

<b>Rose v River Hill Residential, LLC</b>
2012 NY Slip Op 31351(U)
April 21, 2012
Supreme Court, Nassau County
Docket Number: 13138/11
Judge: James P. McCormack
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**SUPREME COURT - STATE OF NEW YORK  
TRIAL/IAS TERM, PART 43 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack**  
**Acting Justice of the Supreme Court**

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**ANTHONY ROSE,**

**Plaintiff(s),**

**Index No. 13138-2011**

**-against-**

**Motion Seq. Nos.: 001, 002, 004  
Motion Submitted: 2/14/12**

**RIVER HILL RESIDENTIAL, LLC. RIVERVIEW CLUB, SOMERSET FINANCIAL GROUP, BAY CRANE SERVICE, INC., WIRELESS NETWORK GROUP, INC. 15 EAST MANAGEMENT INC., T-MOBILE USA, INC., T-MOBILE RESOURCES CORPORATION and T-MOBILE NORTHEAST LLC,**

**Defendant(s).**

\_\_\_\_\_x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....XXX
- Affirmation in Opposition.....
- Affirmation in Support.....X
- Reply Affirmation.....

Defendants, T-Mobile USA, INC., T-Mobile Resources Corporation and T-Mobile Northeast LLC, move unopposed pursuant to CPLR § 602 (Motion Sequence #1) for an Order directing the Clerk of the Supreme Court, Queens County, to transfer Queens Index Number 899/11 to the Supreme Court, Nassau County, and consolidate the action with the action pending in Supreme Court, Nassau County under Index Number 13138/11. Defendant, Wireless Network Group INC. ("WIRELESS"), moves unopposed

pursuant to CPLR §§ 502 and 602 (Motion Sequence #2) for an Order directing the Clerk of the Supreme Court, Queens County, to transfer Queens Index Number 899/11 to the Supreme Court, Nassau County, and consolidate the action with the action pending in Supreme Court, Nassau County under Index Number 13138/11.

Defendants River Hill Residential, LLC. and Riverview Club, have filed an Affirmation in Support of Defendant WIRELESS' motion to consolidate and change venue.

Defendant, Somerset Financial Group ("SFG"), moves unopposed pursuant to CPLR §3212 (Motion Sequence #4), for an Order granting summary judgment on the issue of liability and dismissing Plaintiff's complaint against it. In addition, SFG moves for monetary sanctions against the plaintiff and his attorney Derek Sells, Esq., pursuant to Rule 130 of the Rules of the Chief Administrator, as well as counsel fees and expenses incurred by SFG for the preparation of the motion before the court and the defense of the instant action upon the ground that the plaintiff and his attorneys have continued a frivolous claim against SFG.

### **SUMMARY JUDGEMENT**

Plaintiff alleges that while working at 1155 Warburton Avenue, Yonkers, New York, he sustained injuries when he tripped or slipped and fell on a wrench, debris, and other work equipment located on the staircase leading from the roof to the thirteenth floor of the building. The plaintiff alleges defendants were negligent and careless in maintaining the staircase, not providing the plaintiff with a safe place to work, in not constructing, equipping, arranging, guarding, conducting and operating the job site so as to provide reasonable and adequate protection for the plaintiff's safety, in improperly

placing, operating and guarding equipment and devices at the site, and that those failures resulted in personal injuries the plaintiff sustained. SFG served a verified answer asserting affirmative defenses, including the fact that SFG was not the owner, lessor, lessee, general contractor or sub-contractor at the subject property, was not the general contractor for the construction project at the subject property, did not operate or manage the subject premises and did not perform construction duties or provide construction materials for the project.

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez V. Prospect Hospital*, 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center*, 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York, supra*. The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1<sup>st</sup> Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy*, 35 NY2d 361 (1974).

In the instant matter, SFG has met its burden of establishing a prima facie entitlement to summary judgment by submitting the affidavit of Jules Reich, the President and managing member of the Somerset Financial Group. Mr. Reich, as President and managing member of the Somerset Financial Group attests to the fact that SFG has nothing to do with the subject property. At all relevant times SFG was not an owner, lessor, lessee, manager, agent or operator of the subject property and was not a general contractor, did not perform any construction or provide construction materials for the subject property and did not control or maintain the subject property. SFG was not a partner or member of any entity involved with the subject property.

In addition, SFG has provided the affidavit of Jeffrey Bookman, a managing member of Greystone River Hill, LLC, the manager of River Hill Residential, LLC, the sponsor of the offering plan for the Riverview Club Condominium located at 1155 Warburton Avenue in Yonkers. As one of the principals and members of the sponsor and selling agent, Mr. Bookman attests to the fact that SFG has nothing to do with the subject property. At all relevant times SFG was not an owner, lessor, lessee, manager, agent or operator of the subject property and was not a general contractor, did not perform any construction or provide construction materials for the subject property and did not control or maintain the subject property. SFG was not a partner or member of any entity involved with the subject property.

