

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
TRIAL COURT OF MASSACHUSETTS  
SUFFOLK COUNTY DIVISION  
CIVIL ACTION No. 90-5286

.....

THOMAS SHAY, Individually  
And As Next Friend Of KRISTEN FLANAGAN,  
  
Plaintiff

v.

JEFFREY BERRY, Individually And, Together  
With LOUIS R. GIAMMARCO, As TRUSTEES  
Of The BER-GIAM REALTY TRUST,  
BER-GIAM, INC., And ANTHONY GIAMMARCO,  
  
Defendants

ANSWER OF THE DEFENDANT,  
ANTHONY GIAMMARCO,  
TO AMENDED COMPLAINT

.....

The co-defendant, Anthony Giammarco, in the above entitled civil action, respectfully answers the Amended Complaint of the plaintiff, Thomas Shay, as follows:

1. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations of the plaintiff's residency and relationship to Kristen Flanagan as alleged in paragraph 1 of the Amended Complaint, and calls upon the plaintiff to prove same.

2. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations of the residency of the co-defendant, Jeffrey Berry, as alleged in paragraph 2 of the Amended Complaint, and calls upon the plaintiff to prove same.

3. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations as to the formal existence of the co-defendant, Ber-Giam, Inc., as alleged in paragraph 3 of the Amended Complaint, and calls upon the plaintiff to prove same.

4. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations as to the names of the trustees of, and the existence of, the Ber-Giam Realty Trust at any point in time as alleged in paragraph 4 of the Amended Complaint, and calls upon the plaintiff to prove same.

5. The co-defendant, Anthony Giammarco, denies that he resides in the City of Boston or the County of Suffolk, and denies that on October 30, 1987, he was an employee of Ber-Giam, Inc., stating that he was employed on said date by Dedham Service Center, all in response to paragraph 5 of the Amended Complaint.

6. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations as to the plaintiff's relationship to Kristen Flanagan

as alleged in paragraph 6 of the Amended Complaint, and calls upon the plaintiff to prove same.

7. The co-defendant, Anthony Giammarco, admits that on October 30, 1987, the plaintiff, Thomas Shay, was at his auto body shop on Washington Street in Dedham, Massachusetts, as alleged in paragraph 7 of the Amended Complaint.

8. The co-defendant, Anthony Giammarco, denies the allegations set forth in paragraph 8 of the Amended Complaint.

9. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 9 of the Amended Complaint.

10. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 10 of the Amended Complaint.

11. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 11 of the Amended Complaint.

12. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 12 of the Amended Complaint.

13. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 13 of the Amended Complaint.

14. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 14 of the Amended Complaint.

15. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 15 of the Amended Complaint.

16. The co-defendant, Anthony Giammarco, hereby incorporates herein his responses to paragraphs 1 through 15 of the Amended Complaint, as if the same had been here set forth.

17. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations of paragraph 17 of the Amended Complaint, and calls upon the plaintiff to prove same.

18. The co-defendant, Anthony Giammarco, denies the allegations in paragraph 18 of the Amended Complaint.

19. The co-defendant, Anthony Giammarco, denies the allegations in paragraph 19 of the Amended Complaint.

20. The co-defendant, Anthony Giammarco, denies the allegations in paragraph 20 of the Amended Complaint.

21. The co-defendant, Anthony Giammarco, hereby incorporates his responses to paragraphs 1 through 20 of the Amended Complaint, as if the same had been here set forth.

22. The co-defendant, Anthony Giammarco, neither admits nor denies the tenancy as alleged in paragraph 22 of the Amended Complaint, and calls upon the plaintiff to prove same.

23. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations in paragraph 23 of the Amended Complaint, and calls upon the plaintiff to prove same.

24. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations in paragraph 24 of the Amended Complaint, and calls upon the plaintiff to prove same.

25. The co-defendant, Anthony Giammarco, denies the allegations in paragraph 25 of the Amended Complaint.

26. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 26 of the Amended Complaint.

27. The co-defendant, Anthony Giammarco, hereby incorporates herein his responses to paragraphs 1 through 26 of the Amended Complaint, as if the same had been here set forth.

28. The co-defendant, Anthony Giammarco, neither admits nor denies the allegations set forth in paragraph 28 of the Amended Complaint, and calls upon the plaintiff to prove same.

29. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 29 of the Amended Complaint.

30. The co-defendant, Anthony Giammarco, denies that the defendants allowed an explosion to occur on the premises, and otherwise denies the allegations as to the conduct of the defendants set forth in paragraph 30 of the Amended Complaint.

31. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 31 of the Amended Complaint.

32. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 32 of the Amended Complaint.

33. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 33 of the Amended Complaint in that the plaintiff showed no sign and made no complaint of injury that day or over the following two years.

