

**Yandoli v City of New York**

2012 NY Slip Op 30291(U)

February 2, 2012

Supreme Court, New York County

Docket Number: 109364/07

Judge: Barbara Jaffe

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AMENDED ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
KIM YOUNG YANDOLI and  
ANTHONY DEAN YANDOLI,  
  
Plaintiffs,

Index No. 109364/07

Motion Date: 11/10/11  
Sequence # 003  
DECISION AND ORDER

-against-

CITY OF NEW YORK, JOHN GRIMM,  
HILDA GRIMM, MARIBEL L. MEDINA and  
RICHARD MEDINA,

Defendants.

-----X  
BARBARA JAFFE, J.S.C.:

**For plaintiffs:**  
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**For Grimms:**  
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By notice of motion dated December 22, 2010, defendant John Grimm moves pursuant to CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

By deed dated April 6, 1984, defendant Hilda Grimm conveyed 84-32 150<sup>th</sup> Street, Jamaica, New York, 11435 to herself and her husband, John. (Affirmation of James Feehan, Esq., in Reply, dated March 18, 2011 [Feehan Reply Aff.], Exh. B). On May 30, 1984, the deed was recorded in Queens County. (*Id.*). On January 27, 1992, Hilda passed away. (*Id.*, Exh. A).

On December 28, 2006, plaintiff Kim Young Yandoli tripped and fell on a raised portion of sidewalk adjacent to the subject property. (Affirmation of James Feehan, Esq., dated Dec. 22, 2010 [Feehan Aff.], Exh. A). The portion of sidewalk on which she tripped was raised by tree roots. (*Id.*, Exhs. A, B, D).

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On July 6, 2007, plaintiffs commenced this action by filing a summons and verified complaint, and on August 13, 2007, John Grimm joined issue with service of his verified answer as “John Grimm and Estate of Hilda Grimm i/s/h/a Hilda Grimm.” (*Id.*). There is no evidence that Hilda’s estate was substituted for her as defendant.

On October 27, 2009, at an examination before trial, John Grimm testified that Hilda had inherited the property from her parents, that he has lived there since 1964, that he obtained ownership of the property upon his wife’s death, and that it is a single family home. (Affirmation of Gary S. Fish, Esq., in Opposition, dated March 7, 2011 [Fish Opp. Aff.], Exh. 1).

## II. CONTENTIONS

John Grimm disclaims liability for plaintiff’s injuries on the ground that the property is an owner-occupied single family home and that it is thus exempt from New York City Administrative Code § 7-210. (Affirmation of James Feehan, Esq., in Further Support, dated Feb. 10, 2011).

In opposition, plaintiff denies that the property is owner-occupied, as Hilda never conveyed it to John, a decedent’s estate cannot occupy a home, and that John Grimm is responsible, as the abutting landowner, for repairing damage to the sidewalk caused by tree roots. (Fish Opp. Aff.). In any event, they assert that John Grimm is liable for failing to maintain the sidewalk pursuant to Administrative Code § 19-152(a)(4). (*Id.*).

In reply, John Grimm maintains that the property is exempt, as Hilda conveyed it to herself and him, thereby creating a tenancy by the entirety, and that he became its sole owner upon her death. (Feehan Reply Aff.). He also denies that he may be held liable pursuant to section 19-152(a)(4). (*Id.*).

### III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

#### A. Effect of Hilda Grimm's pre-commencement death

“Generally, where a cause of action survives the death of a party, such death divests the court of jurisdiction until a duly-appointed personal representative is substituted for the deceased party.” (*Paterno v CYC, LLC*, 46 AD3d 788 [2d Dept 2007]). However, where there are multiple defendants, one of whom has died before the action was commenced, the action against the deceased defendant is a nullity (*Marte v Graber*, 58 AD3d 1 [1<sup>st</sup> Dept 2008]), and it is unnecessary to stay the entire action pending the appointment of an administrator for him or her (*Batista v Rivera*, 5 AD3d 308 [1<sup>st</sup> Dept 2004]). The action as against Hilda Grimm is, therefore, a nullity.

#### B. Tenancy by the entirety

A conveyance by one spouse to himself or herself and his or her spouse creates a tenancy by the entirety (24 NY Jur Cotenancy & Partition § 48; *Lequerique v Lequerique*, 60 AD3d 504 [1<sup>st</sup> Dept 2009]), the salient characteristic of which “is the unique relationship between [spouses], each of whom is seized of the whole and not of any undivided portion of the estate such that both

and each own the entire fee” (24 NY Jur Cotenancy & Partition § 38). Upon the death of one spouse, the other spouse has absolute ownership of the entire estate. (*Lequerique*, 60 AD3d at 505).

Here, as the April 6, 1984 deed and John Grimm’s testimony reflect that he and Hilda Grimm held the property as tenants by the entirety and that Hilda Grimm passed away before the accident occurred, absent evidence to the contrary, he was its sole owner at that time.

C. Administrative Code §§ 7-210 and 19-152(a)(4)

New York City Administrative Code § 7-210(b) provides that:

the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition . . . . This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

An abutting landowner’s duty to maintain the sidewalk “in a reasonably safe condition” encompasses the duty to repair defects therein caused by tree roots. (*Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [Sup Ct, New York County]; *Seplow v Solil Mgmt.*, 15 Misc 3d 1138[A], 2007 NY Slip Op 51033[U] [Sup Ct, New York County]). And, even where the abutting landowner is exempt from the liability-shifting provisions of section 7-210(b), he may still be held liable for injuries caused by a sidewalk defect if he caused or created same or put the sidewalk to a special use. (*Gilmartin v City of New York*, 81 AD3d 411 [1<sup>st</sup> Dept 2011]).

Section 19-152(a)(4) provides that an abutting landowner must “install, reinstall, construct, reconstruct, repave or repair only those sidewalk flags which contain a substantial defect” and defines same to include “a trip hazard where the vertical grade differential between

adjacent sidewalk flags is greater than or equal to one half inch.” This section does not provide a basis independent of section 7-210 for which an abutting landowner may be held liable for injuries caused by sidewalk defects. (*Elbadawi v Myrna & Mark Pizzeria, Inc.*, 70 AD3d 627 [2d Dept 2010]; see *Vucetovic v Espom Downs, Inc.*, 10 NY3d 517 [2008] [before enactment of 7-210, violations of 19-152 resulted in fines, not liability, and 7-210 tracks language of 19-152]).

Here, as John Grimm testified that the property is a single-family home and that he lived there when the accident occurred, absent evidence that he used the home for non-residential purposes, that he and/or Hilda Grimm caused or created the raised portion of sidewalk, or that they put it to a special use, he has demonstrated entitlement to summary judgment.


#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant John Grimm’s motion for summary judgment is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendant John Grimm with costs and disbursements to John Grimm, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant John Grimm; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: February 2, 2012  
New York, New York  
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