## CONSOLIDATION AND CHANGE OF VENUE

Defendants T-MOBILE USA, INC., T-MOBILE RESOURCES CORPORATION and T-MOBILE NORTHEAST LLC and WIRELESS NETWORK GROUP INC, move this court for an Order directing the Clerk of the Supreme Court, Queens County, to transfer Queens Index Number 899/11 to the Supreme Court, Nassau County, and consolidating the action with the action pending in Supreme Court, Nassau County under Index Number 13138/11; directing that the action pending in Queens County (Action No. 1) and the Action pending in Nassau County (Action No. 2), be consolidated on the ground that the two actions arise from the same incident and amending the caption pursuant to CPLR §§ 502 and 602 (a).

The action presently before this court under Supreme Court, Nassau County Index Number 13138/11 is a personal injury action by Anthony Rose arising out of an incident which occurred on or about January 31, 2008. This action was initially consolidated from two actions which were pending in the Supreme Court, Kings County under Index Numbers 24303/10 and 31273/10. After consolidation both cases were transferred to Nassau County and consolidated under Nassau County Index Number 13138/11.

The action pending in the Supreme Court, Queens County under Index Number 899/11 is also an action for personal injuries by Anthony Rose arising out of the same accident which occurred on or about January 31, 2008.

CPLR § 602 (a) provides that consolidation among actions should be granted where there are common questions of law and/or fact. However, consolidation of actions should not be granted if doing so would prejudice a substantial right of the opposing party. *Perini Corp. v WDF, Inc.*, 33 A.D.3d 605, 606, 822 N.Y.S.2d 295 (2<sup>nd</sup> Dept. 2006), *Best Price Jewelers. Com, Inc. v Internet Data Storage and Systems, Inc.*, 51 A.D.3d 839, 857 N.Y.S.2d 731 (2<sup>nd</sup> Dept. 2008). A court may order that two actions be consolidated in the interest of justice and judicial economy when two actions arise out of the same incident and where it is highly probable that the same witnesses and evidence will be presented at trial.

As the Supreme Court case pending in Queens County arises out of the same occurrence as the case pending in Supreme Court, Nassau County, venue for the case pending in the Supreme Court, Queens County under Index Number 899/11 should be changed to Nassau County and consolidated with the pending Supreme Court, Nassau County case under Index Number 13138/11 which is venued in Nassau County based upon the Plaintiff's residence.

Accordingly, it is hereby

**ORDERED**, Defendant, Somerset Financial Group's motion for an Order granting summary judgment on the issue of liability, and dismissing Plaintiff's complaint against it is Granted.

**ORDERED**, Defendant, Somerset Financial Group's motion for an Order

granting financial sanctions pursuant to Rule 130 of the Rules of the Chief Administrator is Denied.

**ORDERED**, that the Clerk of Queens County is directed to transfer the file under Queens County Index Number 899/11 to the Nassau County Clerk;

**ORDERED**, that the Queens County case under Index Number 899/11(Action No.1) and the Nassau County case under Index Number 13138/11 (Action No. 2), be consolidated for all purposes under Supreme Court, Nassau County Index Number 13138/11;

**ORDERED**, that a preliminary conference in this action, currently scheduled for May 2, 2012 be held at 9:30 a.m., Nassau County Supreme Court 100 Supreme Court Drive, Mineola , New York 11501, at which time counsel for all parties shall appear; and it is further;



**ORDERED**, that the caption of this matter shall be as follows and the Clerk of the Court is directed to change the caption to reflect this change:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

X

ANTHONY ROSE,

Index No.:13138/11

Plaintiff,

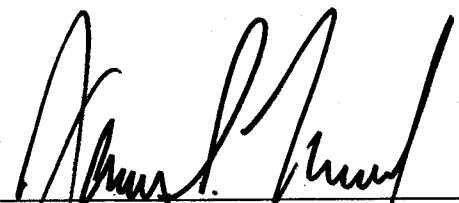
-against-

RIVER HILL RESIDENTIAL, LLC, RIVERVIEW CLUB,  
SOMERSET FINANCIAL GROUP, BAY CRANE  
SERVICE, INC., WIRELESS NETWORK GROUP, INC.,  
15 EAST MANAGEMENT INC., T-MOBILE USA, INC.,  
T-MOBILE RESOURCES CORPORATION, T-MOBILE  
NORTHEAST, LLC, GREYSTONE RIVERHILL, LLC,  
BRONSTEIN PROPERTIES, LLC, LIVE RIGHT REALTY  
INC., LIVER RIGHT REALTY MANAGEMENT CORP.,  
and RIVER CLUB CONDOMINIUM,

Defendants.

This constitutes the Decision and Order of the Court.

Dated: April 21, 2012  
Mineola, N.Y.

  
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Hon. James P. McCormack, A. J. S. C.

**ENTERED**  
MAY 03 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE