

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

PATRICK D. SMYERS,

Plaintiff,

v.

COUNTY OF ATCHISON, KANSAS, *et al.*,

Defendants.

**CIVIL ACTION
No. 07-2364-CM**

MEMORANDUM AND ORDER

This matter is before the court on plaintiff's Objections to Magistrate Judge's Report and Recommendation (Doc. 6). Plaintiff timely objected to the Report and Recommendation. The facts and law are accurately set forth in the Report and Recommendation, and the court will not unnecessarily repeat them here. In reviewing a magistrate judge's Report and Recommendation, the district court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). In the court's review, the court must "consider relevant evidence of record and not merely review the magistrate judge's recommendation." *In re Griego*, 64 F.3d 580, 584 (10th Cir. 1995). The court has reviewed the record in accordance with this standard, and finds that plaintiff's objection should be overruled. Magistrate Judge Sebelius's Report and Recommendation is adopted in its entirety, and the matter is dismissed without prejudice.

Magistrate Judge Sebelius found that (1) plaintiff has failed to show good cause for an extension of time to effect service pursuant to Federal Rule of Civil Procedure 4(m) and (2) it would be an abuse of discretion for this court to extend the time for service under the facts of this case.

"The preliminary inquiry to be made under Rule 4(m) is whether the plaintiff has shown

good cause for the failure to timely effect service.” *Espinoza v. United States*, 52 F.3d 838, 841 (10th Cir. 1995). The plaintiff is entitled to a mandatory extension of time if good cause is shown. *Id.* “If the plaintiff fails to show good cause, the district court must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service.” *Id.* The Tenth Circuit rejects “inadvertence or neglect as good cause for untimely service.” *Crewse v. MCI Telecomms. Corp.*, No. Civ.A. 99-2204, 2000 WL 360109, at *2 (D. Kan. March 16, 2000) (quoting *In re Kirkland*, 86 F.3d 172, 174 (10th Cir. 1996) (internal quotation omitted)).

As Magistrate Judge Sebelius explained in his Report and Recommendation, plaintiff’s counsel did not discover that service had not been completed until three months after the service deadline and more than seven months after the case was filed. Moreover, plaintiff’s counsel’s computer problems do not justify counsel’s delay. The October 2007 computer crash lasted only ten days; plaintiff’s counsel had ample time to review the case status or complete service by the December 7, 2008 service deadline. And the February 2008 computer crash was almost two months after the deadline had passed. The court finds that plaintiff has failed to show good cause.

The court next considers whether to dismiss the case without prejudice or extend the time for service. When determining whether a party should be granted a permissive extension of time under Rule 4(m), the court considers several factors, including (1) whether the applicable statute of limitations would bar the refiled action and (2) whether defendant has been prejudiced by the delay of service. *Espinoza*, 52 F.3d at 842; *Spiess v. Meyers*, 483 F. Supp. 2d 1082, 1097 (D. Kan. 2007) (citations omitted). As Magistrate Judge Sebelius noted in his Report and Recommendation, the statute of limitations expired on at least one of plaintiff’s claims in August 24, 2007, but plaintiff

may be able to refile this action and proceed with his claims which are still viable. And despite receiving notice of plaintiff's claims on January 11, 2007, defendant may be prejudiced by the delay in proceedings.

For the reasons set forth in the Report and Recommendation, the court will not exercise its discretion pursuant to Rule 4(m) to grant plaintiff's requested extension of time. The court finds that dismissal is appropriate in this case.

IT IS THEREFORE ORDERED that plaintiff's Objections to Magistrate Judge's Report and Recommendation (Doc. 6) is overruled.

IT IS THEREFORE ORDERED that the case is dismissed without prejudice.

Dated this 4th day of November, 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge