

[Cite as *Gibson v. Combs, Reitz & Co., PLL*, 2004-Ohio-919.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

BRADLEY M. GIBSON

CASE NUMBER 1-03-67

PLAINTIFF-APPELLANT

v.

O P I N I O N

COMBS, REITZ & COMPANY, ET AL.

DEFENDANTS-APPELLEES

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: March 1, 2004.

ATTORNEYS:

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For Appellant.**

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For Appellees.

JUERGEN A. WALDICK
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For Appellees.

Bryant, J.

{¶1} Plaintiff-appellant Bradley M. Gibson (“Gibson”) brings this appeal from the judgment of the Court of Common Pleas of Allen County ordering distribution of a partnership’s assets equally to the three partners.

{¶2} In 1989, Gibson, Dan Combs (“D. Combs”), Rick Combs (“R. Combs”), Lee MacWhinney (“MacWhinney”), and John Rietz (“Rietz”) entered into a partnership of an accounting practice. D. Combs and Reitz contributed the good will and the clients of their current accounting corporation. Gibson, R. Combs, and MacWhinney each contributed \$30,000 in cash. On August 5, 1992, Reitz left the partnership. As his share of the partnership, Reitz was paid money, received a list of clients, received real estate, office furniture and equipment upon

his departure. In August of 1994, MacWhinney left the partnership and received his entire interest in the data services part of the partnership.

{¶3} In April of 1999, the remaining partners held a meeting. At the meeting, D. Combs and R. Combs (“the Combs”) informed Gibson that they wanted him to leave the partnership. Various negotiations occurred in an attempt to buy out Gibson’s share of the partnership, but no agreement was reached. On June 28, 1999, the Combs sent Gibson a notice of dissolution as to the partnership and formed a new partnership without Gibson. No payment was made to Gibson for his share of the partnership interest. Gibson then filed a complaint against the Combs as well as the corporation which was a partner. The complaint was voluntarily dismissed on May 8, 2001. On May 25, 2001, Gibson filed a complaint for accounting, for declaratory judgment, and for damages for breach of fiduciary duties. The Combs filed their answers on August 1, 2001. A bench trial was scheduled for December 31, 2001, and was vacated¹. A new trial date was set for April 4, 2002.

{¶4} On January 22, 2002, Gibson’s counsel sought leave and was granted leave to withdraw. Gibson obtained new counsel who filed an appearance

on February 14, 2002. On February 25, 2002, counsel filed a motion to amend the original complaint. The trial court denied this motion on March 12, 2002, citing the previous voluntary dismissal as grounds for the denial. The trial court held that since Gibson had voluntarily dismissed his first lawsuit, he should not be granted leave to amend the second lawsuit.

{¶5} On March 26, 2002, the trial court granted the Combs' motion to bifurcate the trial. The trial court also denied Gibson's motion for a continuance based upon his illness. Gibson subsequently supplied the trial court with additional evidence, including a statement from his doctor that he was gravely ill and would be unable to attend the April 4, 2002 trial. The trial court granted a continuance until August 5, 2002. At trial, the Combs reasserted their Civ.R. 12(B)(6) motion to dismiss the first two claims for failure to state a claim upon which relief could be granted. The trial court took the matter under advisement and proceeded with the trial. On September 4, 2002, the trial court granted the Civ.R. 12(B)(6) motion as to the first two claims in the complaint. However, the trial court denied the motion as to the third claim. This judgment was appealed to

¹ Gibson points out that he requested a jury trial in his complaint.

this court. This court dismissed the appeal as being untimely because the third claim remained.

{¶6} On September 10, 2003, the trial court entered judgment in favor of Gibson on the third claim. The trial court, however, ordered Gibson to pay all costs. It is from these entries that Gibson appeals and raises the following assignments of error.

The trial court erred in denying [Gibson's] motion for leave to amend his complaint by journal entry filed March 12, 2002.

The trial court erred in granting [the Combs'] motion for dismissal of [Gibson's] causes of action pursuant to Civil Rule 12(B)(6) in its September 4, 2002, judgment entry.

{¶7} In the first assignment of error, Gibson claims that the trial court erred in not permitting him to amend his complaint. Civ.R. 15(A) states that a party may amend his pleadings by leave of court after an answer is filed. This leave is to be freely given. The facts in this case indicate that new counsel was obtained on February 14, 2002. Counsel reviewed the pleadings and determined that there were some inadequacies in the pleading, namely that the original complaint failed to set forth allegations of wrong doing against one of the partners. Eleven days after counsel was obtained, the motion to amend the

complaint was filed. The motion did not add new parties or change the basis of the claims. The shareholders in the corporation were the same individuals in the partnership. Thus, no prejudice would be suffered by permitting the amendment. The denial of the motion to amend the complaint forced Gibson to dismiss a defendant from the suit because he had failed to allege any wrongdoing or request a remedy from that defendant in the complaint. Thus, the plaintiff was prejudiced by the decision. The trial court's reason for denying the amendment was because it believed that Gibson had already had one opportunity to amend when he voluntarily dismissed his first complaint and that the trial court did not find any support for the claims against the corporation. The interests of justice would permit the amendment of the complaint, especially given the substitution of counsel that occurred in this case. The motion to amend was made more than a month prior to trial and would not present any prejudice to the defendants. Thus, the trial court erred in denying the motion to amend the complaint. The first assignment of error is sustained.

{¶8} In the second assignment of error, Gibson claims that the trial court erred by granting the Combs' Civ.R. 12(B)(6) motions after the trial. Since this court found that the trial court erred in denying the motion to amend the

complaint, this issue is moot. Gibson's new complaint may state a claim under which relief could be granted. Thus, this court need not consider this assignment of error at this time.

{¶9} The judgment of the Court of Common Pleas of Allen County is reversed and the cause is remanded for further proceedings.

Judgment reversed
and cause remanded.

SHAW, P.J., and CUPP, J., concur.