

No. 22-56077

**In the United States Court of
Appeals for the Ninth Circuit**

DARRYL COTTON, individually,
Plaintiff and Appellant,

v.

GINA M. AUSTIN, individually, JESSICA CLAIRE McELFRESH,
individually, and DAVID S. DEMIAN, individually,
Defendants and Appellees.

Appeal from the United States District Court
for the Southern District of California
Case No. 3:18-cv-00325-JO-DEB
The Honorable District Judge Jinsook Ohta

**APPELLEE'S MOTION TO DISMISS APPEAL FOR LACK OF
JURISDICTION; DECLARATION OF CORINNE C. BERTSCHE**

**LEWIS BRISBOIS
BISGAARD & SMITH LLP**
Corinne C. Bertsche, SB# 174939
David M. Florence, SB# 242857
550 West C Street, Suite 1700
San Diego, California 92101
Telephone: 619.233.1006
Facsimile: 619.233.8627

Attorneys for Defendant and Appellee
DAVID S. DEMIAN

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	3
MEMORANDUM OF POINTS AND AUTHORITIES.....	4
I. INTRODUCTION.....	4
II. PROCEDURAL HISTORY.....	6
A. Underlying State Court Action.....	6
B. First Amended Complaint	7
C. Plaintiff's Second Amended Complaint.....	8
III. APPELLANT FAILED TO TIMELY FILE THIS APPEAL	10
IV. CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE	14
CERTIFICATE OF SERVICE.....	15

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Casey v. Albertson’s Inc.</i> , 362 F.3d 1254 (9th Cir. 2004)	12
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978).....	12
<i>Firestone Tire & Rubber Co. v. Risjord</i> , 449 U.S. 368, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981).....	12
<i>Hamer v. Neighborhood Hous. Servs. of Chicago</i> , 138 S.Ct. 13 (2017)	11
<i>Melendres v. Maricopa Cty.</i> , 815 F.3d 645 (9th Cir. 2016).....	11
<i>Miller v. Marriott Int’l, Inc.</i> , 300 F.3d 1061 (9th Cir. 2002)	11
<i>Tillman v. Association of Apartment Owners of Ewa Apartments</i> , 234 F.3d 1087 (9th Cir. 2000).....	11
 Statutes	
28 U.S.C. § 1291.....	12
42 U.S.C. § 1983.....	5, 7, 9
42 U.S.C. § 1985.....	5, 9, 10
 Court Rules	
Federal Rules App. Proc., Rule 4	10
Federal Rules App. Proc., Rule 4(a)(1)(A)	11

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This action is a continuation of plaintiff, Daryl Cotton’s (“Cotton”) unsuccessful efforts to overturn a judgment rendered against him following a jury trial in his breach of contract lawsuit against Larry Geraci (“Geraci”) venued in San Diego County Superior Court.¹

Appellee David S. Demian (“Appellee” or “Demian”) previously briefly represented Cotton in Cotton I and withdrew as counsel early in the litigation. The litigation resulted in a judgment in favor of Geraci in July 2019 following a jury trial. (District Court Document, “Doc.,” No. 18, at ¶ 104.) Cotton thereafter sued not only his prior counsel, but also his adversary, Geraci, Geraci’s counsel, and the judges who previously presided over the Cotton I litigation and this action, claiming the Cotton I judgment was erroneous and procured by “fraud” and “judicial bias.” As in Cotton I, Cotton continued to argue in this action that the contract at issue in the Cotton I litigation was “illegal” and cannot be enforced. (Doc. No. 18, ¶ 1, 17.)

¹ Larry Geraci v. Darryl Cotton, Superior Court of California, County of San Diego 37-2017-00010073-CU-BC-CTL (“Cotton I”).

Plaintiff first initiated this action while Cotton I was still pending. (Doc. No. 1.) On May 13, 2020, plaintiff added Demian as a defendant when filing his First Amended Complaint (“FAC”). (Doc. No. 18.) In the FAC, Cotton asserted two claims entitled “Declaratory Relief” and “Punitive Damages” against defendant Demian, neither of which stated a valid claim. Instead of proceeding with his appeal of the underlying judgment, which Cotton abandoned, he sought to relitigate the underlying action against anyone involved in the case in this action. Plaintiff’s claims constitute a continuous collateral attack to attempt to overturn the judgment against him in Cotton I.

The district court granted defendants’ motions to dismiss Plaintiff’s FAC on October 22, 2021, with 30 days leave to amend. (Doc. No. 96.) On November 22, 2021, Plaintiff filed his Second Amended Complaint against defendants David S. Demian, Gian M. Austin, and Jessica McElfresh, alleging two different causes of action, namely, violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985. (Doc. No. 97.)

