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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	NC-17-1114-BSTa
	)		
TERESA JEAN MOORE,	)	Bk. No.	16-53510
	)		
Debtor.	)	Adv. No.	17-05005
	)		
JEFFREY MERRITT WILSON,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
DEPARTMENT OF TRANSPORTATION	)		
(CALTRANS); U.S. BANK NATIONAL	)		
ASSOCIATION; STEPHEN AARON	)		
SILVER; AUSTIN B. KENNEY; SAN	)		
BENITO COUNTY BOND,	)		
	)		
Appellees.	)		

MEMORANDUM<sup>1</sup>

Submitted Without Argument on January 25, 2018

Filed - February 26, 2018

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

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: Appellant Jeffrey Merritt Wilson, pro se on brief;  
Jan T. Chilton, Mary Kate Sullivan, and Bernard J.  
Kornberg of Severson & Werson on brief for  
appellees U.S. Bank, National Association and  
Austin B. Kenney; Jeanne Scherer, G. Michael  
Harrington, Karl H. Schmidt, and Ankush Agarwal of  
the California Department of Transportation Legal  
Division on brief for appellees California

<sup>1</sup> 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 8024-1.

1 Department of Transportation (CalTrans) and Stephen  
2 Aaron Silver.

3 Before: BRAND, SPRAKER and TAYLOR, Bankruptcy Judges.  
4

5 Appellant Jeffrey Merritt Wilson appeals an order granting a  
6 motion to dismiss his complaint against all defendants for lack of  
7 subject matter jurisdiction and because Wilson's claims were  
8 barred by the doctrine of issue preclusion. We AFFIRM on the  
9 basis that the bankruptcy court lacked jurisdiction over Wilson's  
10 claims.

11 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

12 **A. Events prior to the adversary proceeding**

13 Wilson and the debtor, Teresa Jean Moore, are no strangers to  
14 bankruptcy or to the inside of a courtroom. Prior to Debtor's  
15 current bankruptcy case, Debtor filed no less than seven  
16 bankruptcy cases in various districts, including the District of  
17 Hawaii, the District of Nevada, and the Northern and Central  
18 Districts of California. Wilson has also filed (or had filed  
19 against him) at least four bankruptcy cases in the Northern  
20 District of California since 2010. Wilson and Debtor have also  
21 spent years in the California state courts pursuing,  
22 unsuccessfully, a wrongful foreclosure action against various  
23 parties for real property they once co-owned (the "Property"),  
24 which was lost to foreclosure prior to Debtor's current bankruptcy  
25 case.

26 In 2006, Wilson purchased the Property with a \$776,000 loan  
27 from Commitment Lending. To secure the loan, Wilson executed a  
28 deed of trust against the Property in favor of Commitment Lending.

1 Wilson defaulted, and foreclosure proceedings were initiated. A  
2 Notice of Default was issued in March 2010. In April 2010,  
3 Commitment Lending assigned its interest in the note and deed of  
4 trust to U.S. Bank, which issued a Notice of Trustee's Sale in  
5 July 2010. Around this same time, and apparently without U.S.  
6 Bank's knowledge or authorization, Wilson transferred by grant  
7 deed a 50% interest in the Property to Debtor.

8 In 2011, the California Department of Transportation  
9 ("CalTrans") filed an eminent domain action against the Property  
10 in state court. The defendants included Wilson, Debtor and U.S.  
11 Bank. Wilson and Debtor, pro se, filed a 55-page cross-complaint  
12 against U.S. Bank and others, alleging that the loan documents  
13 were forged and that the pending foreclosure proceeding was  
14 wrongful. Among their claims, Wilson and Debtor asserted that  
15 U.S. Bank was not the party entitled to enforce the note. Wilson  
16 and Debtor sought monetary damages and quiet title for the  
17 Property. Contrary to what he now asserts, Wilson and Debtor  
18 asserted that the state court had "original jurisdiction" to hear  
19 their claims. The state court dismissed Wilson's and Debtor's  
20 cross-complaint with prejudice in May 2013.<sup>2</sup>

21 In May 2014, Debtor filed a bankruptcy case in the District  
22 of Nevada. In November 2014, the Nevada Bankruptcy Court entered  
23 an order granting U.S. Bank stay relief for the Property under  
24

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25  
26 <sup>2</sup> The outcome of the eminent domain action is unknown.  
27 However, since U.S. Bank ultimately foreclosed and has since  
28 obtained a Writ of Possession and posted a Notice to Vacate the  
Property, we assume the outcome was not favorable for Wilson or  
Debtor.

