

UNITED STATES COURT OF APPEALS

November 27, 2018

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

JIM F. DAVIS,

Plaintiff - Appellant,

v.

U.S. GOVERNMENT; FEDERAL
AVIATION ADMINISTRATION;
RENAE ALLMOND; JEFFREY M.
JENNINGS; DENISE L. BAISDEN; PAT
STEPHENS,

Defendants - Appellees.

No. 18-7050
(D.C. No. 6:18-CV-00138-RAW)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, **MATHESON**, and **EID**, Circuit Judges.

Plaintiff Jim F. Davis, proceeding pro se, appeals the district court's dismissal of his case for failure to serve process under Federal Rule of Civil Procedure 4. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.¹

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ See *Constien v. United States*, 628 F.3d 1207, 1210 (10th Cir. 2010) (holding that dismissal for failure to serve process was final appealable order).

I. BACKGROUND

On May 2, 2018, Mr. Davis filed a complaint against the Federal Aviation Administration (“FAA”), seeking \$250,000 in damages. The complaint appeared to allege that the FAA engaged in misconduct during its investigation of a 2016 incident in which Mr. Davis’s aircraft collided with a metal fence post.

Mr. Davis filed a Proof of Service on May 11, 2018 and a certified mail receipt on May 15, 2018. Both documents indicate he sent a copy of the summons to the FAA general counsel’s office via certified mail.

On July 6, 2018, Mr. Davis moved for default judgment against the FAA. A magistrate judge denied Mr. Davis’s motion for lack of proper service, noted that “*some* defendants have not been served,” ROA at 66 (emphasis added), and denied Mr. Davis’s two motions for reconsideration.

The district court overruled Mr. Davis’s objections to the magistrate judge’s rulings and ordered him to “show cause no later than September 20, 2018 as to why this case should not be dismissed for Plaintiff’s failure to effect service of process on Defendants.” ROA at 139.

Mr. Davis responded that “[t]he legal division of the F.A.A. received the summons and acknowledged with the receipt [sic].” ROA at 140. He asserted that service was therefore proper. He argued, “[I]f the service had been improper, it should have been noted by the legal division of the F.A.A. and they should have initiated a Motion to Dismiss because of improper service.” *Id.* Because the district court ordered him to

show cause without the FAA’s participation in the case, he accused it of “practicing law from the bench.” *Id.*

On September 21, 2018, the district court sua sponte dismissed Mr. Davis’s case without prejudice under 28 U.S.C. § 1915(e)(2)(B)(ii) and (iii). It noted that, under Rule 4(m), if a defendant is not served within ninety days, the court “on its own after notice to the plaintiff—*must* dismiss the action without prejudice.” ROA at 147. It further held, “The FAA is not properly before the court and is not required to file *any* pleading until they are properly served.” *Id.* at 148. The court entered judgment against Mr. Davis on the same day. Mr. Davis timely appealed.

II. DISCUSSION

A. *Legal Background and Standard of Review*

Because Mr. Davis is proceeding pro se, we construe his filings liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But pro se parties must follow the same rules of procedure that govern other litigants. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

Federal Rule of Civil Procedure 4 governs service of process. We review dismissals under Rule 4 de novo. *Jenkins v. City of Topeka*, 136 F.3d 1274, 1275 (10th Cir. 1998).

In relevant part, Rule 4 provides:

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States. To serve the United States, a party must:

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney’s office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

Fed. R. Civ. P. 4(i).

B. *Analysis*

Mr. Davis failed to comply with Rule 4.

First, the FAA is a federal agency. *See* 5 U.S.C. § 551(1) (defining “agency”).

Accordingly, under Rule 4(i)(2), in addition to sending a copy of the summons and

complaint to the FAA, Mr. Davis must follow the service of process rules for serving the United States set forth in Rule 4(i)(1)(A). He must either:

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney’s office[.]

Fed. R. Civ. P. 4(i)(1)(A).

Mr. Davis sent the summons to the FAA via certified mail, but he did not “deliver a copy of the summons and of the complaint to the United States attorney.” Fed. R. Civ. P. 4(i)(1)(A)(i). Nor did he send a copy of the summons and complaint to the “civil-process clerk at the United States attorney’s office.” Fed. R. Civ. P. 4(i)(1)(A)(ii). Accordingly, he did not follow Rule 4’s requirements for serving an agency of the United States.

Second, in his complaint, Mr. Davis named four individual defendants in addition to the FAA. He did not attempt to serve these individuals. Even if he had properly served the FAA, dismissal would still be appropriate as to the remaining defendants.

III. CONCLUSION

The district court properly dismissed Mr. Davis’s case for failure to serve process

under Rule 4. We affirm the dismissal of Mr. Davis's amended complaint without prejudice.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge