

STATE OF MICHIGAN
COURT OF APPEALS

CLARENCE KING and LATANYA KING,

Plaintiffs-Appellants,

v

HSBC BANK USA, N.A., TRUSTEE,

Defendant-Appellee.

UNPUBLISHED

October 21, 2010

No. 292031

Oakland Circuit Court

LC No. 2008-092812-CH

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order dismissing their case for failure to attend a settlement conference and for failure to file a witness list. Because the trial court did not abuse its discretion in dismissing plaintiff's case, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for involuntary dismissal is reviewed for an abuse of discretion. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995). Likewise, the trial court's decision to dismiss a case for failure to attend a pretrial or settlement conference is reviewed for an abuse of discretion. *Schell v Baker Furniture Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998), *aff'd* 461 Mich 502 (2000). The trial court's ruling on a motion for reconsideration is also reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The trial court has authority to issue a scheduling order that sets dates for the exchange of witness lists and the completion of discovery. MCR 2.401(B)(2)(a) and (I)(1). The trial court may prohibit any witness not listed in accordance with the court rules from testifying at trial except for good cause shown. MCR 2.401(I)(2). Further, a party's failure to comply with the court rules or a court order is grounds for dismissal. MCR 2.504(B)(1). "[T]he mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of such a drastic sanction [as dismissal]. Rather, the record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). Factors to be considered in determining whether dismissal is an appropriate sanction include: (1) whether the violation was wilful or accidental; (2) the party's

history of refusing to comply with court orders; (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether the party has a history of deliberately delaying the proceedings; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) attempts by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. *Id.* at 32-33.

The trial court also has authority to order “the attorneys for the parties, alone or with the parties,” to appear for a conference to “consider any matter that will facilitate the fair and expeditious disposition of the action,” including settlement. MCR 2.401(A), (C)(1)(g), and (F). The failure of a party or a party’s attorney to appear for a scheduled conference “may constitute . . . a ground for dismissal under MCR 2.504(B).” MCR 2.401(G)(1). As noted, MCR 2.504(B)(1) permits the trial court to dismiss a party’s action or claims for failure to comply with the court rules or a court order. However, the trial court must excuse the party’s or attorney’s absence and not dismiss the case if dismissal would cause manifest injustice or the party’s or attorney’s absence was not due to culpable negligence. MCR 2.401(G)(2).

In September 2008, the trial court issued a scheduling order. The order directed the parties to file witness and exhibit lists by January 2, 2009, and that discovery was to be completed by February 2, 2009. Plaintiffs never filed a witness or an exhibit list. In December 2008, the trial court issued a notice directing the parties and their attorneys to appear January 13, 2009 for a mandatory settlement conference. Neither plaintiffs nor their attorney, Linda Smith Mays, appeared. Defense counsel orally moved to dismiss plaintiffs’ case. The trial court directed defendant to file a written motion to dismiss and directed defendant to properly notice the motion for hearing. Defendant filed a written motion to dismiss plaintiffs’ action and scheduled it to be heard February 25, 2009. Plaintiffs did not file a response to the motion and did not appear for the motion hearing. Given plaintiffs’ and Mays’s failure to act in response to the trial court’s orders, and their failure to offer any explanation for their inaction, it cannot be said that the trial court abused its discretion in granting the motion to dismiss. Moreover, we are unable to determine from the record whether the trial court assessed the relevant *Dean* factors before ordering dismissal because plaintiffs have failed to provide a transcript of the February 25, 2009, hearing, despite a request from this Court. Plaintiffs’ failure to provide the transcript may alone preclude appellate relief, given that an appellant is responsible for securing the complete transcript of all proceedings, unless excused by court order or the parties’ stipulation and, without the requested record, it is simply not possible to determine whether the trial court abused its discretion or properly exercised it. MCR 7.210(B)(1); *McLemore v Detroit Receiving Hosp and University Medical Center*, 196 Mich App 391, 402; 493 NW2d 441 (1992).

Furthermore, assuming that the trial court was required to address the *Dean* factors and failed to do so¹, the proper remedy would be to remand to the trial court for reconsideration,

¹ It is questionable whether a trial court is required to evaluate all options before deciding whether dismissal should be imposed for failure to appear for a settlement conference. See *Dubuc v Golden & Kunz, PC*, 469 Mich 942; 674 NW2d 152 (2003) (CORRIGAN, C.J., concurring).

Adams v Perry Furniture Co (On Remand), 198 Mich App 1, 17-18; 497 NW2d 514 (1993), overruled in part on other grounds by *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 289; 602 NW2d 572 (1999); *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 631; 420 NW2d 835 (1987), but such a remedy is not appropriate in this case because the trial court addressed the relevant factors when ruling on plaintiffs' motion for reconsideration. Plaintiffs do not claim that the trial court erred in its analysis of the relevant factors.

Plaintiffs' motion for reconsideration failed to allege any error by which the trial court and the parties were misled. See MCR 2.119(F)(3). Instead, plaintiffs sought to have the trial court excuse their inaction on the ground that attorney Mays was indisposed by illness. But not only did plaintiffs fail to show that Mays was actually suffering from an illness that prevented her from representing plaintiffs, her alleged illness did not explain other lapses, such as plaintiffs' own failure to appear for the settlement conference or their failure to bring the matter of Mays's alleged illness to the trial court's attention before their inaction resulted in dismissal of the case. Accordingly, the trial court did not abuse its discretion in denying the motion for reconsideration.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro