

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 REPLY TO APPELLANT'S RESPONSE AND
OPPOSITION TO MOTION TO DISMISS APPEAL
FOR LACK OF JURISDICTION**

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FOR LACK OF JURISDICTION**

Defendant and Appellee, David S. Demian (“Demian”) hereby responds to plaintiff and appellant Daryl Cotton’s opposition to his motion to dismiss appeal.

**I. THIS COURT LACKS JURISDICTION TO HEAR THIS
APPEAL SINCE PLAINTIFF FAILED TO TIMELY FILE
THE NOTICE OF APPEAL**

Plaintiff’s opposition to defendant’s motion to dismiss fails to address the basis for the motion – this court’s lack of jurisdiction due to

the untimeliness of this appeal. Instead, plaintiff continues to argue the purported merit of his claims against defendants in this action and his underlying action against Larry Geraci.¹ Plaintiff's opposition is another continuation of his unsuccessful effort to overturn the underlying State Court judgments.

Plaintiff's argument that this appeal should not be dismissed based on his argument that the two underlying State Court judgments are void due to illegality of the purpose of Geraci's purchase of Cotton's property is unpersuasive and without any legal support. Whether or not the judgment against Cotton in the underlying Geraci State Court action is "void" has no bearing on plaintiff's time to appeal the district court's judgment in this action.

As set forth in the moving papers, since plaintiff failed to timely file the notice of appeal of the court's judgment dismissing this action against Demian, this court lacks jurisdiction to determine this appeal. See *Melendres v. Maricopa Cty.*, 815 F.3d 645, 649 (9th Cir. 2016); *Tillman v. Association of Apartment Owners of Ewa Apartments*,

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

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.”).

Here, since 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, plaintiff had until October 21, 2022 to file his notice of appeal. Since plaintiff did not file the notice of appeal until November 16, 2022, this appeal must be dismissed, regardless of the merits. *Melandres, supra*, 815 F.3d at p. 649 (“we are not at liberty to overlook a defect with the notice of appeal no matter how compelling an appellant's argument may be.”)

CONCLUSION

For the foregoing reasons, defendant David Demian requests this court dismiss plaintiff’s appeal.

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

Corinne C. Bertsche

David M. Florence

Attorneys for Defendant and Appellee

DAVID S. DEMIAN

**CERTIFICATE OF COMPLIANCE
FRAP 27(d)(2)(a) and Ninth Circuit Rule 27-1
FOR CASE NUMBER 22-56077**

Pursuant to Federal Rules of Appellate Procedure, Rule 27(d)(2)(a) and Ninth Circuit Rule 27-1, I certify that the **APPELLEE’S REPLY TO APPELLANT’S RESPONSE AND OPPOSITION TO MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION** is proportionately spaced, has a typeface of 14 point or more and contains 392 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Diego California, on December 27, 2022.

DATED: December 27, 2022 LEWIS BRISBOIS BISGAARD &
SMITH LLP

By: /s/ Corinne C. Bertsche
Corinne C. Bertsche

**CERTIFICATE OF SERVICE
FOR CASE NUMBER 22-56077**

I hereby certify that on December 27, 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 REPLY TO APPELLANT'S RESPONSE AND
OPPOSITION TO 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.

/s/ Raquel Legaspi
Raquel Legaspi