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Michael J. Tricarico
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Court of Appeals

STATE OF NEW YORK

CAROL HENRY,

Appellant,

against

HAMILTON EQUITIES, INC., HAMILTON EQUITIES COMPANY, SUZAN CHAIT-GRANDT, as Administrator of the Estate of Joel Chait, CHAIT-HAMILTON MANAGEMENT CORPORATION, RAFAE CONSTRUCTION, CORP. and AP CONSTRUCTION, INC.,

Respondents.

BRIEF FOR RESPONDENTS HAMILTON EQUITIES, INC., HAMILTON EQUITIES COMPANY, SUZAN CHAIT-GRANDT, AS ADMINISTRATOR OF THE ESTATE OF JOEL CHAIT, AND CHAIT-HAMILTON MANAGEMENT CORPORATION

KENNEDYS CMK LLP
Attorneys for Respondents Hamilton Equities, Inc., Hamilton Equities Company, Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait, and Chait-Hamilton Management Corporation
570 Lexington Avenue, 8th Floor
New York, New York 10022
212-252-0004
michael.tricarico@kennedyscmk.com

Of Counsel:

Michael J. Tricarico

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PRELIMINARY STATEMENT

Respondents Hamilton Equities, Inc., Hamilton Equities Company, and Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait (collectively referred to herein as the "Hamilton Respondents")[1] submit this brief in response to the Brief for Appellant Carol Henry ("App. Br."), filed on or about November 5, 2018, in support of her appeal to this Court.

In connection with her appeal, Appellant Carol Henry (the "Appellant") seeks to reverse the thoughtful well-reasoned decisions of the Supreme Court and Appellate Division below, both of which correctly declined to extend a narrow exception to the doctrine governing out-of-possession property owner liability established by this Court in Putnam v. Stout, 38 N.Y.2d 607 (1976). In granting the Hamilton Respondent's motion for summary judgment, and subsequently affirming that decision, those lower courts enforced the Putnam holding (and the Restatement (Second) of Torts section it is based upon), as intended, and in a manner that is consistent with decisions issued by the lower courts of this state,

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[1] In this suit, claims were also originally asserted against Chait Hamilton Management Corporation ("Chait Hamilton"). Its role at the premises was limited to collecting rent from Grand Manor, and paying the mortgage and related legal and accounting bills. [A733-736, 743-744, 817, 833-834, 836-839, 856-860, 862-863]. The Appellant conceded in her motion for leave to appeal to this court that she did not appeal the trial court's decision granting summary judgment in favor of Chait Hamilton to the Appellate Division, First Department. [May 31, 2018 Affirmation of Alan S. Friedman, at p. 6]. Thus, as the non-liability of Chait Hamilton has been finally determined, and Chait Hamilton is not specifically identified as a respondent herein. Nevertheless, in addition to Chait Hamilton having no liability due to its limited role as a rent collector and payer of bills, the same arguments regarding non-liability on the part of the other Hamilton Respondents would also apply to Chait Hamilton.

and courts in numerous other jurisdictions around the country. As previously indicated, the Putnam exception to the rule of non-liability on the part of out-of-possession property owners is a narrow one, and this Court should continue to construe and apply it as such. What the Appellant seeks from this Court is a decision that would disregard the rationale behind the Putnam holding, and broaden its application to a point that would render the generally accepted limitations on out-of-possession property owner liability illusory and meaningless.

To understand Putnam fully, one must first examine the state of the law in New York before Putnam was decided. Prior to Putnam, New York's leading authority regarding property owner liability was this Court's 1931 decision in Cullings v. Goetz, 256 N.Y. 287 (1931). In Cullings, the Court had concluded that the defendant property owners were essentially immune from tort liability for injuries suffered on their property despite having covenanted *directly with their tenant* to make repairs as part of an oral lease. Recognizing the rigid nature of the Cullings rule, the Putnam court carved out a narrow exception, pursuant to which a property owner, who had covenanted directly to its tenant to make repairs, would not escape liability based upon technical, out-moded rules of contract. Putnam did not otherwise disturb the general rule that an out-of-possession property owner, who has *not* entered into such a covenant with its tenant, will face no tort liability for injuries suffered on its property.

In this case, the Appellant alleges that she suffered personal injuries while working at the Grand Manor Nursing & Rehabilitation Center (the "Grand Manor Facility"). The Appellant has sought to hold the owners of the Grand Manor Facility—the Hamilton Respondents[2]—liable for her injuries.

The Grand Manor Facility was constructed for, and leased, pursuant to a lease agreement (the "Grand Manor Lease"), to then-tenants Saul Liebman and Bert Liebman d/b/a Grand Manor Health Related Facility (hereinafter "Grand Manor"). It undisputed that the Grand Manor Lease places the obligation to make repairs to the Grand Manor Facility on Grand Manor, and imposes *no* affirmative repair obligation on the Hamilton Respondents. Thus, Putnam—which held that an out-of-possession property owner who had covenanted to make repairs in a lease with its tenant could not avoid tort liability for injuries to third-persons—has no application here.

