law, we see that through ERISA's broad scope, an employer can establish an ERISA plan "rather easily." *Internatl. Resources* at 297. The ERISA definition of "employee welfare benefit plan" specifically allows that ERISA plans may be established "through the purchase of insurance or otherwise." 29 U.S.C.A. 1002(1). Even if an employer does no more than arrange for a "group-type insurance program" it can establish an ERISA plan, unless it is a mere advertiser who makes no contributions on behalf of its employees. 29 C.F.R. 2510.3-1(j); *Credit Managers Assoc. of Southern California v. Kennesaw Life and Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir.1987).

{¶ 25} Here, it is undisputed that Penske arranged for a group life insurance policy for its employees, and, as discussed above, contributed some amount to the premiums. The Life Insurance Program Summary Plan Description in combination with administrative information section were intended to meet ERISA's summary plan description requirements.

{¶ 26} For further guidance on determining whether a reasonable person could ascertain the intended benefits, the class of beneficiaries, the source of financing, and procedures for receiving benefits, courts are permitted to look to sources outside the plan, fund, or program—*e.g.*, an insurance company's procedure for processing claims. *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir.1982).

{¶ 27} Looking at all the documents produced, including the plan, the summary of benefits, and the Associate Benefit Guide, we find that a reasonable person could ascertain the intended benefits, the class of beneficiaries, the source of financing, and procedures for receiving benefits. The second prong of the *Thompson* test shows that a plan does exist.

{¶ 28} The third prong of the *Thompson* test can easily be found as it is clear that Penske established or maintained the life insurance plan with the intent of providing benefits to its employees.

{¶ 29} Using the three prong *Thompson* test, we find that the life insurance offered to the decedent by Penske is an ERISA plan covered by the federal statutes as assumed by the trial court.

B. Pre-emption

{¶ 30} ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." 29 U.S.C.A. 1144(a). "ERISA preempts state law and state law claims that 'relate to' any employee benefit plan as that term is defined therein." *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1275 (6th Cir.1991); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). "The phrase 'relate to' is given broad meaning such that a state law cause of action is preempted if 'it has connection with or reference to that plan.' " *Cromwell* at 1275. Congress' intent in enacting ERISA was to completely pre-empt the area of employee benefit plans and to make regulation of benefit plans solely a federal concern. *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir.1987).

{¶ 31} The Supreme Court of the United States has consistently emphasized the expansive sweep of the preemption clause. *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 730 (1985). "Thus, only those state laws and state law claims whose effect on employee benefit plans is merely tenuous, remote or peripheral are not preempted." *Cromwell* at 1276.

{¶ 32} Summarizing some of the facts around the case most strongly in favor of the nonmoving party, we see that Penske and the decedent had an agreement for life insurance. The only piece of paper that was ever received by the decedent was the annual Associate Benefit Guide that was prepared by Penske. Penske's intention was that employees could rely on their Associate Benefit Guide. (R. 47.) Penske had contracted with Prudential to provide life insurance and Prudential had prepared many documents related to the benefit plan including the Plan and the Summary Plan. These documents, prepared by Prudential, were intended to act as a summary plan description. The summary plan description is a statutorily required document that must be given to plan beneficiaries under ERISA. 29 U.S.C.A. 1022(a). The Associate Benefit Guide fails as a summary plan description as it lacks many basic requirements laid out in ERISA. 29 U.S.C.A. 1022(b).

{¶ 33} Betz's state law claims relate at least peripherally to the life insurance policy purchased by the Plan sponsor, Penske, to provide benefits for its employees. Thus, it would appear that Betz's state law claims are pre-empted under ERISA.

C. ERISA as a Waivable Affirmative Defense.

{¶ 34} The argument that Betz's state claims are pre-empted under ERISA was not developed before the trial court and is first mentioned in Penske's brief on appeal. Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997). A party who fails to raise an argument in the court below waives his or her right to raise it on appeal. *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278 (1993). *See also Gentile v. Ristas*, 160 Ohio App.3d 765, 787, 2005-Ohio-2197, ¶ 74 (10th Dist.). An appellate court must, therefore, limit its review of the case to the arguments contained in the record before the trial court. *Litva v. Richmond*, 172 Ohio App.3d 349, 2007-Ohio-3499, ¶ 18 (7th Dist.).

{¶ 35} An examination of issues presented to the trial court shows that Penske's summary judgment motion was based on the theory that Penske is not the proper party defendant for a claim based on an ERISA governed policy. There was no mention of pre-emption. Betz did not agree with Penske's characterization of her claims and stated repeatedly in the trial court that she was not bringing a claim under ERISA but rather a claim under state law for a breach of contract. (R. 47.) However, we cannot consider Betz's state law claims if ERISA would pre-empt such claims.

{¶ 36} Under federal law interpreting ERISA, pre-emption of state law claims is an affirmative defense that is waived if not timely pled. *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir.1986). This view has been adopted in at least one district court in the Sixth Circuit. *Old Line Life Ins. Co. of Am. v. Garcia, (*E.D. Mich.), No. o2-40239, (Nov. 19, 2007), citing *Allstate Ins. Co. v. My Choice Med. Plan for LDM Technologies, Inc.*, 298 F.Supp.2d 651, 655-56 (E.D. Mich.2004) (enumerating other circuits that have held ERISA pre-emption waived if not raised in a responsive pleading). This court has held likewise. *Brown v. Zurich*, 150 Ohio App.3d 105, 2002-Ohio-6099, ¶ 33 (10th Dist.) (failure to raise ERISA pre-emption before the trial court constitutes a waiver of the issue).

{¶ 37} Therefore, we conclude that ERISA pre-emption is an affirmative defense that may be waived if not timely asserted. Here, the issue of ERISA pre-emption was raised for the first time on appeal. Allowing Penske to raise the defense at this stage of the litigation would result in unfair surprise, prejudice, and delay. Accordingly, we conclude that Penske may not assert ERISA pre-emption as an affirmative defense to Betz's breach of contract claims. Once ERISA pre-emption is removed from the equation, there is no reason why Betz cannot proceed on her state law breach of contract claims against Penske.

{¶ 38} If Betz does not prevail on her theory that "Pay" means the gross pay on the decedent's W-2 form, there is also an issue in the benefit calculations that potentially could result in an erroneous payout. Laying aside the question of whether the right party has been sued, fundamental fairness would dictate that under the Plan Betz should receive the amount specified in the Plan. The Plan specifically states on page 6 under Benefit Amounts when calculating benefit amounts "[i]f this amount, [the employee's annual earnings], is not a multiple of $1,000, it will be rounded to the next higher multiple of $1,000." The decedent's 2009 Associate Benefit Guide sets forth "benefits compensation" of $39,697.84, which Penske argues is the actual "Pay" of the decedent. (R. 47.) $39,697.84 multiplied by 3 is $119,093.52. According to the Plan, $39,697.84 should have been "rounded to the next higher multiple of $1,000." Thus, under Prudential's own plan documents, it should have paid out $120,000 plus the correct amount of interest on that amount.

{¶ 39} The first assignment of error is sustained.

III. Discovery Sanctions

{¶ 40} Betz's second assignment of error asserts that the trial court erred in denying her Civ.R. 37 motion for discovery sanctions against Penske. We find that the trial court was within its discretion in failing to grant discovery sanctions.

{¶ 41} A trial court has broad discretion when imposing discovery sanctions. A reviewing court shall review these rulings only for an abuse of discretion. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254 (1996), syllabus. "[T]he trial court must consider the posture of the case and what efforts, if any, preceded the noncompliance and then

balance the severity of the violation against the degree of possible sanctions, selecting that sanction which is most appropriate." *Russo v. Goodyear Tire & Rubber Co.*, 36 Ohio App.3d 175, 178 (9th Dist.1987).

{¶ 42} In determining a suitable sanction, a trial court should consider: (1) the history of the case; (2) all the facts and circumstances surrounding the noncompliance; (3) what efforts, if any, the faulting party made to comply; (4) the ability or inability of the faulting party to comply; and (5) any other relevant factors. *Billman v. Hirth*, 115 Ohio App.3d 615, 619 (10th Dist.1996). Taking into account the background of the noncompliance, the trial court must balance the severity of the violation against the degree of possible sanctions and select the sanction that is most appropriate. *Huntington Natl. Bank v. Zeune*, 10th Dist. No. 08AP-1020, 2009-Ohio-3482, ¶ 27. A violation may call for different degrees of sanctions under different circumstances. *Russo* at 178.

{¶ 43} The reviewing court, in looking at the sanctions so imposed, cannot substitute its judgment for that of the trial court. Thus, the appropriateness of the choice of the sanction imposed is reviewable to the extent that the trial court may have abused its discretion by being arbitrary in selecting too harsh or too lenient a sanction. *Id.* at 179.

{¶ 44} An abuse of discretion connotes more than an error of judgment; it implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong. *Pembaur v. Leis*, 1 Ohio St.3d 89 (1982); *In re Ghali*, 83 Ohio App.3d 460, 466 (10th Dist. 1992).

{¶ 45} The trial court noted in its decision denying discovery sanctions that a Penske representative and Penske's counsel failed to appear at a properly noticed deposition. The trial court also noted that there were delays and difficulty in scheduling. Penske's counsel mistakenly placed the wrong date on his calendar. After the missed deposition, there were efforts by Penske's counsel to reschedule a deposition. The trial courts, as well as accepting memoranda, conducted a status conference to address the issue.

{¶ 46} The trial court found that a default judgment and sanctions against Penske were unwarranted and that an order compelling the deposition of Penske's representative and extending the case schedule was more appropriate. We find that the trial court did not abuse its discretion in issuing this order. The trial court made note of the factors

surrounding the deposition. The trial court's decision cannot be read as unreasonable, arbitrary, or capricious.

{¶ 47} The second assignment of error is overruled.

IV. The Amended Complaint

{¶ 48} Betz's third assignment of error asserts that the trial court abused its discretion in denying her motion to file a first amended complaint. We agree. The trial court failed to take into account the delay caused by Penske, and the lack of prejudice caused by additional state claims. The trial court also concluded that Penske was not a proper party defendant.

{¶ 49} The trial court found that Betz had unduly delayed seeking to amend her complaint and that to allow an amendment would be too prejudicial to Penske. The court also found that since Penske was not a proper party defendant, any additional claims against Penske were unwarranted.

{¶ 50} Civ.R. 15(A) provides that a party may amend its pleading by leave of court and that such leave "shall be freely given when justice so requires." The decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99 (1999). While the rule allows for liberal amendment, motions to amend pleadings pursuant to Civ.R. 15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Id*. Time alone is generally an insufficient reason for the court to deny leave to amend; the primary consideration is whether there is actual prejudice to the defendants because of the delay. *Schweizer v. Riverside Methodist Hosp.*, 108 Ohio App.3d 539, 546 (10th Dist. 1996). If a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading. *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 123 (1991).

{¶ 51} The trial court cited undue delay in denying the motion. Penske took about three months to answer Betz's interrogatories and requests of production. Further, Betz continually tried to depose a Penske representative for many months. This deposition was continued multiple times at the behest of Penske and in one instance Penske failed to

attend the scheduled deposition. This critical deposition did not occur until May 2, 2011 nearly one year after the complaint was filed and six months after interrogatories were answered. To find that Betz had unduly delayed seeking to amend her complaint is unreasonable.

{¶ 52} The trial court also indicated that the amended complaint would be too prejudicial to Penske. Since Penske's theory of defense was that they were not a proper party defendant under ERISA, additional state law claims would not require additional work on Penske's behalf as to that theory.

{¶ 53} The trial court further relies on its conclusion that Penske was not a proper party defendant and therefore any additional claims are unsupported. As discussed above, Betz's state claims against Penske were not pre-empted by ERISA, and there remains an issue of interpretation of the terms of the contract. The poor drafting of the Associate Benefit Guide and subsequent reliance on that document by Penske may have exposed Penske to liability. These are questions of law and fact that have yet to be resolved.

{¶ 54} As such, the trial court abused its discretion in denying Betz's motion to amend her complaint. The trial court should allow Betz to amend her complaint in light of our analysis.

{¶ 55} The third assignment of error is sustained.

V. Conclusion

{¶ 56} The first and third assignments of error are sustained and the second assignment of error is overruled. This case is remanded to the trial court to allow Betz to amend her complaint, to address Betz's state law claims, either as renewed motions for summary judgment or trial and, if necessary, address the proper calculation of benefits.

Judgment affirmed in part
and reversed in part; case remanded.

BRYANT and CONNOR, JJ., concur.