

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 25, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

TIMOTHY DAVIS,

Plaintiff - Appellant,

v.

STACIE KOCH, of Corizon Health
Wyoming,

Defendant - Appellee.

No. 23-8029
(D.C. No. 1:22-CV-00227-SWS)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **BACHARACH, KELLY, AND MORITZ**, Circuit Judges.

This appeal involves the validity of service by regular mail and the effect of a failure to comply with procedural requirements. These requirements include the time to serve the defendant and the method of conducting service. Fed. R. Civ. P. 4(e), (m). These methods don't include

* Mr. Davis doesn't request oral argument, and it would not help us decide the appeal. So we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

regular mail. So when a plaintiff relies on regular mail for service and the deadline expires, can a district court dismiss the action? We answer *yes*.

In civil cases, the plaintiff must serve the defendants with the summons and complaint. Fed. R. Civ. P. 4(c)(1). Service of these documents is due 90 days after the plaintiff files the complaint. Fed. R. Civ. P. 4(m).¹

Mr. Davis insists that he mailed the summons and complaint to the defendant,² but the district court considered the mailing insufficient for service. So the district court reminded Mr. Davis of his deadline and told him that failure to timely serve the defendant would result in dismissal. When the deadline passed without further effort to serve the defendant or a request for more time, the district court dismissed the action.

Mr. Davis appeals, arguing that he did serve the defendant and acted diligently. We address these arguments under the abuse-of-discretion

¹ When the plaintiff shows good cause, the district court must extend the 90-day deadline. Fed. R. Civ. P. 4(m). But Mr. Davis didn't argue good cause to the district court or argue on appeal that he had shown good cause. *See* p. 4, below.

² In district court, Mr. Davis said that he had mailed the complaint; but he didn't mention the summons. On appeal, he argues that he served the summons with the complaint. We assume for the sake of argument that (1) Mr. Davis had mailed the summons and (2) the district court should have realized that Mr. Davis had mailed the summons. These assumptions don't matter because the district court didn't rely on a failure to include the summons in the documentation being served.

standard. *Despain v. Salt Lake Area Metro Gang Unit*, 13 F.3d 1436, 1437 (10th Cir. 1994). Applying this standard, we conclude that (1) Mr. Davis didn't properly serve the defendant and (2) the failure to conduct proper service allowed the district court to dismiss the action.

The federal procedural rules state how plaintiffs are to serve the summons and complaint. Fed. R. Civ. P. 4. Under these rules, the plaintiff can personally deliver the documents to the defendant or its agent, leave the documents with an adult who resides with the defendant, or follow state law. Fed. R. Civ. P. 4(e).

Mr. Davis states that he served the defendant through regular mail. This form of service doesn't involve personal delivery to the defendant, its agent, or a co-resident. So we consider only whether service by regular mail is authorized under state law.

In applying state law, we consider the law of the state where the court is located or where the defendant is served. Fed. R. Civ. P. 4(e)(1). Both are in Wyoming, so we apply Wyoming law. Wyoming allows service by mail only when it's registered or certified—not regular mail. Wyo. R. Civ. P. 4(r)(2). So the mailing didn't satisfy Mr. Davis's obligation to serve the defendant.

Mr. Davis argues that he acted diligently even if the mailing didn't suffice for service. He was a layperson and presumably didn't realize that he had to do more than send the summons and complaint by regular mail.

But even pro se plaintiffs must serve the defendant in a way that satisfies the procedural requirements. *Jones v. Frank*, 973 F.2d 872, 873–74 (10th Cir. 1992).

Granted, the district court would have had to extend the service deadline if Mr. Davis had made a showing of good cause. Fed. R. Civ. P. 4(m). But Mr. Davis didn't tell the district court that he had good cause or ask for more time to serve the defendant. *See* note 1, above. Without an allegation of good cause or a request for more time, the district court had the discretion to dismiss the action. *Constien v. United States*, 628 F.3d 1207, 1216–17 (10th Cir. 2010). So we affirm the dismissal.

Entered for the Court

Robert E. Bacharach
Circuit Judge