

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DRAGA CAIRONE,)	
)	
Plaintiff,)	
)	Case No. 17-cv-4247
v.)	
)	Judge Robert M. Dow, Jr.
MCHENRY COUNTY COLLEGE, et al.,)	
)	
Defendants.)	
)	
)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiff Draga Cairone’s motion [8] for extension of time to file complaint and motion for leave to file an amended complaint [26]. For the reasons set forth below, the Court denies Plaintiff’s motion [8] for an extension of time to file complaint, but grants Plaintiff’s motion for leave to file an amended complaint [26]. Defendants’ motion to dismiss is stricken as moot [18] with leave to refile with respect to the amended complaint. Plaintiff is given until April 17, 2018 to file her amended complaint. Defendants are given until May 15, 2018 to answer or otherwise respond to the amended complaint. The case is set for status on May 24, 2018 at 9:00 a.m.

I. Background

Plaintiff Draga Cairone filed this lawsuit on June 6, 2017, alleging that Defendants (1) violated her procedural and due process rights under 42 U.S.C § 1983, (2) failed to reasonably accommodate her under Title II of the American’s with Disabilities Act (“ADA”), and (3) breached their implied contract with her under Illinois law. Plaintiff’s claims relate to a June

3, 2015 letter Defendants allegedly sent to Plaintiff imposing sanctions on Plaintiff for sexual harassment.

On July 19, 2017, Plaintiff filed a motion [8] for extension of time to file complaint, asking that the Court grant Plaintiff an extension of time to file her complaint under Federal Rule of Civil Procedure 6(b)(1)(B) due to excusable neglect and circumstances beyond Plaintiff's control. According to Plaintiff, because the alleged violation occurred on June 3, 2015, the two-year statute of limitations on her claims expired on June 3, 2017, which fell on a Saturday. [8, at ¶ 1.] Applying Federal Rule of Civil Procedure 6(a)(1)(C), which provides that if the last day to file "is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday[.]" Plaintiff concludes that her complaint had to be filed by midnight on June 5, 2017. *Id.* But Plaintiff did not file her complaint until 11:45 a.m. on June 6, 2017. *Id.* at ¶ 2.

Plaintiff's counsel represents that he began the e-filing process in the early evening hours of June 5, 2017, after the CM/ECF help desk had closed. *Id.* at ¶5. Counsel further represents that the CM/ECF system repeatedly malfunctioned when he attempted to add Plaintiff as a new party. *Id.* at ¶7. Once Plaintiff's counsel was able to add Plaintiff as a new party, the CM/ECF system also did not allow him to upload the complaint. *Id.* at ¶8. Counsel attempted to fix the problem by restarting the CM/ECF program, restarting his computer, and using different web browsers. *Id.* at ¶¶ 7, 9.

Counsel represents that he made another effort to file the complaint at 11:58, but was still unable to do so. *Id.* at ¶11. After taking a break and looking up the law on late filing, counsel again attempted to file the complaint. *Id.* at ¶12. At 2:27 a.m., counsel got an error message and took screenshots of the error message, which he attached to Plaintiff's motion for an extension of

time to file complaint. [See 8-2; 8-3; 8-4.] Counsel could not recall whether he earlier received the same error message. [8, at ¶12.] Counsel again tried to file the complaint the following morning, and the complaint was filed at 11:45 a.m. without any problems. *Id.* at ¶13. Before the Court is Plaintiff's motion for extension of time to file her complaint [8], which she filed on July 19, 2017.

II. Legal Standard

“The timeliness of an action based on federal-question jurisdiction turns on the date the action was commenced in accordance with Rule 3 of the Federal Rules of Civil Procedure.” *Farley v. Koepf*, 788 F.3d 681, 684–85 (7th Cir. 2015) (citing *West v. Conrail*, 481 U.S. 35, 39, (1987); *Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703, 706 (7th Cir. 2007)). “This rule applies even where, as here, the limitations period must be borrowed from state law because the federal statute lacks its own statute of limitations.” *Id.* (citing *Conrail*, 481 U.S. at 39 & n. 4). The statute of limitations for § 1983 cases filed in Illinois is two years, as set forth in Illinois' personal injury statute, 735 Ill. Comp. Stat. 5/13-202. *Rosado v. Gonzalez*, 832 F.3d 714, 716 (7th Cir. 2016) (citation omitted). “Because personal injury actions were recognized at common law, this statute of limitations is procedural rather than jurisdictional. Therefore, the limitations period at issue in this case is potentially subject to equitable tolling and equitable estoppel.” *Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992). The same borrowed statute of limitations applies to claims brought under Title II of the ADA. *Soignier v. Am. Bd. of Plastic Surgery*, 92 F.3d 547, 551 n. 3 (7th Cir. 1996).

III. Analysis

A. Federal Rule of Civil Procedure 6(b)

Plaintiff initially moved for an extension of time to file her complaint under Federal Rule

of Civil Procedure 6(b), which provides: “When an act may or must be done within a specified time, the court may, for good cause, extend the time * * * on motion after the time has expired if the party failed to act because of excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B). But Rule 6(b) “does not authorize courts to enlarge statutory limitation periods for filing suit.” *Reynolds ex rel. Reynolds-Ejzak v. Oak Park-River Forest Sch. Dist. 200*, 2008 WL 4686160, at *4 (N.D. Ill. May 22, 2008); see also *McNicholas v. Elrod*, 1990 WL 186559 (N.D. Ill. Nov. 17, 1990). Indeed, Plaintiff now recognizes that she was “incorrect” in moving for an extension of time under Rule 6(b). [17, at 2.] Instead, Plaintiff shifts course in her reply brief to argue that the statute of limitations should be equitably tolled and that this Court should apply the “good cause” equitable tolling standard set forth in Illinois Supreme Court Rule 9(d)(1). *Id.*

However, after recognizing that “[t]his Court’s decision on this matter should be controlled by the Illinois doctrine of equitable tolling” and not Rule 6, Plaintiff goes on to argue that because § 1983 claims have a judicially borrowed statute of limitations, not a statutorily prescribed limitations period, Rule 6(b) can be applied to extend the time for Plaintiff to file her complaint. But the only case cited by Plaintiff in support of this argument reached the opposite conclusion. *McNicholas*, 1990 WL 186559, at *2 (“Rule 6(b) does not authorize federal courts to enlarge time periods established by statute, however.” (citing 4A Charles A. Wright & Arthur Miller, Fed. Prac. and Proc. § 1165 at 473-75 (1987))). Even when a statute of limitations is borrowed from state law, Rule 6(b) cannot be used to enlarge the statute of limitations. *Reynolds ex rel. Reynolds-Ejzak*, 2008 WL 4686160, at *4. Accordingly, the Court cannot extend the statute of limitations on Plaintiff’s claims under Rule 6(b).

Even though the Court need not address the arguments Plaintiff first raised in her reply brief, *United States v. Adamson*, 441 F.3d 513, 521 n. 2 (7th Cir.2006) (arguments raised for the

first time in a reply brief are waived), in the exercise of its discretion, the Court will consider Plaintiff's alternative arguments, to which the Court gave Defendants the opportunity to respond. [See 29.]

