

SEP 09 2011

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	CC-11-1027-MkAlPa
6	RICARDO DIAZ,	)	Bk. No.	RS 10-38370-CB
7	Debtor.	)	Adv. No.	RS 10-01530-CB
8	_____	)		
9	RICARDO DIAZ,	)		
10	Appellant,	)		
11	v.	)	<b>MEMORANDUM*</b>	
12	WASHINGTON MUTUAL BANK; JP	)		
13	MORGAN CHASE BANK; BANK OF	)		
14	AMERICA NATIONAL ASSOCIATION	)		
15	AS SUCCESSOR BY MERGER TO	)		
16	LASALLE BANK, NA AS A TRUSTEE	)		
17	FOR WAMU MORTGAGE PASS-THROUGH	)		
	CERTIFICATES 2007-OA3;	)		
	CALIFORNIA RECONVEYANCE	)		
	COMPANY,	)		
	Appellees.	)		
	_____	)		

Argued and Submitted on July 22, 2011  
at Pasadena, California

Filed - September 9, 2011

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

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Appearances: Appellant Ricardo Diaz, in propria persona, argued  
on his own behalf; Mikel A. Glavinovich of  
Alvarado Smith, APC, argued on behalf of Appellees  
Washington Mutual Bank, et al.

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\*This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1 Before: MARKELL, ALLEY\*\* and PAPPAS, Bankruptcy Judges.

2  
3 **INTRODUCTION**

4 Chapter 7<sup>1</sup> debtor Ricardo Diaz ("Diaz") appeals the  
5 bankruptcy court's order dismissing his complaint without leave  
6 to amend. We VACATE and REMAND for further proceedings.

7 **FACTS**

8 This appeal arises from an adversary proceeding Diaz filed  
9 in his bankruptcy case. His complaint named four defendants  
10 (collectively, the "Defendants"):

- 11 (1) Washington Mutual Bank ("WAMU"),<sup>2</sup> which made a loan to Diaz  
12 in 2007 secured by his residence located in Moreno Valley,  
13 California (the "Property");<sup>3</sup>
- 14 (2) JP Morgan Chase Bank ("JP Morgan Chase"), which acquired  
15 substantially all of WAMU's assets pursuant to a Purchase  
16 and Assumption Agreement dated September 25, 2008 between  
17 JP Morgan Chase and the Federal Deposit Insurance

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\*\*Hon. Frank R. Alley, Chief U.S. Bankruptcy Judge for the  
District of Oregon, sitting by designation.

20 <sup>1</sup>Unless specified otherwise, all chapter and section  
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
22 all "Rule" references are to the Federal Rules of Bankruptcy  
23 Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure.

24 <sup>2</sup>WAMU was not represented in the bankruptcy court, has not  
25 been represented on appeal, and did not participate in the  
26 adversary proceeding. Nonetheless, throughout this decision, we  
collectively refer to all four named defendants as "the  
Defendants" for the sake of convenience.

27 <sup>3</sup>Diaz's bankruptcy schedules reflect that the Property was  
28 one of two residences that Diaz owned; the other was located in  
San Jacinto, California.

1 Corporation as receiver for WAMU ("FDIC");<sup>4</sup>

2 (3) Bank of America National Association as successor by merger  
3 to LaSalle Bank, NA as a trustee for WAMU Mortgage Pass-  
4 Through Certificates 2007-OA3 ("Bank of America"), which  
5 acquired title to the Property at a nonjudicial foreclosure  
6 sale in April 2010 and later recovered possession of the  
7 Property pursuant to a state court unlawful detainer  
8 judgment in July 2010; and

9 (4) California Reconveyance Company ("CRC"), which acted as the  
10 foreclosing trustee in the foreclosure of the Property.

11 According to Diaz, in March 2007, he obtained a loan from  
12 WAMU in the amount of \$388,000, which enabled Diaz to purchase  
13 the Property. The loan was evidenced by a promissory note (the  
14 "Note") and secured by a deed of trust (the "Deed of Trust"),  
15 both of which Diaz signed.