34. The co-defendant, Anthony Giammarco, denies the allegations in paragraph 34 of the Amended Complaint.

35. The co-defendant, Anthony Giammarco, denies the allegations in paragraph 35 of the Amended Complaint.

36. The co-defendant, Anthony Giammarco, hereby incorporates herein his responses to paragraphs 1 through 35 of the Amended Complaint, as if the same had been here set forth.

37. The co-defendant, Anthony Giammarco, denies the allegations as alleged in paragraph 37 of the Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

As the plaintiff continued the operation of his auto body business without interruption from the date of the alleged explosion on or about October 30, 1987, through October of 1989, when the plaintiff ceased his operation of his auto body business because he refused to pay the rent increase, and subsequently relocated the business to the South Boston, West Roxbury, and Roslindale sections of Boston, the plaintiff has not been medically disabled from his occupational endeavors, and therefore the co-defendant, Anthony Giammarco, now owes the plaintiff nothing.

SECOND AFFIRMATIVE DEFENSE

As there is no allegation that the co-defendant, Anthony Giammarco, stood in any status as a "merchant" under Mass. G.L. Chapt. 93A in relation to the plaintiff's allegations under his fourth count, and no allegation that the co-defendant, Anthony Giammarco, stood in any status as a "landlord" under the laws of the Commonwealth in relation to the plaintiff's allegations under his third count, Counts III and IV ought to be dismissed as against the co-defendant, Anthony Giammarco.



### THIRD AFFIRMATIVE DEFENSE

As the plaintiff's Complaint in five (5) counts, containing 37 enumerated paragraphs of allegations, makes no allegation of any duty owed by the co-defendant, Anthony Giammarco, to the plaintiff, or any breach of a duty by the said co-defendant, Anthony Giammarco, to the plaintiff, the Complaint is totally lacking in minimal specificity as to require judgment for the co-defendant, Anthony Giammarco, on the pleadings.

### FOURTH AFFIRMATIVE DEFENSE

As the date of the alleged occurrence according to the Amended Complaint was October 30, 1987, and as the co-defendant was not a party to the original lawsuit, but was only added as a party in or after September of 1991, when the plaintiff added a party plaintiff, additional party defendants, and additional causes of action, the co-defendant, Anthony Giammarco, is not subject to the claims herein as the statute of limitations has expired as to any cause of action against him.

### FIFTH AFFIRMATIVE DEFENSE

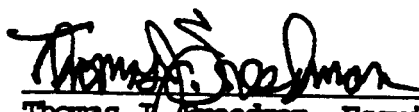
As the plaintiff concedes that he allowed the alleged explosion to occur (Amended Complaint, ¶30), the plaintiff is responsible for any damages that he inflicted upon himself.

SIXTH AFFIRMATIVE DEFENSE

As the plaintiff utterly fails to allege any conduct of the co-defendant, Anthony Giammarco, in regard to the allegations of liability and injury, there is absolutely no allegation of responsibility of the co-defendant, Anthony Giammarco, and the co-defendant, Anthony Giammarco is entitled to judgment against the plaintiff in his dual capacities.

WHEREFORE, the co-defendant, Anthony Giammarco, prays that the Amended Complaint be dismissed with prejudice, or, in the alternative, that the Court enter judgment for the co-defendant, Anthony Giammarco, against the plaintiff, Thomas Shay, and award the co-defendant, Anthony Giammarco, his costs of suit, including a reasonable attorney's fees.

Dated: December 16, 1991

  
Thomas J. Freedman, Esquire  
18 Tremont Street, Suite 614  
Boston, Massachusetts 02108  
Telephone: (617) 523-5352  
EEO #178840

ATTORNEY FOR CO-DEFENDANT,  
ANTHONY GIAMMARCO

CERTIFICATE OF SERVICE

I, Thomas J. Freedman, Esquire, attorney for the within co-defendant, Anthony Giammarco, hereby certify that I duly served the within Answer of the Defendant, Anthony Giammarco, to Amended Complaint, by depositing a copy of same in the United States mail, postage prepaid, this 16<sup>th</sup> day of December, 1991, addressed to: F. Jay Flynn, Jr., Esquire, McNamara, DeSimone & Flynn, P.A., 131 State Street, Suite 525, Boston, Massachusetts 02109, attorneys for plaintiff; Richard A. Zucker, Esquire, Gallagher and Gallagher, P.C., One Constitution Plaza, Boston, Massachusetts 02129, attorneys for defendants, Jeffrey Berry and Ber-Giam, Inc.; and John F. Finnerty, Jr., Esquire, Finnerty & Finnerty, 21 Custom House Street, Suite 230, Boston, Massachusetts 02110, attorneys for defendants, Jeffrey S. Berry and Louis R. Giammarco, Trustees of the Ber-Giam Realty Trust.

Dated: December 16, 1991

  
Thomas J. Freedman, Esquire