

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

HERBERT DEVAN FISHER, JR.,

Plaintiff,

v.

No. 19-4075-SAC

RUSSELL STOVER
CHOCOLATES, LLC,

Defendant.

MEMORANDUM AND ORDER

The plaintiff Mr. Fisher filed his employment discrimination complaint in September 6, 2019 against the defendant Russell Stover Chocolates, LLC. ECF# 1. The court denied his motion for leave to proceed *in forma pauperis*, and Mr. Fisher paid the required filing fee later in September. ECF## 5-6. When Mr. Fisher failed to serve the defendant within 90 days after submitting his complaint or paying his filing fee, the magistrate judge granted Mr. Fisher a permissive extension until February 14, 2020, to serve the defendant. ECF# 7. The magistrate judge directed Mr. Fisher to the guide for pro se litigants “available on the District’s website and contain[ing] information on service of a summons and complaint.” *Id.* at p. 2. The magistrate judge further warned Mr. Fisher that his case could be dismissed without prejudice pursuant to Fed. R. Civ. P. 4(m) if he failed to timely serve the defendant. *Id.* Upon the passing of the February 14th deadline without any docket entry showing the defendant to have been served, the magistrate judge filed an order requiring the plaintiff to show cause in writing by March 6, 2020, why the magistrate judge should

not recommend the plaintiff's case be dismissed without prejudice pursuant to Fed. R. Civ. P. 4(m). ECF# 9. The plaintiff filed no response to the magistrate judge's notice and order to show cause.

On April 10, 2020, the magistrate judge issued her report and recommendation when the defendant had yet to be served and the plaintiff had taken no action in this case since late September of 2019. ECF# 11. In her order, the magistrate judge summarizes that Mr. Fisher is registered to receive ECF notifications and that prior orders were also mailed to him by regular and certified mail without any returned as undeliverable. *Id.* at p. 2. From the payment of his filing fee, the plaintiff has not done anything in this case for over six months despite a permissive extension and court order. Dismissal under Fed. R. Civ. P. 41(b) is also available when a plaintiff fails to prosecute his case or to obey a court's order. The magistrate judge recommends dismissal without prejudice under Fed. R. Civ. P. 4(m) and/or 41(b). The magistrate judge's order informs Mr. Fisher that he has 14 days after being served with a copy of this order to submit any objections to the report and recommendation and that if he fails to submit any, appellate review may be unavailable to him. ECF# 11.

The magistrate judge's report and recommendation was filed on April 10, 2020, and mailed to Mr. Fisher by regular and certified mail. ECF# 11. The certified mail receipt shows delivery on April 13, 2020. ECF# 12. Under the provisions of Fed. R. Civ. P. 72(b)(2), the plaintiff had 14 days after being served with a copy of the report and recommendation to serve and file specific written objections. Thus,

the time has expired for plaintiff to file any objections to the report and recommendation.

The court accepts the reasons for dismissing this case as explained in the report and recommendation. The court notes too that plaintiff has filed no objection to the report and recommendation within the time prescribed. For these reasons, the court accepts the report and recommendation in its entirety, and this case is dismissed without prejudice pursuant to Fed. R. Civ. P. 4(m) and 41(b).

IT IS SO ORDERED.

Dated this 28th day of April, 2020, Topeka, Kansas.

s/Sam A. Crow
Sam A. Crow, U.S. District Senior Judge