1 § 362(d)(1)<sup>3</sup> and (d)(2), and also granted "in rem" relief under  
2 § 362(d)(4), finding that Debtor's petition and her and Wilson's  
3 transfers of interest in the Property were part of a scheme to  
4 delay, hinder, or defraud creditors.

5 A new Notice of Sale was issued for the Property, setting a  
6 trustee's sale date. On that same day, Debtor filed an  
7 involuntary chapter 7 bankruptcy petition against Wilson in the  
8 Northern District of California. That case was later dismissed.

9 The trustee's sale for the Property occurred on July 30,  
10 2015; U.S. Bank was the successful bidder for \$488,750.00 and  
11 later recorded a trustee's deed. Thereafter, U.S. Bank filed an  
12 unlawful detainer action. Debtor filed this chapter 13 bankruptcy  
13 case in response on December 16, 2016.

14 **B. The adversary proceeding**

15 Wilson, as self-proclaimed "Competent-Fact-Witness, Preferred  
16 Stockholder, American-State-National, Third-Party Intervenor and  
17 Beneficiary of the Estate-Trust," filed an adversary complaint in  
18 Debtor's case against CalTrans, San Benito County Bond, U.S. Bank,  
19 Stephen Aaron Silver, Esq. and Austin B. Kenney, Esq. (attorneys  
20 for CalTrans and U.S. Bank, respectively, in the eminent domain  
21 action) (collectively, "Defendants"), challenging the completed  
22 foreclosure of the Property. Wilson's complaint alleged claims  
23 for: breach of the covenant of good faith and fair dealing;  
24 "violation of past subject matter jurisdictional challenge  
25 procedures;" violations of the Fourth and Fifth Amendments;

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27 <sup>3</sup> Unless specified otherwise, all chapter, code and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 violation of the "forever benefits of a specific United States  
2 Land Patent;" violations of oaths of allegiance and oaths of  
3 office; and violations of the Civil Racketeer Influenced and  
4 Corrupt Organizations Act. Wilson asserted that the bankruptcy  
5 court had "original" jurisdiction over the complaint.

6 In short, Wilson's complaint asserted that the foreclosure  
7 sale was void because both the state court and Defendants "lacked  
8 subject matter jurisdiction." His argument went as follows:  
9 because title to Wilson's Property was originally derived from the  
10 Treaty of Guadalupe Hidalgo and then transferred by a federal land  
11 patent to private citizens, only federal courts can render  
12 decisions regarding validity of title; thus, the state court  
13 lacked jurisdiction to authorize anything respecting the Property,  
14 and Defendants lacked "standing" and "subject matter jurisdiction"  
15 to proceed with the sale under California's nonjudicial  
16 foreclosure laws because those laws did not apply.

17 Wilson alleged that his complaint was a "re-brand-new Subject  
18 Matter Jurisdiction Challenge" to the state court's power to issue  
19 orders in the eminent domain and unlawful detainer actions,  
20 including the dismissal of Wilson's and Debtor's cross-complaint.  
21 Wilson alleged that that judge who issued the orders in those  
22 actions had no valid "Oath of Office" on file and was therefore  
23 "impersonating a judicial officer." Wilson also disputed whether  
24 the attorneys representing Defendants in the eminent domain and  
25 unlawful detainer actions had the authority to do so, a claim he  
26 raises repeatedly. Wilson requested declaratory relief that  
27 Defendants had no interest in the Property.

28 Thereafter, Wilson filed several additional documents titled

1 as either "requests for judicial notice" or "demand notices."

2 U.S. Bank and Kenney moved to dismiss Wilson's complaint  
3 under Civil Rule 12(b)(1) and (b)(6) for lack of jurisdiction and  
4 failure to state a claim ("Motion to Dismiss"). They argued that  
5 non-debtor Wilson could not invoke any bankruptcy protections  
6 related to the Property. Further, they argued that any legal  
7 interest Debtor held in the Property was extinguished by the  
8 prepetition foreclosure; hence, the Property was never property of  
9 the estate. Therefore, because Wilson's claims did not "arise in"  
10 or "arise under" title 11, or "relate to" administration of the  
11 bankruptcy estate, U.S. Bank and Kenney argued that the bankruptcy  
12 court lacked subject matter jurisdiction. Alternatively, they  
13 argued that Wilson had already litigated the Defendants' right to  
14 foreclose on the Property and lost; thus, he was precluded from  
15 relitigating this same issue.

16 Wilson responded by filing another round of documents,  
17 including what the bankruptcy court deciphered as his "opposition"  
18 to the Motion to Dismiss. Wilson argued that U.S. Bank and Kenney  
19 had failed to establish that the bankruptcy court lacked  
20 jurisdiction over the complaint. Wilson also argued that, because  
21 "Defendants and their alleged Bar Attorneys" had not shown they  
22 were authorized to represent Defendants, they were "trespassers."  
23 Wilson also attempted to raise a stay violation argument against  
24 U.S. Bank and to challenge the validity of the "in rem" order  
25 issued by the Nevada Bankruptcy Court.

26 After a brief hearing, the bankruptcy court entered an order  
27 granting the Motion to Dismiss and dismissing the complaint  
28 against all Defendants with prejudice ("Dismissal Order"). The

1 court first determined that it lacked subject matter jurisdiction  
2 over the complaint. In addition, it found that Rooker-Feldman  
3 provided an alternative ground to dismiss the first two claims,  
4 because those claims challenged the validity of the completed  
5 foreclosure of the Property and Wilson had conceded that U.S.  
6 Bank's right to foreclose had been finally decided by the state  
7 court. Lastly, the court determined that Wilson's first two  
8 claims were barred by the doctrine of issue preclusion.

9 Wilson timely appealed.<sup>4</sup>

## 10 **II. JURISDICTION**

11 As discussed below, the bankruptcy court lacked subject  
12 matter jurisdiction over the complaint under 28 U.S.C. § 1334.  
13 However, we have jurisdiction to review the court's Dismissal  
14 Order under 28 U.S.C. § 158.

## 15 **III. ISSUES**

- 16 1. Did the bankruptcy court err in dismissing the complaint for  
17 lack of subject matter jurisdiction?
- 18 2. Did the bankruptcy court err in dismissing the complaint on  
19 the basis of issue preclusion?

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21 <sup>4</sup> On August 30, 2017, the bankruptcy court declined to enter  
22 a judgment in favor of Defendants, believing that it was precluded  
from doing so since the Dismissal Order was on appeal.

23 Rule 7058 incorporates Civil Rule 58 and applies in adversary  
24 proceedings. Civil Rule 58(a) states that every judgment must be  
25 entered on a separate document. The Dismissal Order dismissing  
26 the complaint may not be a sufficiently separate final judgment  
27 under Civil Rule 58(a). Although no separate judgment was  
28 entered, the bankruptcy court's order became final under Civil  
Rule 58(c)(2)(B) 150 days after the order was entered on the  
docket. Regardless, the separate judgment requirement is not  
jurisdictional and can be waived. See Bankers Tr. Co. v. Mallis,  
435 U.S. 381, 384-85 (1978). On appeal, Wilson did not argue the  
lack of a separate judgment. Accordingly, he waived his right to  
require entry of a separate judgment. Id. at 386.

1 3. Did the bankruptcy court abuse its discretion by dismissing  
2 the complaint with prejudice?

3 **IV. STANDARDS OF REVIEW**

4 We review de novo questions of subject matter jurisdiction.  
5 Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1193  
6 (9th Cir. 2005); Davis v. Courington (In re Davis), 177 B.R. 907,  
7 910 (9th Cir. BAP 1995) (dismissal of a complaint for lack of  
8 subject matter jurisdiction).

9 We review de novo the bankruptcy court's determination that  
10 issue preclusion was available. Plyam v. Precision Dev., LLC  
11 (In re Plyam), 530 B.R. 456, 461 (9th Cir. BAP 2015). If issue  
12 preclusion was available, we review the bankruptcy court's  
13 application of it for an abuse of discretion. Id.

14 A dismissal granted without leave to amend and with prejudice  
15 is reviewed for abuse of discretion. AE ex rel. Hernandez v.  
16 Cnty. of Tulare, 666 F.3d 631, 636 (9th Cir. 2012).

17 A bankruptcy court abuses its discretion if it applies the  
18 wrong legal standard, misapplies the correct legal standard, or if  
19 its factual findings are illogical, implausible, or without  
20 support in inferences that may be drawn from the facts in the  
21 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,  
22 832 (9th Cir. 2011).

23 **V. DISCUSSION**

24 Wilson raises 17 issues on appeal. Although Wilson fails to  
25 articulate any coherent argument for supporting reversal of the  
26 Dismissal Order, because he is pro se, we construe his brief  
27 liberally and address what arguments he appears to raise. See  
28 Keys v. 701 Mariposa Project, LLC (In re Keys), 514 B.R. 10, 15

1 n.3 (9th Cir. BAP 2014) (we must liberally construe pro se appeal  
2 briefs).

