UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2331
Summary Calendar

ALBIN J. DRABEK,

Plaintiff-Appellant,

VERSUS

GERALD G. LARSON, Director, General Services Department, City of Houston, KATHRYN J. WHITMIRE, Mayor, City of Houston, and CITY OF HOUSTON,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(91-CV-2462)

(October 5, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Albin J. Drabek appeals the district court's dismissal of his suit against Gerald G. Larson, Kathryn J. Whitmire, and the City of Houston (the City) for insufficiency

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of service of process. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Drabek filed a complaint with the Equal Employment Opportunity Commission (the EEOC) alleging employment discrimination by the City. On June 1, 1991, he received a Notice of Right to File Civil Action from the EEOC, which entitled him to sue within ninety days of that date.[1] He filed the instant suit alleging employment discrimination eighty-nine days later, on August 29, 1991.

Drabek initially named Larson and the City as defendants. At one time, Larson had been employed by the City as the Director of its General Services Department. Apparently unbeknownst to Drabek, Larson quit working for the City several months before Drabek filed this suit. Additionally, the City had abolished the position of Director of General Services Department prior to the filing of this suit. Drabek's original complaint did not specify whether he was suing Larson in his private or official capacity.

Drabek did not immediately attempt to serve the defendants, despite the requirement of Rule 4(j) of the Federal Rules of Civil Procedure[2] that he serve them within 120 days of filing the complaint. He did, however, amend his complaint 117 days later on December 24, 1991 to add Whitmire as a defendant. Whitmire

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[1] 42 U.S.C. § 2000e-5(f)(1).

[2] All reference to the Rules are to the Federal Rules of Civil Procedure unless otherwise noted.

was the mayor of the City, but the amended complaint did not specify whether she was being sued in her individual or official capacity. Neither did it specify in what capacity Larson was being sued.

Drabek subsequently engaged a private process server to serve the defendants. The private process server mailed the summons and copies of the complaints to Larson, Whitmire, and the City Attorney for Houston by certified mail. The return receipts for the mailings addressed to Larson and Whitmire show that they were signed for on December 27, 1991, 120 days after Drabek filed his original complaint. Both receipts appear to have been signed by the same person, but that signature is not legible. The receipt for the mailing to the City Attorney shows that it was signed by the same person, but on December 31, 1991.

The defendants moved to dismiss for insufficiency of service of process. Whitmire alternatively moved to dismiss for want of jurisdiction because Drabek had not sued her within 90 days of the date of his right to sue letter. The district court subsequently granted these motions to dismiss.[3] Drabek neither moved for additional time under Rule 6(b) to perfect service nor sought a finding of good cause for extension of time under Rule 4(j). He did, however, timely appeal.

II

[3] Although neither the district court's Final Judgment nor its underlying Order specify whether the dismissal was with prejudice, Rule 4(j) specifies that such dismissal shall be without prejudice. Accordingly, we shall treat the instant dismissal as without prejudice.

ANALYSIS

Drabek argues that the district court's dismissal of his suit under Rule 4(j) was erroneous. That rule provides:

> If a service of the summons and complaint is not made upon a defendant with 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court own initiative with notice to such party or upon motion.[4]

"When service of process is challenged, the serving party bears the burden of proving its validity or good cause for failure to effect timely service."[5] On appeal, Drabek makes no attempt to argue that he had good cause for failure to effect timely service; instead his sole argument is that he in fact properly served the defendants. We review the dismissal of a suit under Rule 4(j) for abuse of discretion.[6]

As different methods of service are required for different defendants,[7] our analysis necessarily begins with the identification of the defendants to the instant action. Drabek eventually named three parties as defendants: Larson, Whitmire, and the City. We consider each in turn.

The City obviously falls into the category of defendants

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[4] Fed. R. Civ. P. 4(j).

[5] Systems Signs Supplies v. United States Department of Justice, 903 F.2d 1011, 1013 (5th Cir. 1990) (citations omitted).

[6] Id. at 1014; McDonald v. United States, 898 F.2d 466, 468 (5th Cir. 1990).

[7] See Fed. R. Civ. P. 4(d).

identified in Rule 4(d)(6): "a state or municipal corporation or other governmental organization thereof."[8] The relevant classifications of Larson and Whitmire are less obvious. Drabek's pleadings consistently describe Larson as the Director of the General Service Department of the City of Houston. Likewise, his pleadings consistently identify Whitmire as the Mayor of the City of Houston. Nowhere in his pleadings, however, does Drabek specify whether he is suing Larson or Whitmire in their personal or official capacities.

The Supreme Court instructs that suits against an official in his personal capacity "seek to impose personal liability upon a governmental official for actions he takes under color of law. Official-capacity suits, in contrast, represent only another way of pleading an action against an entity of which the officer is an agent."[9] A suit against an official in his official capacity "is not a suit against the official personally, for the real party in interest is the entity."[10]

If a complaint does not specify whether an official is being sued personally, in an official capacity, or both, "the course of proceedings . . . typically will indicate the nature of liability sought to be imposed."[11] Such is the case with the instant suit.

