

UNITED STATES COURT OF APPEALS
Filed 6/25/96
TENTH CIRCUIT

BENJAMIN J. ROSCOE,
Plaintiff-Appellant,

v.

JAMES E. SCHOENBERGER,
Defendant-Appellee.

No. 95-2270
(D.C. No. CIV-93-682-M)
(Dist. N.M.)

ORDER AND JUDGMENT*

Before **SEYMOUR**, Chief Judge, **KELLY** and **LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R.

34.1.9. The case is therefore ordered submitted without oral argument.

Mr. Benjamin J. Roscoe filed this pro se action in Metropolitan Court

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions 10th Cir. R. 36.3.

in Bernalillo County, New Mexico against a federal employee alleging defamation, interference with business, violation of constitutional rights, and false accusation of crimes. Defendant removed the action to federal district court and filed a motion to dismiss for failure to effect service, which the court granted. Mr. Roscoe appeals, and we affirm.

Where service of process is attempted prior to removal of an action to federal court, state law determines whether service was valid. 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1082 (2d ed. 1987). Mr. Roscoe alleges that service was perfected under N.M. R. Civ. P. (Metro. Cts.) 3-202 (Michie 1995 Cum. Supp.). Under Rule 3-202 (E) “[a] summons and complaint may be served upon a defendant . . . by mailing a copy . . . together with [an] acknowledgement [However,] [i]f no acknowledgement . . . is received by the sender . . . service . . . shall be made . . . in the manner prescribed by Paragraph F.” If service is made by mail, the returned acknowledgment must be filed with the court. N.M. R. Civ. P. (Metro Cts.) 3-202 (G).

Although Mr. Roscoe alleged that he mailed a copy of the complaint and summons to defendant, he did not file a returned acknowledgment with the state court, nor did he attempt to perfect service under Rule 3-202 (F). Accordingly, we agree with the district court that his action should be

dismissed.¹

We **AFFIRM** the judgment of the district court. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Stephanie K. Seymour
Chief Judge

¹ We note that Mr. Roscoe has not attempted to perfect service under Fed.R.Civ.P. 4, and we decline to consider facts and issues he raises for the first time on appeal. See Oyler v. Allenbrand, 23 F.3d 292, 299 n.8 (10th Cir. 1994).