3 **A. Standards applicable to the Motion to Dismiss**

4 When considering a motion to dismiss under Civil  
5 Rule 12(b)(1), applicable here by Rule 7012, the bankruptcy court  
6 is not restricted to the face of the pleadings but may review  
7 evidence outside the pleadings to resolve factual disputes  
8 concerning the existence of jurisdiction without converting the  
9 motion to one for summary judgment. See U.S. ex rel. Robinson  
10 Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248  
11 (9th Cir. 1992) (court "may take notice of proceedings in other  
12 courts, both within and without the federal judicial system, if  
13 those proceedings have a direct relation to matters at issue");  
14 McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)  
15 (court can consider affidavits and testimony); Biotics Research  
16 Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983)  
17 (consideration of material outside the pleadings did not convert a  
18 Civil Rule 12(b)(1) motion into one for summary judgment).<sup>5</sup>  
19 Accordingly, we review the bankruptcy court's action as a  
20 dismissal under Civil Rule 12 and not one for summary judgment.

21 The burden of establishing subject matter jurisdiction rests  
22 on the party asserting that the court has jurisdiction. McNutt v.  
23 GM Acceptance Corp., 298 U.S. 178, 182-83 (1936). Hence, Wilson  
24 had the burden of establishing that the bankruptcy court had  
25 subject matter jurisdiction, not Defendants.

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27 <sup>5</sup> For this reason, we reject Wilson's "Issue 16," which  
28 essentially faults the bankruptcy court for considering and using  
information it obtained from the documents filed by U.S. Bank with  
its Motion to Dismiss to render its decision.

1 **B. The bankruptcy court did not err in dismissing the complaint**  
2 **for lack of subject matter jurisdiction, and it did not abuse**  
3 **its discretion by dismissing it with prejudice.**

4 A defendant may assert, by motion, the defense that the court  
5 lacks jurisdiction to consider a lawsuit. Civil Rule 12(b)(1);  
6 Rule 7012. The bankruptcy court determined on U.S. Bank's and  
7 Kenney's motion that it lacked subject matter jurisdiction over  
8 Wilson's complaint.

9 Bankruptcy court jurisdiction is statutorily based. Under  
10 28 U.S.C. § 1334(b), a bankruptcy court has jurisdiction over "all  
11 civil proceedings arising under title 11, or arising in or related  
12 to cases under title 11." The terms "arising under title 11" and  
13 "arising in a case under title 11" are terms of art which the  
14 courts have defined. Wilshire Courtyard v. Cal. Franchise Tax Bd.  
15 (In re Wilshire Courtyard), 729 F.3d 1279, 1285 (9th Cir. 2013).

16 A proceeding "arises under" title 11 if it presents claims for  
17 relief created or controlled by title 11. Id. In contrast, the  
18 claims for relief in a proceeding "arising in" a title 11 case are  
19 not explicitly created or controlled by title 11, but such claims  
20 nonetheless would have no existence outside of a bankruptcy case.  
21 Id. Wilson's claims did not "arise under" the Code because they  
22 did not invoke any bankruptcy right, nor did they "arise in" the  
23 Code as they could exist outside of Debtor's bankruptcy.

24 The bankruptcy court also has jurisdiction over "those  
25 proceedings that are 'related to' a bankruptcy case."  
26 In re Pegasus Gold Corp., 394 F.3d at 1193. An action is "related  
27 to" a bankruptcy case if the outcome of the proceeding could  
28 conceivably alter the debtor's rights, liabilities, options or  
freedom of action (either positively or negatively) in such a way

1 as to impact the administration of the bankruptcy estate. Great  
2 W. Sav. v. Fietz (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988)  
3 (adopting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir.  
4 1984)). In terms of "related to" jurisdiction, "bankruptcy courts  
5 have no jurisdiction over proceedings that have no effect on the  
6 estate of the debtor." Celotex Corp. v. Edwards, 514 U.S. 300,  
7 308 & n.6 (1995).

8 At best, the only jurisdiction the bankruptcy court could  
9 have had here was "related to" jurisdiction. Debtor was not a  
10 party to the complaint. Furthermore, and contrary to Wilson's  
11 contention, the Property was never property of her bankruptcy  
12 estate because it was sold at a non-judicial foreclosure sale on  
13 July 30, 2015, nearly 18 months before she filed the current  
14 bankruptcy case. None of Wilson's claims implicate Debtor or  
15 estate property, and the outcome of the adversary proceeding could  
16 not conceivably alter Debtor's rights, liabilities, or options, or  
17 otherwise impact the administration of her bankruptcy estate.

18 Accordingly, we conclude that the bankruptcy court lacked  
19 subject matter jurisdiction to entertain Wilson's complaint, and  
20 it did not err by dismissing it on that basis. See also 28 U.S.C.  
21 § 1334(e)(1). Any arguments Wilson raises to the contrary (his  
22 Issues 4, 9, 10, 11, 14, 15 & 17) lack merit.

