

STATE OF MICHIGAN
COURT OF APPEALS

BAY VALLEY HARBOR LIMITED
PARTNERSHIP, d/b/a BAY VALLEY HARBOR
APARTMENTS,

Plaintiff-Appellant,

v

MICHIGAN MILLERS MUTUAL INSURANCE
COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 17, 2004

No. 246525
Macomb Circuit Court
LC No. 2001-001962-CK

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order dismissing its complaint for failure to comply with a court order. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's sole claim on appeal is that the trial court abused its discretion in dismissing the case for plaintiff's failure to comply with a discovery order. The record clearly shows that while defendant filed motions to compel discovery, it never moved to dismiss for plaintiff's failure to comply with the resulting orders and the case was not dismissed on that ground. Further, the record shows that while defendant did move to dismiss for plaintiff's failure to file a witness list, that motion was denied. The court subsequently dismissed the action because plaintiff failed to pay costs as directed. Thus, the issue as stated is without merit.

We note that in its brief, plaintiff contends that the court improperly dismissed the case for the failure to pay costs. That issue has not been preserved for appeal because it was not included in the statement of questions presented for appeal and thus need not be considered. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). In any event, the argument is without merit. The record shows that plaintiff had a history of failure to comply with pretrial procedure and court orders. Even though it failed to file a witness list, the court did not dismiss the case but imposed a lesser sanction which allowed plaintiff to proceed to trial. However, it conditioned the lesser sanction on payment of costs by a date certain or else the case would be dismissed. Plaintiff deliberately did not pay the costs by the due date because an order embodying the court's ruling had not been entered. The court accepted that as a valid excuse and did not dismiss the case. Instead, it entered an order extending the date for payment of costs,

again subject to dismissal for noncompliance. Plaintiff chose not to pay despite knowledge of the consequences. Under the circumstances, the court's order of dismissal did not constitute an abuse of discretion. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

Affirmed.

/s/ Janet T. Neff

/s/ Brian K. Zahra

/s/ Christopher M. Murray