UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7795
Summary Calendar

RUBEN S. FLORES,

Plaintiff-Appellant,

versus

SECRETARY OF THE NAVY,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(CA C 93 150)

(March 27, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Ruben S. Flores (Flores) appeals an order of the district court dismissing his complaint without prejudice for failure to timely serve the proper parties. We find that the district court did not abuse its discretion and therefore affirm.

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Flores was formerly employed as a firefighter by the Naval Air Station at Corpus Christi, Texas. In June 1991, he was discharged, having been deemed medically disqualified to serve as a firefighter. Having exhausted his administrative remedies, to no avail, Flores filed this action in the district court below, alleging that the Navy discriminated against him based on his race (Hispanic) and disability (post-traumatic stress disorder). The complaint, filed April 29, 1993, did not indicate the proper parties for service, and the docket sheet entry corresponding to the filing of the complaint noted that "[n]o summonses [were] issued at the time the complaint was filed."

Under Federal Rule of Civil Procedure 4(m),[1] Flores had 120 days from the date he filed his complaintSQor until August 27, 1993SQto serve the appropriate parties. Because Flores sought to sue an agency of the United States, he was required to serve the United States Attorney for the Southern District of Texas, the Attorney General of the United States, and the Secretary of the Navy. Fed. R. Civ. P. 4(i)(1). On August 4, 1993, Flores had issued a summons to the Secretary of the Navy; a return of service on this summons was filed October 12, 1993, reflecting service on

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[1] Rule 4 was substantially amended by the 1993 amendments to the federal rules, effective December 1, 1993; many of its sections were consequently renumbered. Current section 4(m) was previously section 4(j). The other section of Rule 4 relevant to this appeal, current section 4(i), replaces sections 4(d)(4) and 4(d)(5) of the prior rules. This opinion will refer to the relevant sections of the rule by their current, post-amendment designations.

August 10, 1993. It was not until October 13, 1993, that Flores had summonses issued for the U.S. Attorney and the Attorney General. Although the docket sheet indicates that a return of service for the U.S. Attorney was filed on November 1, 1993, reflecting service on October 21, 1993, no return of service for the Attorney General appears anywhere in the record.

As these facts demonstrate, as of August 27, 1993, the date on which the 120-day period expired, Flores had only served the Secretary of the Navy, and he had not even had summons issued for either the Attorney General or the U.S. Attorney. On September 21, 1993, the district court issued a show cause order requiring Flores to demonstrate why his case should not be dismissed under then Rule 4(j). The clerk subsequently removed the order from the district court's calendar, however, apparently after one of Flores's attorneys indicated that the Secretary of the Navy had been served.[2] Thereafter, on October 26, Flores moved to enlarge the time in which to serve the other defendants, claiming excusable neglect. *See* Fed. R. Civ. P. 6(b)(2).[3] The U.S. Attorney, appearing on behalf of the Secretary of the Navy, responded by filing a motion to dismiss Flores's suit for failure to timely

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[2] We infer this from the clerk's notation indicating that Flores's attorney "was informed that original Return of Service must be filed." The return of service from the Secretary of the Navy was filed within a week of this order.

[3] Before the 1993 amendments, the typical vehicle for requesting an enlargement of time in which to serve a party was Rule 6(b). According to the drafters, the amendments to Rule 4 were intended to place within Rule 4 itself the mechanisms for relief formerly provided in Rule 6(b). *See* Fed. R. Civ. P. 4(m) (advisory committee notes).

serve the proper parties.

The district court held a hearing on these motions on December 13, 1993. Asked to explain why all the appropriate parties had not been timely served, counsel for Flores argued that there had been an unspecified failure of communication between Flores's three attorneys, a case of "too many cooks spoil[ing] the broth." He admitted that this was the only explanation he could offer to show excusable neglect. The district court held that this excuse was insufficient to show excusable neglect under Rule 6(b)(2). In addition, the district court held that, assuming that the 1993 amendments did apply to this case, it could not provide Flores relief under Rule 4(i)(3), which mandates a "reasonable time" to cure defects in service of multiple parties under Rule 4(i)(1) "if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States," because Flores had failed to serve either the U.S. Attorney or the Attorney General within the 120-day time limit. The district court therefore dismissed Flores's complaint without prejudice.