Demian filed a motion to dismiss Plaintiff’s SAC for failure to state a claim, which the district court granted without leave to amend on September 21, 2022. (Doc. No. 117.) The court thereafter entered

judgment in favor of defendants and against plaintiff on September 21, 2022. (Doc. No. 118.)

Plaintiff untimely filed a notice of appeal on November 16, 2022, more than 30 days after judgment was entered. (Doc. Nos. 118, 119.)

Appellee thus respectfully requests this Court dismiss plaintiff's appeal for lack of jurisdiction.

II. PROCEDURAL HISTORY

A. Underlying State Court Action

On March 21, 2017, Geraci filed a complaint in San Diego Superior Court against Cotton (Cotton I) for breach of contract arising out of Geraci's alleged purchase of Cotton's real property. Cotton filed a cross-complaint against Geraci and Berry for fraud and breach of contract as to an alleged oral joint venture agreement with Geraci to develop a cannabis dispensary on the property, among other causes of action. (Doc. No. 18, at ¶¶ 4-6, 60-73, 75-77, 79.) Cotton claimed in the underlying action that Geraci's purchase of the subject property was illegal and fraudulent.

Unhappy with adverse rulings in the state court action, Cotton initially filed the present lawsuit on February 9, 2018 while Cotton I

was still pending. (Doc. No. 1.) The district court sua sponte stayed the present action, pending resolution of plaintiff's state court action.

However, in July 2019, following a jury trial, judgment was entered in favor of Geraci, and against Cotton finding that the parties entered into a fully integrated purchase contract. (Doc. No. 18 at ¶ 104.) Cotton filed an appeal of the judgment, which was subsequently dismissed and remittitur issued. Pursuant to Cotton's ex parte application on December 23, 2019, the district court then lifted the stay of this action and ordered that defendants be served with any summons or pleadings. (Doc. Nos. 8, 11.)

B. First Amended Complaint

On May 13, 2020, Plaintiff filed his FAC in this action, adding Demian as a defendant. The FAC asserts the following causes of action: First and Second Causes of Action for Violation of Federal Civil Rights pursuant to 42 U.S.C. §§ 1983 against Judge Cynthia Bashant and Judge Joel Wholfeil; Third Cause of Action for Declaratory Relief against Geraci, Rebecca Berry, Michael Weinstein, Gina Austin, Jessica McElfresh and Demian; and Fourth Cause of Action for "Punitive Damages" against all defendants. (Doc. No. 18.)

In the FAC, Cotton specifically pleads and admits that he has brought this action as a “collateral attack on a state court judgment issued by Judge Joel R. Wohlfeil in Cotton I.” (Doc. No. 18, at ¶ 1.) Cotton claims in this action that the “Cotton I judgment is void for being procured via a fraud on the court, the product of judicial bias, and because the alleged contract has an unlawful object and is therefore illegal and cannot be enforced.” (Doc. No. 18 at ¶ 17.)

The district court thereafter granted Demian’s motion to dismiss Plaintiff’s FAC on October 22, 2021, with 30 days leave to amend. (Doc. No. 96.)

On November 22, 2021, Plaintiff filed his Second Amended Complaint against defendants David S. Demian, Gian M. Austin, and Jessica McElfresh, alleging two different causes of action, namely, violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985.² (Doc. No. 97.)

C. Plaintiff’s Second Amended Complaint.

Plaintiff’s SAC alleges violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985. In support of his first cause of action for violation of 42 U.S.C. §

² Plaintiff titles his amended pleading “Complaint for: 1. Deprivation of Civil Rights (42 U.S.C. § 1983); 2. Deprivation of Civil Rights (42 U.S.C. § 1985).”

1983, Plaintiff alleges that “FTB” failed to disclose prior relationships with Geraci, purposefully amended Plaintiff’s pleadings to sabotage his case, sought to have Plaintiff admit facts they knew not to be true, among other allegations. (Doc. No. 97, at ¶¶ 166-170.) Plaintiff alleges no specific allegations against Demian or “FTB” in his second cause of action for violation of 42 U.S.C. § 1985.

Demian filed a motion to dismiss Plaintiff’s SAC for failure to state a claim, arguing (1) Plaintiff’s first cause of action for violation of 42 U.S.C. § 1983 fails as a matter of law because Demian, as a private individual, was not a state actor nor was acting under the color of the law; (2) Plaintiff’s first cause of action does not present any direct allegations against Demian; and (3) Plaintiff’s second cause of action for violation of 42 U.S.C § 1985 also fails as a matter of law since (a) it does not contain any allegations against Demian; and (b) Plaintiff also cannot allege that Demian in any way prohibited witnesses from testifying and denied Plaintiff access to judicial proceedings as Demian has not been involved with Plaintiff’s case since 2017, prior to trial and judgment. (Doc. No. 98.)

The remaining co-defendants, Jessica McElfresh (“McElfresh”) and Gina M. Austin (“Austin”) also filed motions to dismiss. (Doc. Nos. 99, 100.) The district court agreed with each defendant, and granted Demian, McElfresh, and Austin’s motions to dismiss without leave to amend on September 21, 2022. (Doc. No. 117.) The court thereafter entered judgment in favor of defendants and against plaintiff on September 21, 2022. (Doc. No. 118.)

Plaintiff untimely filed a notice of appeal on November 16, 2022, more than 30 days after judgment was entered. (Doc. Nos. 118, 119.)

III. APPELLANT FAILED TO TIMELY FILE THIS APPEAL

Pursuant to Federal Rules of Appellate Procedure, Rule 4, a notice of appeal must be filed within 30 days after entry of the final judgment or order from which the appeal is taken, absent an applicable extension. FRAP 4(a)(1)(A). “The thirty-day deadline serves an important purpose, which is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant’s demands.” *Melendres v. Maricopa Cty.*, 815 F.3d 645, 649 (9th Cir. 2016) (internal quotes omitted.) This time limit is

“mandatory and jurisdictional.” *Tillman v. Association of Apartment Owners of Ewa Apartments*, 234 F.3d 1087, 1089 (9th Cir. 2000); *Miller v. Marriott Int’l, Inc.*, 300 F.3d 1061, 1063 (9th Cir. 2002) (“The filing of an effective notice of appeal is a jurisdictional requirement which cannot be waived.”) “[A]n appeal filing deadline prescribed by statute will be regarded as ‘jurisdictional,’ meaning that late filing of the appeal notice necessitates dismissal of the appeal.” *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S.Ct. 13, 16 (2017). Thus, the “court of appeals lacks jurisdiction to decide an appeal if the notice of appeal is not timely filed.” *Tillman, supra*, 234 F.3d at p. 1089 (appeal dismissed for lack of jurisdiction because the notice of appeal was filed after the 30-day period after judgment was entered).

Here, the district court rendered its ruling granting defendants’ motions to dismiss without leave to amend on September 21, 2022, and thereafter entered judgment the same date. The judgment entered on September 21, 2022 was final and appealable. A decision is “final” within the meaning of 28 U.S.C. § 1291 if it “(1) is a full adjudication of the issues, and (2) clearly evidences the judge’s intention that it be the

court's final act in the matter.” *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1258 (9th Cir. 2004).

A final judgment under § 1291 is “a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978) (internal quotation omitted).

Under the final judgment rule, an appellant must “raise all claims of error in a single appeal following final judgment on the merits.” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981).

The judgment entered on September 21, 2022 was final and thus appealable. The 30-day period began to run on that date, and expired on October 21, 2022. Plaintiff did not move to extend his time to appeal, and no other exception applies. Thus, the notice of appeal filed on November 16, 2022 was not timely and this appeal must be dismissed.

IV. CONCLUSION.

For the foregoing reasons, Appellee David S. Demian respectfully requests that this court dismiss the appeal.

DATED: December 6, 2022

Respectfully submitted,

LEWIS BRISBOIS BISGAARD
& SMITH LLP

By: /s/ Corinne C. Bertsche

Corinne C. Bertsche

David M. Florence

Attorneys for Appellee

DAVID S. DEMIAN

CERTIFICATE OF COMPLIANCE
FOR CASE NUMBER 22-56077

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(a) and Ninth Circuit Rule 27-1, I certify that Appellee's Motion to Dismiss for Lack of Jurisdiction is proportionally spaced, has a typeface of 14-point or more and contains 1,768 words.

DATED: December 6, 2022 LEWIS BRISBOIS BISGAARD &
SMITH LLP

By: /s/ Corinne C. Bertsche
Corinne C. Bertsche
Attorney for Appellee,
DAVID S. DEMIAN

CERTIFICATE OF SERVICE
FOR CASE NUMBER 22-56077

I hereby certify that on December 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

**APPELLEE'S MOTION TO DISMISS APPEAL
FOR LACK OF JURISDICTION**

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Additionally, I served the document on the following person at the following address:

Darryl Cotton (Plaintiff in Pro Per)
6176 Federal Blvd.
San Diego, CA 92114

The document was served by the following means:

☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

☒ Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is

placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

/s/ Raquel Legaspi
Raquel Legaspi

4868-0406-4321.1