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

King Allah,

 Plaintiff,

v.

T. Mercy, et al.,

 Defendants.

No. CV-18-01457-PHX-DWL

ORDER

Pending before the Court are (1) the “Special Appearance and Motion to Dismiss Due to Summons Abatement” filed by defendants T. Mercy and M. Moncada¹ (Doc. 21) and (2) the “Cross-Motion for Extension of Time to Serve Defendants Mercy and Moncada” filed by plaintiff King Allah (“Allah”) (Doc. 26). As explained below, the Court will deny the motion to dismiss and grant the cross-motion for extension of time.

BACKGROUND

On May 13, 2018, Allah filed his complaint. (Doc. 1.) The complaint names three individuals (Mercy, Moncada, and Will) as defendants and was filed exactly two years after the date of the alleged incident giving rise to Allah’s claims.

On May 15, 2018, the Court issued a standard order directing the clerk of court to dismiss the complaint if it wasn’t served within 90 days, as required by Rule 4(m) of the

¹ Although the complaint refers to a defendant named “Mondaca,” subsequent filings by both parties spell this defendant’s last name as “Moncada.” (*See, e.g.* Docs. 15, 21.) For consistency, the Court will refer to this defendant as Moncada.

1 Federal Rules of Civil Procedure. (Doc. 6.)

2 On August 13, 2018—the very last day of the permissible service period—Allah
3 filed a motion for more time to complete service. (Doc. 12.) The next day, and while the
4 motion was pending, Allah served two of the defendants, Mercy and Moncada. (Docs.
5 15, 16.) Soon afterward, the Court issued an order denying the motion for more time to
6 complete service, finding that Allah had “sat on his hands and [done] absolutely nothing
7 to effectuate service,” had improperly sought to “deflect[] all fault for his failure to serve
8 Defendants,” and had thus failed to demonstrate good cause for the requested extension.
9 (Doc. 13.) Nevertheless, the Court afforded Allah another opportunity to file an
10 extension motion and encouraged Allah to use that opportunity to provide a better
11 “justification [for] why this Court should . . . not dismiss this matter for Plaintiff’s failure
12 to serve.” *Id.*

13 In response, Allah filed an amended motion. (Doc. 14.) Unfortunately, the
14 amended motion only sought an extension as to one of the defendants, Will. The first
15 paragraph of the motion stated that an extension wasn’t being sought as to the other two
16 defendants, Mercy and Moncada, because they purportedly had been “timely served
17 yesterday, August 1[4], 2018.” *Id.* The Court granted the motion (*see* Doc. 19), and
18 defendant Will was thereafter timely served (*see* Doc. 20).

19 ANALYSIS


20 Defendants Mercy and Moncada have now moved to dismiss “due to insufficient
21 service of process,” arguing that “they were served on August 14, 2018—one day late
22 and on the day the Court had directed the Clerk to terminate all non-served Defendants”
23 and that Allah “did not move to extend the time to serve [them] and this Court did not
24 otherwise grant any such extension.” (Doc. 21 at 2.) In his response/cross-motion, Allah
25 concedes the service effort occurred one day too late but asks the Court to “exercise[] its
26 discretion” to “either deem the complaint served on Defendants on August 14, 2018 as
27 timely served or, alternatively, enter an order setting a brief time within which Plaintiff
28 may re-serve Defendants Mercy and Moncada.” (Doc. 26 at 3.) Allah contends the

1 defendants didn't suffer any prejudice from the one-day delay in service and that granting
2 the dismissal motion would result in an unfair windfall to them because any re-filed
3 complaint could be considered untimely under the statute of limitations.

4 Although the Court shares the defendants' frustration with Allah's conduct—it
5 borders on reckless to wait until the final day of the limitations period to file the
6 complaint, then wait until the very end of the service period to attempt to serve the
7 complaint—the Ninth Circuit's law construing Rule 4(m) suggests the Court should
8 exercise its discretion to overlook a one-day delay in service when the contrary approach
9 might create a statute-of-limitations bar to the lawsuit. *Mann v. American Airlines*, 324
10 F.3d 1088, 1090-91 (9th Cir. 2003) ("Rule 4(m) explicitly permits a district court to grant
11 an extension of time to serve the complaint [after the service period has otherwise
12 expired]. The district court's discretion is not diminished when the statute of limitations
13 would bar re-filing of the suit if the district court decided to dismiss the case instead of
14 grant an extension. To the contrary, the advisory committee notes explicitly contemplate
15 that a district court might use its discretion to grant an extension in that very situation:
16 'Relief may be justified, for example, if the applicable statute of limitations would bar the
17 re-filed action.'") (citations omitted).

18 Accordingly, **IT IS ORDERED** that the motion to dismiss (Doc. 21) is **DENIED**
19 and the cross-motion for extension of time (Doc. 26) is **GRANTED** to the extent it seeks
20 confirmation that Defendants Mercy and Moncada were timely served.

21 Dated this 6th day of November, 2018.

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26 Dominic W. Lanza
27 United States District Judge
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