B. Equitable Tolling

“The Supreme Court has held that when a federal court adopts a state statute of limitations, the court must also adopt the state rules tolling that statute of limitations unless the rules are inconsistent with the Constitution and laws of the United States.” *Smith v. City of Chicago Heights*, 951 F.2d 834, 837 (7th Cir. 1992) (citing *Board of Regents v. Tomanio*, 446 U.S. 478, 483–86 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454, 460-66 (1975)). “Although equitable tolling is recognized in Illinois, it is rarely applied.” *Smith v. Weber*, 2018 WL 1358429, *4 (Ill. App. Ct. Mar. 15, 2018). Under Illinois law, a “statute of limitations may be equitably tolled if the defendant actively misled the plaintiff, if the plaintiff was prevented in some extraordinary way from asserting her rights, or if the plaintiff mistakenly asserted her right in the incorrect forum.” *Reynolds ex rel. Reynolds-Ejzak*, 2008 WL 4686160, at *3 (citing *Clay v. Kuhn*, 727 N.E.2d 217 (2000)). Plaintiff does not contend that she was actively misled by Plaintiff, nor does Plaintiff contend that she mistakenly asserted her right in the incorrect forum. Thus, in order for the statute of limitations to be tolled under Illinois law, Plaintiff must show that she “was prevented in some extraordinary way from asserting” her rights. The kinds of “extraordinary barriers” that may prevent a plaintiff from asserting her rights include “legal disability, an irredeemable lack of information, or situations where the plaintiff could not learn the identity of proper defendants through the exercise of due diligence.” *Thede v. Kapsas*, 897 N.E.2d 345, 351 (Ill. App. Ct. 2008). Plaintiff has not established that any such extraordinary barriers prevented her from timely filing her complaint.

It is clear that an attorney's failure to familiarize himself with the court's electronic filing system does not constitute extraordinary circumstances sufficient to justify the equitable tolling of a statute of limitations. See, e.g., *Johnson v. Astrue*, 2010 WL 2365527, at *3 (N.D. W. Va. June 8, 2010) ("The unfamiliarity of the plaintiff's counsel with electronic filing is insufficient to remove this case from the garden variety of attorney error or neglect cases, which courts generally hold are inappropriate for equitable tolling. (citing *Davila v. Barnhart*, 225 F. Supp. 2d 337, 339 (S.D.N.Y.2002))); *Townsley v. Astrue*, 2008 WL 1897598, at *5 (M.D. Fla. Apr. 28, 2008) ("[T]he fact that [plaintiff's] counsel is allegedly unfamiliar with the court's filing systems does not entitle [plaintiff] to an equitable tolling of the statute of limitations."). Here, however, Plaintiff's counsel represents that he was very familiar with the CM/ECF system, but that the CM/ECF system failed through no fault of his own.

Still, Plaintiff has not established that the temporary failure of the CM/ECF system in this case constitutes an extraordinary circumstance justifying the application of equitable tolling. Plaintiff's counsel does not specify at what time he began the filing process. But he admits that he did not start the filing process until the evening of June 5, 2017, after the help desk had closed. Temporary computer problems, internet problems, and/or problems with a court filing system are not the kind of extraordinary barriers—e.g., legal disability, an irredeemable lack of information, or situations where the plaintiff could not learn the identity of proper defendants through the exercise of due diligence—that can justify the application of equitable tolling. Such problems are common enough that a party should anticipate the possibility that they may occur. See, e.g., *Towner v. Astrue*, 2011 WL 3875425, at *7 (N.D. Iowa Aug. 31, 2011) ("By waiting until the last minute, when [plaintiff] encountered difficulties with the electronic filing system, it ultimately caused his complaint to be untimely filed. It cannot be said that 'some extraordinary

circumstance stood in his way’ of filing his complaint timely.”) (citing *Burns v. Prudden*, 588 F.3d 1148, 1150 (8th Cir. 2009)); *In re Harper*, 489 B.R. 251, 260 (Bankr. N.D. Ga. 2013) (“There is nothing ‘extraordinary’ about computer ‘freezes.’ This is an event that happens everyday in both commercial and personal environments, and is the reason that modern computers have automatic file back-ups, and that nearly all commercial and governmental databases are backed up at external locations.”). Thus, Plaintiff has not established that extraordinary circumstances prevented her from timely filing her complaint.

