

**Manning v Forest**

2011 NY Slip Op 33929(U)

November 28, 2011

Sup Ct, Queens County

Docket Number: 11228/2008

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD

----- x	Action No. 1
BUEL PENELOPE MANNING, as	Index No.: 11228/2008
Administratrix of the Estate of NOEL	Motion Date: 9/15/11
GEORGE MANNING,	Motion No.: 20
Plaintiff,	Motion Seq.: 4
- against -	
VALERIE FOREST and	
AVIS WILLACY,	
Defendants.	

----- x	Action No. 2
COUNTRYWIDE HOME LOAN SERVICING, L.P.,	Index No. 28701/2008
400 Countrywide Way	
Simi Valley, CA. 93065,	
Plaintiff,	
- against -	

AVIS M. WILLACY, BUEL PENELOPE MANNING,  
AS ADMINISTRATRIX OF THE ESTATE OF NOEL  
GEORGE MANNING, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU, THE BANK OF NEW  
YORK MELLON TRUST COMPANY, NATIONAL  
ASSOCIATION F/K/A THE BANK OF NEW YORK  
TRUST COMPANY, N.A., AS TRUSTEE AND  
JOHN DOE,

Defendants,

-----x

-----X

AVIS M . WILLACY,

Action No. 3

Index No. 13170/2011

Plaintiff,

-against-

ERIC FOREST, VALERIE FOREST, COUNTRYWIDE  
HOME LOAN SERVICING, L.P. & BUEL  
PENELOPE MANNING,

Defendants.

-----x

The following papers numbered 1 to 20 were read on this motion by plaintiff in Action No. 1 for an order pursuant to CPLR 602(a) consolidating Action No. 1 with Action No. 2 and the cross-motion of defendant Avis Willacy in Action No. 1 and No 2., for an order consolidating Action No. 1 with Action No. 2 and Action No. 3:

Papers  
Numbered

Plaintiff Manning's Notice of Motion-Exhibits.....	1 - 5
Defendant Willacy's Cross-Motion .....	6 - 9
Plaintiff Countrywide's Affirmations in Opposition.....	10 - 14

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This is an action concerning real property located at 216-18 135th Street, Laurelton, New York, 11413. The property was acquired by Noel George Manning as tenant in common with Glenore Maynard on December 19, 1995 and was the marital abode of Noel George Manning and his spouse Buel Penelope Manning until Noel's death on August 13, 2001. Because Noel died intestate and Buel name was not on the deed, Buel was not an owner of record of the property and the property became an asset of the estate upon Noel's death. By decree of the Queens County Surrogate's Court dated August 6, 2005, Buel Penelope Manning was issued Letters of Administration for the estate of her husband.

Buel asserts that she was desirous of remaining in the house, but the mortgage was in arrears and she could not obtain a new mortgage in her own name to purchase the property from the estate. She states that she reached an agreement with her friend Valerie Foster to permit Valerie Foster to obtain a mortgage and acquire title from the estate with the understanding that Buel

would reacquire title once she could obtain her own mortgage. Based upon this understanding, plaintiff deeded the premises to Valerie Forest on April 20, 2005.

Buel alleges that after the deed was transferred she remained in the house and paid the mortgage. It is also alleged by plaintiff that on February 29 2008, Valerie Forest transferred title to the premises to one Avis M. Willacy without the knowledge of Buel. Willacy financed her purchase by obtaining a mortgage loan from Countrywide Bank, FSB in the principal amount of \$417,000.

On May 5, 2008, Buel, as administratrix of the estate commenced an action pursuant to RPAPL § 15 against Valerie Forest and Avis Willacy to (1) vacate the deed between Forest and Willacy; (2) to declare that plaintiff is the sole fee owner of the subject property; and (3) to strike the Countrywide mortgage of record obtained by Willacy on the ground that Buel obtained a constructive trust over the premises and that Forest committed fraud by selling the premises without plaintiff's permission, knowledge or consent. Defendant Forest served an answer denying the material allegations of the complaint, asserting various affirmative defenses including a defense based upon failure to join necessary parties.

On November 26, 2008 Countrywide commenced a foreclosure action against Avis Willacy and Buel Penelope Manning as Administratrix of the Estate of Noel George Manning. That action is presently pending before Justice Markey under Index No. 28701/2008. A motion for summary judgment filed by Countrywide is presently pending in that action.

On June 1, 2011, Avis Willacy commenced a separate action under Index No. 13170/2011 by filing a summons with notice against Eric Forest, Valerie Forest, Countrywide and Buel Penelope Manning to recover money damages and to rescind the subject note and mortgage of February 2008. Money damages are sought against the Forest defendants based upon their allegedly fraudulent actions against Avis Willacy in inducing her to enter into the mortgage. Willacy claims she had no idea she was signing a mortgage, did not live in the subject premises, did not know that she was the title owner of property and did not benefit from a sham perpetrated upon her. The action also seeks to rescind a deed pertaining to the subject property as between Avis Willacy and Buel Penelope Manning dated May 6, 2011.