16 On May 6, 2009, CRC as trustee under the Deed of Trust  
17 recorded in the Official Records of Riverside County a notice of  
18 default and election to sell (Doc. no. 2009-0224625) (the "Notice  
19 of Default"), which stated that Diaz had defaulted on his  
20 obligations under the Deed of Trust and that the beneficiary  
21 (identified as WAMU) had elected to have the Property sold to  
22 satisfy the secured obligations. On that same date, CRC also  
23 recorded an assignment of deed of trust (Doc. no. 2009-0224624)  
24 (the "Assignment"). The assignment purported to transfer to Bank  
25 of America WAMU's beneficial interest in the Note and the Deed of  
26 Trust.

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28 <sup>4</sup>The complaint did not name the FDIC as a defendant.

1 In or around August 2009, CRC recorded a notice of sale,<sup>5</sup>  
2 and a nonjudicial foreclosure sale was held on April 6, 2010.  
3 On April 14, 2010, CRC recorded a Trustee's Deed Upon Sale (the  
4 "Trustee's Deed") identifying Bank of America as the successful  
5 bidder at the sale and conveying title to Bank of America.

6 Shortly after the recordation of the Trustee's Deed, Bank of  
7 America commenced eviction proceedings against Diaz by serving on  
8 Diaz a notice to vacate the Property and by filing in state court  
9 an unlawful detainer complaint (Riverside County Superior Court,  
10 Moreno Valley Division, Case No. MVC10002430). Bank of America  
11 alleged that it owned the Property and acquired title to the  
12 Property at a properly conducted foreclosure sale. On that  
13 basis, the state court granted Bank of America summary judgment  
14 for possession of the Property on July 9, 2010, and thereafter  
15 issued a writ of possession on July 21, 2010.<sup>6</sup>

16 Diaz filed his first chapter 7 bankruptcy case on July 20,  
17 2010 (Case No. RS-10-32577-CB), which was dismissed on August 24,  
18 2010, based on Diaz's failure to file certain required documents.  
19 Diaz filed a second chapter 7 bankruptcy case on September 2,  
20 2010 (Case No. RS-10-38370-CB). He filed his complaint against  
21 the Defendants on September 7, 2010 (the "Complaint"). Diaz had  
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23 <sup>5</sup>A partial copy of the notice of sale is attached to Diaz's  
24 complaint. That copy does not have any recording information  
25 noted on its face, but the particulars of the notice of sale are  
not critical to our resolution of this appeal.

26 <sup>6</sup>Diaz appealed the unlawful detainer judgment, and the  
27 appeal docket indicates that on June 21, 2011, the appellate  
28 division of the Riverside County Superior Court issued a per  
curiam opinion affirming the unlawful detainer judgment (Appeal  
No. APP10000202).

1 not listed the claims asserted in his Complaint on his bankruptcy  
2 schedules filed in either his first or in his second case.

3 Diaz represented himself in his bankruptcy cases and in his  
4 adversary proceeding, and many aspects of his Complaint are far  
5 from clear, but we will do our best to interpret it in the light  
6 most favorable to Diaz. The Complaint contained four causes of  
7 action, each asserted against all of the Defendants:

8 (1) wrongful foreclosure; (2) RESPA violations;<sup>7</sup> (3) quiet title;  
9 and (4) declaratory and injunctive relief.

10 In his wrongful foreclosure claim, Diaz alleged that he  
11 suffered damages as a result of Defendants' foreclosure  
12 proceedings because the Notice of Default was defective. Diaz  
13 asserted the Notice of Default was defective because the  
14 Defendants did not comply with the requirements of Cal. Civil  
15 Code § 2923.5.<sup>8</sup> According to Diaz, the Notice of Default also  
16 was defective because the Assignment was recorded before the  
17 Notice of Default was recorded. As a result, Diaz contends, the  
18 Notice of Default should have listed Bank of America as  
19 beneficiary, rather than WAMU.

20 In his RESPA claim, Diaz alleged that he suffered damages as

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22 <sup>7</sup>"RESPA" refers to the Real Estate Settlement Procedures  
Act, 12 U.S.C. §§ 2601, et seq.

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24 <sup>8</sup>Cal Civil Code § 2923.5 is part of California's emergency  
legislation enacted in 2008 in response to the unprecedented  
25 number of foreclosures occurring in California and nationwide.  
Generally speaking, Cal Civil Code § 2923.5 requires lenders,  
26 before commencing foreclosure proceedings, to personally contact  
borrowers to assess the borrowers' financial situation and to  
27 consider options other than foreclosure. See Legislative  
Findings accompanying Cal Civil Code § 2923.5; Mehta v. Wells  
28 Fargo Bank, N.A., 737 F.Supp.2d 1185, 1193 (S.D. Cal. 2010).

1 a result of two distinct types of violations. First, he claimed  
2 that he served on Defendants a "Qualified Written Request"  
3 pursuant to 12 U.S.C. § 2605(e), but Defendants never responded  
4 as required. Second, he claimed that Defendants received or made  
5 "secret kickbacks and yield spread premiums" in violation of  
6 12 U.S.C. § 2607.

7 In his quiet title claim, Diaz contended that the bankruptcy  
8 court should quiet title in his favor, declaring him to be the  
9 fee simple owner of the Property and rejecting all adverse claims  
10 to title asserted by the Defendants. While Diaz's quiet title  
11 allegations are difficult to follow, it appears that, according  
12 to Diaz, CRC as trustee under the Deed of Trust improperly  
13 conducted the foreclosure proceedings because none of the other  
14 Defendants demonstrated that they had any right to enforce the  
15 Note.

16 Diaz's claim for declaratory and injunctive relief was based  
17 on essentially the same alleged deficiencies and statutory  
18 violations as Diaz asserted in his other claims. That this claim  
19 asks for declaratory and injunctive relief is the only apparent  
20 difference between this claim and the other claims.

21 The Defendants filed a motion to dismiss all of the causes  
22 of action stated in the complaint pursuant to Civil Rule  
23 12(b)(6).<sup>9</sup> Defendants argued that, absent an allegation that  
24 Diaz was prepared to tender the full amount owed on the loan,  
25 Diaz's quiet title cause of action and his cause of action under  
26

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27 <sup>9</sup>Rule 7012(b) makes Civil Rule 12(b)(6) applicable in  
28 adversary proceedings.

1 Cal. Civil Code §2923.5 both failed to state a claim. According  
2 to the Defendants, the Cal. Civil Code § 2923.5 cause of action  
3 also failed to state a claim because the only remedy provided for  
4 under the statute was a potential postponement of the foreclosure  
5 sale. With respect to Diaz's RESPA claim, Defendants generally  
6 contended that Diaz had failed to allege a number of the elements  
7 necessary for stating a RESPA claim; however, the Defendants'  
8 actual argument focused on their assertion that, in light of  
9 Diaz's allegations and exhibits, the FDIC was the only entity  
10 potentially liable for the alleged RESPA violations. To attack  
11 both the quiet title and injunctive/declaratory relief claims,  
12 the Defendants further argued that the beneficiary under a deed  
13 of trust (or its assignee) is not required to produce the note  
14 secured by the deed of trust in order to validate nonjudicial  
15 foreclosure proceedings under California law.

16 Two days before the hearing on the motion to dismiss, Diaz  
17 filed a response to the Defendants' motion to dismiss, along with  
18 a request for judicial notice. Diaz did not introduce the  
19 documents attached to his request for judicial notice by  
20 identifying them or explaining how they are subject to judicial  
21 notice. Upon review, they appear to be excerpts from one or more  
22 reports by a Congressional Oversight Panel discussing in general  
23 terms the mortgage crisis in the United States and the occurrence  
24 of irregularities in the documentation of mortgages and in their  
25 transfer between players in the mortgage-securitization process.  
26 Diaz's opposition alternately focused on two contentions:  
27 (1) that the Defendants had not established their entitlement to  
28 relief under Civil Rule 12(b)(6); and (2) that the foreclosure

1 proceedings, and particularly the Notice of Default, were  
2 defective.

3 After a hearing, the bankruptcy court granted the dismissal  
4 motion and dismissed the complaint without leave to amend based  
5 on the legal grounds that the Defendants had asserted. Neither  
6 at the hearing nor in its written ruling did the court articulate  
7 its reasoning for dismissing the complaint without leave to  
8 amend. Diaz timely appealed.

### 9 JURISDICTION

10 We have jurisdiction under 28 U.S.C. § 158. The  
11 jurisdiction of the bankruptcy court is discussed below.

### 12 ISSUE

13 Did the bankruptcy court err when it considered the merits  
14 of Diaz's claims for relief without first considering whether  
15 Diaz had standing to prosecute those claims?

### 16 STANDARD OF REVIEW

17 Standing is a legal issue that we review de novo. Veal v.  
18 Am. Home Mtg. Servicing, Inc. (In re Veal), 450 B.R. 897, 906  
19 (9th Cir. BAP 2011).

20 Were we to reach the issue of the propriety of the  
21 bankruptcy court's decision under Rule 12(b)(6), we acknowledge  
22 that the court must accept as true all well-pled facts alleged in  
23 Diaz's complaint, Johnson v. Riverside Healthcare Sys., 534 F.3d  
24 1116, 1121 (9th Cir. 2008), but is not bound by conclusory  
25 statements, statements of law, and unwarranted inferences cast as  
26 factual allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
27 555-57 (2007); Clegg v. Cult Awareness Network, 18 F.3d 752, 754-  
28 755 (9th Cir. 1994). While the court generally must not consider



1 materials outside the complaint, the court may consider exhibits  
2 submitted with the complaint. Durning v. First Boston Corp.,  
3 815 F.2d 1265, 1267 (9th Cir. 1987).

4 The court may use judicially noticed facts to establish that  
5 a complaint does not state a claim for relief. Intri-Plex  
6 Techs., Inc. v. Crest Grp., Inc., 499 F.3d 1048, 1052 (9th Cir.  
7 2007). In this regard, the court can properly take judicial  
8 notice of papers filed in related litigation, Estate of Blue v.  
9 County of Los Angeles, 120 F.3d 982, 984 (9th Cir. 1997), and  
10 papers filed in an underlying bankruptcy case are subject to  
11 judicial notice in related adversary proceedings. O'Rourke v.  
12 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58  
13 (9th Cir. 1989). Documents that are considered "matters of  
14 public record" also are subject to judicial notice. Mack v.  
15 S. Bay Beer Distribs. Inc., 798 F.2d 1279, 1282 (9th Cir. 1986)  
16 (administrative agency reports and records), overruled in part on  
17 other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino,  
18 501 U.S. 104 (1991); Rosenfeld v. JPMorgan Chase Bank, N.A.,  
19 732 F.Supp.2d 952, 959 (N.D. Cal. 2010) (documents routinely  
20 recorded in a County's official records).

#### 21 **DISCUSSION - DIAZ'S STANDING**

22 Before any federal court exercises jurisdiction over a  
23 matter, the court must determine whether the plaintiff has  
24 standing. "Standing is a 'threshold question in every federal  
25 case, determining the power of the court to entertain the suit.'" In re Veal,  
26 450 B.R. at 906 (quoting Warth v. Seldin, 422 U.S.  
27 490, 498 (1975)). Constitutional standing requires injury in  
28 fact, causation, and redressability; we do not doubt that Diaz

1 meets the minimal standards for constitutional standing. Diaz  
2 alleged that he was injured by the Defendants' foreclosure  
3 proceedings and related conduct, and that Defendants' failure to  
4 comply with applicable statutes caused him injury. In addition,  
5 the relief that Diaz seeks in his Complaint, if appropriate,  
6 would address and remedy his alleged injuries. Cf. In re Veal,  
7 450 B.R. at 906.