Furthermore, the doctrine of equitable tolling will not protect a party who fails to take ordinary precautions. *Luckett v. Rent-A-Center, Inc.*, 53 F.3d 871, 873 (7th Cir. 1995). A party seeking to invoke equitable tolling under Illinois law therefore must make a showing of due diligence. *Rosado v. Gonzalez*, 832 F.3d 714, 717 (7th Cir. 2016). “Due diligence is a ‘fact specific inquiry, guided by reference to the hypothetical reasonable person.’” *Williams v. Bd. of Review*, 948 N.E.2d 561, 573 (Ill. 2011) (quoting *Former Employees of Siemens Info. Commc’n Networks, Inc. v. Herman*, 120 F. Supp. 2d 1107, 1114)).

Plaintiff failed to exercise the requisite due diligence by waiting until the last minute to file her complaint. Lawyers who “wait until the last minute to comply with a deadline * * * are playing with fire.” *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996). “Waiting until the last hours is not diligent; the errors that often accompany hurried action do not enable the bungling lawyer to grant himself extra time.” *Farzana K. v. Indiana Dep’t of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007); see also *Hallgren v. U.S. Dep’t of Energy*, 331 F.3d 588, 591 (8th Cir. 2003) (rejecting equitable tolling where plaintiff’s counsel waited until end of 90-day period to mail complaint to clerk; “By mailing the complaint one day before the deadline, [the plaintiff’s] attorney assumed the risk that any slight disruption of ordinary mail service might delay the

filing.”); *Johnson v. Quarterman*, 483 F.3d 278, 286 (5th Cir. 2007) (“The State observes that the computer failure occurred at 7:30 p.m. on the very day the petition was due to be filed, and thus counsel waited until the last minute to complete the petition, demonstrating a lack of diligence which cannot support application of the doctrine of equitable tolling.”); *Perry v. Accurate Staffing Consultants, Inc.*, 2010 WL 2650881, at *4 (W.D.N.C. June 30, 2010) (“Plaintiff’s counsel should have known that he ran a risk in filing the complaint on the afternoon of the expiration of the ninety-day period.”); see also *Brinkman v. Nasseff Mech. Contractors Inc.*, 251 F. Supp. 3d 1266, 1275 (D. Minn. 2017) (“Equitable tolling is predicated on excusable neglect, but such an assertion rings hollow when a plaintiff * * * sits on her claims without explanation and then races to court just before the filing deadline. (internal citation omitted)). Thus, Plaintiff is not entitled to equitable tolling of her claims.

C. Illinois Procedural Rules

In her reply, Plaintiff invokes Illinois Supreme Court Rule 9(d)(1) to argue that the Court should grant her motion for an extension. But the Illinois Supreme Court Rules are “the procedural rules of the Illinois courts, and thus do not set out substantive law which the federal courts must follow[.]” *Bachenski v. Malnati*, 11 F.3d 1371, 1380 (7th Cir. 1993) (recognizing that state court rules are procedural). Plaintiff also invokes a DuPage Circuit Court local rule and a Cook County general administrative order regarding electronic filings in those jurisdictions. Although the Court is to borrow the statute of limitations and tolling rules from Illinois, federal procedural rules still apply. *Jenkins v. Vill. of Maywood*, 506 F.3d 622, 624 (7th Cir. 2007) (holding that even when the court borrows a state statute of limitations, federal procedural rules still applied to the determination of when the action was voluntarily dismissed). Because this

Court does not follow state procedural rules, Plaintiff's reliance on these state procedural rules is misplaced.

D. Timeliness of Complaint

Even though the Court denies Plaintiff's motion to extend the time to file the complaint pursuant to the authorities raised by Plaintiff in her motion and her reply, this does not mean that Plaintiff's complaint was untimely. In § 1983 cases, federal courts apply Federal Rule of Civil Procedure 6(a) to determine whether the statute of limitations has run. See, e.g., *Henderson v. Bolanda*, 253 F.3d 928, 931 n. 2 (7th Cir. 2001) ("The two-year statute of limitations for any Section 1983 claim arising out of [the plaintiff's] arrest expired on May 8, 1999. However, since that date fell on a Saturday, the time period was extended until the next business day, or May 10, 1999.") (citing Fed. R. Civ. P. 6(a)). Under Rule 6(a)(3), if the clerk's office is inaccessible "on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday." Fed. R. Civ. P. 6(a)(3).