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[8] Fed. R. Civ. P. 4(d)(6).

[9] Kentucky v. Graham, 473 U.S. 159, 165 (1985) (internal quotation and citation omitted).

[10] Id. at 166.

[11] Id. at 167 n.14 (internal quotation and citation omitted).

Drabek's response to the defendants' motions to dismiss established that he was only suing Larson and Whitmire in their official capacities. He repeats this assertion in his brief on appeal. Consequently, the City is the only true defendant to Drabek's suit. Thus naming Larson and Whitmire, in their official capacities only, was purely surplusage and of no moment to the instant suit.[12]

Rule 4(d) provides in pertinent part that service shall be made as follows:

> (6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other process upon any such defendant.[13]

Drabek did not comply with the first method of service prescribed in this rule (the federal method) as it does not authorize service by mail on municipal corporations.[14] On appeal, he makes no pretense to have complied with this federal method, but instead claims to have served the defendant properly under the second method prescribed by Rule 4(d)(6), i.e., in the manner prescribed by Texas law for service upon such a defendant (the state method).

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[12] See id. (holding that "[t]here is no longer a need to bring official-capacity actions against local government officials").

[13] Fed. R. Civ. P. 4(d)(6).

[14] Norlock v. City of Garland, 768 F.2d 654, 656 (5th Cir. 1985).

Unfortunately for Drabek, though, he did not raise this claim in the district court. The general rule in this circuit is that a claim not presented to the district court will not be considered for the first time on appeal.[15] Yet even if Drabek had properly presented this claim to the district court, he would fail for it is a claim without merit.

Although the Texas Rules of Civil Procedure (the Texas Rules) do not expressly prohibit serving cities by mail, they do mandate that "[u]nless the citation or an order of court otherwise directs, the citation shall be served by any person authorized by Rule 103.[16] Texas Rule 103 in turn provides: "Citation and other notices may be served anywhere by (1) any sheriff or other person authorized by law or, [sic] (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age."[17]

Drabek's private process server was not authorized by either law or a written order of the court to serve the defendants. Consequently, Drabek failed to serve the summons and complaint in "the manner prescribed by the law of that state for the service of summons or other process upon any such defendant."[18]

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[15] H & F Barge Co. v. Garber Bros., Inc., 534 F.2d 1103, 1104 (5th Cir. 1976); Martin v. M/V War Admiral, 507 F.2d 1093, 1096 (5th Cir. 1975).

[16] Tex. R. Civ. P. 106(a) (emphasis added).

[17] Tex. R. Civ. P. 103.

[18] Fed. R. Civ. P. 4(d)(6). Further, § 17.024 of the Texas Civil Practice and Remedies Code, which governs service on political subdivisions, does not appear to allow service on such

Finally, Drabek argues that the court should allow him to combine the most favorable elements from the federal and state methods for service of process into a hybrid method, under which his service could be upheld. We are loathe to engage in judicial legislation, yet that is what would be required to confect the rule suggested by Drabek. Besides, we find no redeeming merit in his proposal; neither do we find any support for it in the prior opinions of this court or the Texas state courts.[19]

III

CONCLUSION

Presented with two (but only two) authorized methods for serving the City))the only true defendant in the instant action))Drabek failed to comply with either. Consequently, the district court did not abuse its discretion in dismissing Drabek's suit for failure to perfect service in a timely manner.

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entities by mail. See Tex. Civ. Prac. & Rem. Code § 17.024.

[19] See e.g., Carimi v. Royal Carribbean Cruise Line, Inc., 959 F.2d 1344, 1348 (5th Cir. 1992) ("[B]eing a less dependable and less formal alternative to conventional service and citation, Rule 4(c)(2)(C)(ii) [the service by mail provision of the Federal Rules of Civil Procedure] must be construed strictly as must all rules in derogation of the norm."); Delta Steamships Lines, Inc. v. Albano, 768 F.2d 728, 730 (5th Cir. 1985) ("[T]he requirements of Rule 4(c)(2)(C)(ii) must be fully satisfied if the benefits of the Rule are claimed. Consistent therewith, a more general state mail service procedure may not be considered the effective equivalent of this subsection. Only a careful compliance with 4(c)(2)(C)(ii) will suffice."); Uvalde Country Club v. Martin Linen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985) ("[F]ailure to affirmatively show strict compliance with the [Texas] Rules of Civil Procedure renders the attempted service of process invalid and of no effect."); Smith v. Commercial Equipment Leasing Co., 678 S.W.2d 917, 918 (Tex. 1984) ("The settled rule in this state is that the manner of service must strictly comply with the rules.").

Its judgment is therefore

AFFIRMED.