8 However, in addition to constitutional standing, as one  
9 aspect of the judicially self-imposed prudential limitations on  
10 the exercise of federal court jurisdiction, Diaz also must  
11 demonstrate that he is asserting his own legal rights and not  
12 those belonging to others. Id. at 907 (citing Sprint Commc'ns  
13 Co., LP v. APCC Servs., Inc., 554 U.S. 269, 289 (2008)).

14 Here, Diaz sought in his adversary proceeding to pursue  
15 claims that accrued before he filed his bankruptcy case.<sup>10</sup> Even  
16 though Diaz did not list his claims in his bankruptcy schedules  
17 as assets, Diaz's claims are property of the bankruptcy estate.  
18 See § 541(a); McGuire v. United States, 550 F.3d 903, 914 (9th  
19 Cir. 2008); Rosner v. Worcester (In re Worcester), 811 F.2d 1224,  
20 1228 (9th Cir. 1987); see also Goodwin v. Mickey Thompson Entm't  
21 Grp., Inc. (In re Mickey Thompson Entm't Grp., Inc.), 292 B.R.  
22 415, 421 (9th Cir. BAP 2003) (identifying trustee's settlement of  
23 debtor's prepetition causes of action against third party as a  
24 sale of estate property). The chapter 7 trustee has the  
25 authority and duty to "collect and reduce to money" all property  
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27 <sup>10</sup>At oral argument before this panel, Diaz acknowledged that  
28 his claims for relief all arose prepetition.

1 of the estate, including Diaz's claims. §704(a)(1).

2 Furthermore, unless and until the trustee abandons them,  
3 Diaz's unscheduled claims continue to be property of the estate.  
4 See § 554(c) & (d); Cusano v. Klein, 264 F.3d 936, 945-46 (9th  
5 Cir. 2001).

6 The Bankruptcy Code designates the trustee as the estate's  
7 representative and authorizes the trustee to sue and be sued in  
8 that capacity. § 323; Spirtos v. One San Bernardino County  
9 Super. Court Case (In re Spirtos), 443 F.3d 1172, 1175 (9th Cir.  
10 2006). Thus, generally speaking, only the trustee has standing  
11 to prosecute claims for relief that are estate property.

12 McGuire, 550 F.3d at 914; In re Spirtos, 443 F.3d at 1175-76; see  
13 also, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S.  
14 343, 352-53 (1985); Hansen v. Finn (In re Curry & Sorensen,  
15 Inc.), 57 B.R. 824, 828-29 & n.4 (9th Cir. BAP 1986) (dismissing  
16 complaint without prejudice based on plaintiff's lack of  
17 standing).

18 In sum, the bankruptcy court erred in addressing the merits  
19 of Diaz's claims for relief without first assessing whether Diaz  
20 had standing to pursue those claims on behalf of the estate.

21 Rather than simply reversing, however, we must vacate and  
22 remand. Diaz has the right, at any time before the closing of  
23 the case, to amend his schedules. Rule 1009. Once scheduled,  
24 the claims may be abandoned back to him by the closing of the  
25 case or by affirmative abandonment by the trustee under § 554.  
26 More importantly, now that such potential claims for relief are  
27 disclosed, the trustee can determine whether to pursue them for  
28 the estate's benefit. Whether any of these actions have

1 occurred, and if so, their effect on standing and jurisdiction,  
2 however, are matters for the bankruptcy court in the first  
3 instance.

4 **CONCLUSION**

5 For the reasons set forth above, we VACATE the bankruptcy  
6 court's dismissal order and REMAND this matter to the bankruptcy  
7 court with instructions that the court determine whether Diaz has  
8 the requisite standing to prosecute these claims against  
9 Defendants.

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