23 We further conclude that the bankruptcy court did not abuse  
24 its discretion by dismissing the complaint with prejudice. Wilson  
25 argues that the court should have allowed him to amend the  
26 complaint to cure the defect of jurisdiction (Issue 6).  
27 Generally, the "court should grant leave to amend even if no  
28 request to amend the pleading was made, unless it determines that

1 the pleading could not possibly be cured by the allegation of  
2 other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.  
3 2000). In other words, dismissal is proper if any potential  
4 amendment of the complaint would be futile. Although Wilson did  
5 not request the opportunity to amend and the bankruptcy court did  
6 not address this issue, amendment in this case would be futile.  
7 No facts that Wilson could assert about real property that was  
8 never part of Debtor's bankruptcy estate would cure the defect of  
9 lack of subject matter jurisdiction. For this reason, the court  
10 also did not err by dismissing the complaint as to all Defendants  
11 and not just as to U.S. Bank and Kenney, the only parties on the  
12 Motion to Dismiss (Issue 1).

13 Because we can affirm on the basis that the bankruptcy court  
14 lacked subject matter jurisdiction over the complaint, we need not  
15 determine whether it erred in applying issue preclusion as an  
16 alternative basis to dismiss.

17 **C. Wilson's remaining arguments lack merit.**

18 For completeness, we also address various issues Wilson  
19 raises in his brief not specifically addressed above and some of  
20 which were never presented to the bankruptcy court.

21 For his Issues 2, 5 and 13, Wilson seems to contest U.S.  
22 Bank's and Kenney's "standing" to appear on the Motion to Dismiss  
23 and the propriety of the court allowing their attorneys to appear  
24 on their behalf without proof. These arguments fail. Wilson  
25 hauled U.S. Bank and Kenney into the court with his complaint.  
26 These defendants do not need to establish "standing" to defend  
27 themselves in his lawsuit. To the contrary, as plaintiff, it was  
28 Wilson's burden to establish that **he** had standing to appear before

1 the court. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-  
2 61 (1992).

3 As for their attorneys, they were not required to "prove" to  
4 Wilson that they were authorized to appear on behalf of their  
5 clients. An attorney making an appearance for a litigant is  
6 presumed to have been granted authority to represent that  
7 litigant. Dep't of Water & Power of City of L.A. v. Anderson,  
8 95 F.2d 577, 580 (9th Cir. 1938). Furthermore, because U.S. Bank  
9 and Kenney did not deny the authority of their attorneys to  
10 appear, the bankruptcy court was not required to make any such  
11 inquiry. Id.

12 In Issue 3, Wilson faults the bankruptcy court for not  
13 entering defaults against Defendants. A default was not warranted  
14 for U.S. Bank and Kenney. They timely filed a Civil Rule 12(b)  
15 motion in lieu of an answer, which is entirely permissible under  
16 the rule. As for CalTrans and Silver, the record reflects that  
17 there were some service issues respecting the original summons and  
18 complaint. An alias summons was later issued, giving them until  
19 April 14, 2017, to file an answer. They too filed a motion to  
20 dismiss in lieu of an answer, which may have been filed three days  
21 late on April 17, but Wilson never requested that a default be  
22 entered after April 14 and before April 17. The court was not  
23 required to do it sua sponte.

24 In Issue 7, Wilson complains that the bankruptcy court "did  
25 not allow" his complaint "to be transferred to the proper court if  
26 needed be." Wilson never made any such request, and the court  
27 never denied one.

28 In Issue 8, Wilson suggests he did not get fair treatment

1 because he appeared pro se. A review of the record shows that the  
2 bankruptcy court gave Wilson's multitude of papers and argument  
3 more than due consideration. Further, Wilson is not your typical  
4 pro se litigant; he has seen the inside of many courtrooms.

5 Finally, in Issue 12, Wilson contends that the bankruptcy  
6 court erred by not considering that a stay was in place due to his  
7 involuntary chapter 7 case that was filed just days before the  
8 foreclosure sale. Relief for a stay violation was not a claim  
9 asserted in Wilson's complaint; rather, he raised it in opposition  
10 to the Motion to Dismiss. "The complaint cannot be amended by the  
11 briefs filed by the plaintiff in opposition to the motion to  
12 dismiss." Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1039  
13 (7th Cir. 1987) (citation omitted). As such, the bankruptcy court  
14 did not have to consider this issue.

#### 15 VI. CONCLUSION

16 For the reasons stated above, we AFFIRM.  
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