Flores filed his notice of appeal on December 22, 1993; at the same time, he began filing a series of post-judgment motions. After the last of these motions was denied,[4] Flores's prior notice

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[4] On the same day that he filed his notice of appeal to this Court, Flores also filed a motion for a new trial, for reconsideration, and to alter or amend the dismissal order with the district court. Flores filed an amended motion on February 3, 1994; the district court denied this motion on May 27 for the same reasons given in the December hearing. On June 3, Flores filed a motion to vacate, to correct the record, and for relief from judgment under Rule 60(a) and (b). This motion focused mainly on Flores's contention that, despite the absence in the record of a return of service from the Attorney General, the

of appeal became effective, at least with respect to the original judgment. As he has never amended the notice of appeal, however, it does not bring up for review any of the rulings on the post-judgment motions. *See* Fed. R. App. P. 4(a)(4).

Discussion

The parties dispute whether the 1993 amendments to Rule 4 should apply to this case. The amendments, which became effective December 1, 1993, "shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil case then pending." Amendments to the Federal Rules of Civil Procedure and Forms, Order of April 22, 1993 ¶ 2 (reprinted in Fed. R. Civ. P., 28 U.S.C. (West Supp. 1994)). The district court did not make a specific finding that it would be just and practicable to apply the new amendments to the present case; we will assume *arguendo* that they do apply. Nevertheless, we hold that, under either the prior or amended rules, the district court did not abuse its discretion in denying Flores relief in this case.

Under Rule 4(m), the district court may dismiss an action for failure to serve a party within the 120-day period, "provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." Fed. R.

Attorney General had in fact been served on October 18, 1993. On June 28, the district court struck Flores's first amended motion to vacate, filed June 15, for failure to comply with local rules requiring the inclusion of a statement indicating that a conference with opposing counsel had been held. Flores filed his second amended motion on July 14, 1994. Because the district court failed to act on this motion, it was deemed denied and was stricken from the record on September 7.

Civ. P. 4(m). Flores bears the burden of demonstrating good cause for not complying with the requirements of Rule 4. *McGinnis v. Shalala*, 2 F.3d 548, 551 (5th Cir. 1993) (per curiam), *cert. denied*, 114 S.Ct. 1293 (1994). We review a district court's decision to dismiss an action for failure of timely service for abuse of discretion. *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993) (per curiam); *see also McGinnis*, 2 F.3d at 550 (noting that district court's determination that plaintiff has failed to prove good cause is also reviewed for abuse of discretion).

The district court did not abuse its discretion in this case. To demonstrate good cause, Flores was required to show

> "at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice, and some showing of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified." *Lambert v. United States*, 44 F.3d 296, 299 (5th Cir. 1995) (internal quotation marks and citations omitted).

Clearly, a wholly unexplained miscommunication between counsel does not satisfy any part of this test. The district court therefore was not obligated under Rule 4(m) to allow additional time for service.

Of course, under the amended rules, the district court has discretion to "direct that service be effected within a specified time," Fed. R. Civ. P. 4(m), even absent a showing of good cause, *see* Fed. R. Civ. P. 4(m) (advisory committee notes) (stating that the amended rule "authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown"). We emphasize, however, that the

decision is still within the district court's broad discretion. Surely, in exercising that discretion, the district court is entitled to some colorable explanation for the plaintiff's failure to follow the federal rules, even if that explanation need not rise to the level of good cause. We refuse to find an abuse of discretion when the plaintiff has provided such meager justification for his dereliction as was offered here.

Nor is the mandatory extension now provided for in Rule 4(i)(3) available to Flores in this case.[5] That section is explicit in requiring an extension only "if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States." Fed. R. Civ. P. 4(i)(3). The clear implication is that service must have been effected on at least one of these two parties *before the expiration of the 120-day period specified in Rule 4(m)*. The alternative interpretation of the rulesQthat it is satisfied as long as service is effected on one of these parties at some pointsQwould make Rule 4(m) a nullity in cases involving the United States or one of its agencies as a defendant. As it is undisputed that neither the U.S. Attorney nor the Attorney General was served within the 120-day period, the district court did not abuse its discretion in dismissing this case.

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[5] In ruling on the availability of relief under Rule 4(i)(3), the district court stated that, assuming the prerequisites of the section were met, it could grant relief without requiring Flores to demonstrate good cause. We note that this representation is not completely accurate; the circumstances envisioned in Rule 4(i)(3) are themselves "[a] specific instance of good cause." Fed. R. Civ. P. 4(m) (advisory committee notes).

Conclusion

The judgment of the district court is therefore

AFFIRMED.