Plaintiff's counsel submitted an affidavit indicating that despite repeated efforts to file the complaint on the evening of June 5, 2017, counsel was unable to do so because of technical issues. Counsel's representations indicate that it was a problem with the court's ECF system—and not a problem with Plaintiff's computer—that caused the technical issues. Plaintiff's counsel represents that he began the e-filing process in the early evening hours of June 5, 2017. [8, at ¶ 5.] Counsel had successfully filed at least a dozen complaints without any difficulties. *Id.* at ¶ 3. When counsel attempted to add Plaintiff as a new party, the system would return to the "open a civil case page." *Id.* at ¶ 7. This happened multiple times. *Id.* Counsel checked his settings to make sure that they were the same as when he had previously filed complaints without any difficulty. *Id.* At one point, the CM/ECF system allowed counsel to add parties, but not to

upload the complaint or other initial documents, which counsel represents were in the correct format. *Id.* at ¶ 8. Counsel also attaches an error message that he received when he tried to file the complaint in the early morning hours of June 6, 2017. [8-2; 8-3; 8-4.] Counsel could not recall whether he had received this error message earlier in the process. [8, at ¶ 12.] Although it would have been helpful if counsel had taken note of any error messages he received while trying to file the complaint on the evening of June 5, the Court has no reason to doubt counsel's sworn representations regarding the repeated failures of the court's ECF system on the evening of June 5. Thus, under Rule 6(a)(3), it appears that Plaintiff's complaint was timely. See *Justice v. Town of Cicero, Ill.*, 682 F.3d 662, 664 (7th Cir. 2012) ("If [plaintiff] had tried to file [his Rule 59(e) motion] at 11 PM on November 22, only to discover that the system would not accept his document, then he could take advantage of Rule 6(a)(3), which extends the time when the clerk's office is inaccessible."); *Star Pac. Corp. v. Star Atl. Corp.*, 574 F. App'x 225, 229 (3d Cir. 2014) (finding that time for filing Rule 59(e) motion was extended under Rule 6(a)(3) where counsel made numerous unsuccessful attempts to file motion on the evening the motion was initially due, but was unable to successfully do so because of technical difficulties with the district court's ECF system); see also Fed. R. Civ. P. 6(a)(3) advisory committee's note to 2009 amendment ("The text of the rule no longer refers to 'weather or other conditions' as the reason for the inaccessibility of the clerk's office. The reference to 'weather' was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office.").

Defendants moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) on October 31, 2017, raising—among other arguments—the argument that Plaintiff's claims are barred by the statute of limitations. [See 18.] On November 14, 2017, Plaintiff filed a motion for leave to file

an amended complaint. [See 26.] Plaintiff's motion for leave to file an amended complaint [26] is granted. Defendants' motion to dismiss [18] is stricken as moot with leave to refile with respect to the amended complaint. Should Defendants move to dismiss Plaintiff's amended complaint, Defendants may raise any arguments they may have regarding why Plaintiff's complaint should not be considered timely pursuant to Rule 6(a)(3), including that the Court's analysis above is incorrect.

V. Conclusion

For the reasons stated above, the Court denies Plaintiff's motion [8] for an extension of time to file complaint and grants Plaintiff's motion for leave to file an amended complaint [26]. Defendants' motion to dismiss is stricken as moot [18] with leave to refile with respect to the amended complaint. Plaintiff is given until April 17, 2018 to file her amended complaint. Defendants are given until May 15, 2018 to answer or otherwise respond to the amended complaint. The case is set for status on May 24, 2018 at 9:00 a.m.

Dated: April 3, 2018



Robert M. Dow, Jr.
United States District Judge