In May 2010, defendants in Action No. 1 Forrest and Willacy moved to dismiss for failure to join necessary parties. This court held by decision dated July 28, 2010, that because Noel died intestate that his daughters have an interest in the

property and thus are necessary parties. In addition this court held that because plaintiff sought to cancel the Country wide mortgage of record, that Countrywide as the holder of that mortgage is also a necessary party. Therefore, this court granted the motion to dismiss only to the extent of directing plaintiff to join the intestate distributees of Noel George Manning and Countrywide as party defendants and to serve and file a supplemental summons and amended complaint.

In December 2010, defendant Forest moved for summary judgment dismissing the complaint and plaintiff cross-moved to consolidate this action with Countrywide's foreclosure action against Willacy. This court denied the motion for summary judgment and denied the cross-motion to consolidate without prejudice as same was not served upon Countrywide. In June 2011, plaintiff again moved to consolidate this action with the pending foreclosure action, however, this Court denied the motion without prejudice as the plaintiff's action had been dismissed in the trial scheduling part for failure to appear.

In September 2011 the matter was restored to the trial calendar by stipulation and plaintiff brought the instant motion to consolidate in lieu of filing a supplemental summons and complaint upon Countrywide. To date, plaintiff has not joined Buel's daughters and has not joined Countrywide as necessary parties in Action No. 1, however plaintiff asserts that consolidating the matter with Countrywide's foreclosure case will have the same effect as serving Countrywide with a supplemental summons and complaint. Plaintiff attaches affidavits from all of Buel's intestate distributees in which they waive any and all interest in the property.

Counsel for Avis Willacy a defendant in Action Nos. 1 and 2 and a plaintiff in Action No. 3, cross-moves to consolidate the three above captioned actions on the ground that there are common questions in all three actions which pertain to whether the mortgage which is sought to be vacated is valid.

Counsel for Valerie Forest has filed an affirmation in which he states that he takes no position with respect the motions to consolidate.

Counsel for Countrywide has filed an affirmation in which he opposes consolidation. Countrywide asserts that the motion is premature in that Action No. 1 has not yet been restored to the calendar. However, subsequent to the filing of Countrywide's opposition, the matter was restored and is now pending in the Trial Scheduling Part. Countrywide also objects on the ground that plaintiff has failed to add Countrywide as a necessary party in action No 1. as directed by this Court in its order dated July

28, 2010. In addition, Countrywide objects to consolidation on the ground that there is a motion pending before Justice Markey in which Countrywide has moved for summary judgment in its favor dismissing the answer of Buel Manning in the foreclosure action. Countrywide also objects to consolidation of action No. 3 on the ground that Countrywide has not been served with the summons with notice in Action No. 3. Countrywide states that until the summons and complaint are served they cannot be joined in the action. However, this Court notes that the court records contain an affidavit of service indicating that Countrywide was served on September 13, 2011 by service upon the Secretary of State.

Upon review and consideration of the motion and cross-motion for consolidation and the opposition thereto, this court finds that motions to consolidate the above captioned Action Nos. 1, 2 and 3 is granted. "Where common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (see Kally v Mount Sinai Hosp., 44 AD3d 1010 [2d Dept. 2007]; Flaherty v RCP Assocs., 208 AD2d 496 [2d Dept. 1994]). "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts" (see Best Price Jewelers.Com, Inc. v Internet Data Storage & Systems, Inc., 51 AD3d 839 [2d Dept. 2008]).

Here, it is clear that the interests of justice and judicial economy will be served by consolidation of the three actions, since all three actions concern the same parties and claims arising out of the same property (see Nigro v Pickett, 39 AD3d 720[2d Dept. 2007]).

Accordingly, it is hereby

ORDERED, that the motion to consolidate Action No. 1 and Action No. 2 and Action No. 3 is granted to the extent that the matters shall be consolidated for joint trial, and it is further,

ORDERED, that plaintiff in Action No. 1 shall serve an amended summons and complaint upon Countrywide adding Countrywide as well as the intestate distributees of Noel George Manning as necessary party-defendants in Action No. 1, and it is further,

ORDERED, that the parties are given leave to serve amended answers asserting any cross-claims and counterclaims necessitated by the consolidation for joint trial within 30 days after service of a copy of this order with notice of entry thereof and it is further,

ORDERED, that the moving parties shall serve a copy of this order with notice of entry on all parties to the actions consolidated and the Clerk of Queens County.

Dated: November 28, 2011  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.