Recognizing this, the Appellant seeks an unwarranted extension of the Putnam holding. In that regard, she argues that although the Hamilton Respondents did not enter into a direct covenant with Grand Manor to make repairs to the premises, they nevertheless can be liable for her injuries because of

[2] As far as the roles of the various respondents are concerned, by deed dated May 14, 1982, defendant Hamilton Equities Company (a limited partnership) sold one-half of its property interest to Joel J. Chait. This transfer made them tenants in common for the subject property. [A711-713, 729-730, 1234-1236]. Defendant Hamilton Equities Inc. is the general partner of the limited partnership Hamilton Equities Company. The sole limited partner in Hamilton Equities Company is Robert Nova. [A713-714, 774]. As designated in the caption, Suzan Chait-Grandt is the administrator of the estate of Joel Chait.

representations contained in a separate contract between Hamilton Equities Company and the United States Department of Housing and Urban Development ("HUD").

In that regard, HUD had guaranteed a mortgage obtained by Hamilton Equities Company in connection with the construction of the Grand Manor Facility, and required the execution of a document entitled Regulatory Agreement for Multi-Family Housing Projects (the "HUD Agreement"). The HUD Agreement contained a boilerplate provision common to mortgage-related agreements, pursuant to which the mortgagor agrees to maintain the property (i.e., the mortgage collateral) in "good repair and condition." Such provisions protect the lender, and in this case, the guarantor of the mortgage, from devaluation of the mortgage collateral. As the trial court and appellate court in this case correctly found, the HUD Agreement and the covenant therein did *not* serve to impose upon the Hamilton Respondents unfettered tort liability to third parties.

Nevertheless, the Appellant presses her argument based upon two words ("or otherwise") contained in the Putnam decision. Putnam, which adopted § 357 of the Restatement (Second) of Torts as a basis for changing the then-existing rule of virtual immunity for property owners, provided that an out-of-possession property owner can face potential liabilities where, *inter alia*, "the lessor . . . has contracted by a covenant in the lease *or otherwise* to keep the land in repair."

In essence, the Appellant contends that, by adopting the words "or otherwise," Putnam intended to impose tort liability on a property owner for any covenant, to any party, in which the property owner had indicated that its property would be maintained in "good repair," even if (i) the tenant was unaware of and had no basis for relying on the covenant, and (ii) the tenant had in fact assumed the sole obligation to maintain the premises in good repair under its direct lease with the property owner. Simply put, there is no support for this interpretation of the Putnam decision. In fact, such an interpretation is completely contradicted by: (i) a plain reading of Putnam, the policy factors this Court relied upon therein, and the precedent this Court sought to modify in deciding Putnam; (ii) the Restatement provision adopted by the Court in Putnam; and (iii) the case law following and applying Putnam and the Restatement, which uniformly holds that, while a covenant to repair need not be contained within the operative lease between the property owner and tenant, such an agreement must still be between the property owner and the tenant, rather than some attenuated third party, such as a governmental mortgage guarantor.

The Appellant further bemoans the lower court decisions in this case, and argues that if permitted to stand, the law will have reverted to the "pre-*Putnam* general rule broadly favoring out-of-possession owners." This is simply not true, as the results reached below are entirely consistent with Putnam. Should this Court grant the Appellant's requested result, it would be imposing previously unheard of liability, that would extend to essentially *any property owner* whose

property was subject to a mortgage agreement (*see* infra at p. 9 n.3) or a mortgage guarantee agreement. Such a result would also undoubtedly lead to a slew of new litigation, higher rents, higher property insurance premiums, and other undue burdens and costs. In essence, under the Appellant's interpretation of Putnam, the exception would swallow the rule. The Hamilton Respondents respectfully submit that this Court should not entertain such a result.

Finally, even if the Court were to conclude that the existence of the HUD Agreement entitled the Appellant to bring a claim against the Hamilton Respondents, that claim would fail as a matter of law. In this regard, it is well settled that a "general awareness" that a dangerous condition may be present on an owner's property is legally insufficient to constitute notice of the particular condition that caused the alleged accident. Rather, liability can be predicated only upon the failure of a property owner, such as the Hamilton Respondents, to remedy the alleged condition upon receiving actual or constructive notice of that specific condition. As the Appellant cannot establish the requisite notice of the purportedly defective condition, summary judgment was properly granted in favor of the Hamilton Respondents for this reason as well.

To that end, while the Appellant points to reports authored by HUD that outline HUD's inspections of the Grand Manor Facility, none of those reports identify any issues regarding the area in which the Appellant purportedly fell. Moreover, the Appellant egregiously omits discussion of the HUD inspection report closest in time to the alleged accident, which revealed an exemplary

inspection score, and identified no issues that could possibly put the Hamilton Respondents on notice of the claimed condition. Thus, even if the Court were to construe Putnam as the Appellant contends it should, the Hamilton Respondents still simply cannot be held liable for the Appellant's alleged injuries.

For all these reasons, and as outlined further below, the Order of the Supreme Court, Bronx County (Ruiz, J.), entered August 25, 2017, as affirmed by the Appellate Division, First Department in a Decision and Order entered May 1, 2018, which granted the Hamilton Respondent's motion for summary judgment dismissing the Appellant's complaint, should be affirmed in all respects.

QUESTIONS PRESENTED

Q: Under New York law, as established by Putnam v. Stout, 38 N.Y.2d 607 (1976), can an out-of-possession property owner be held liable in negligence for injuries to a third party because of a covenant to maintain the premises in "good repair and condition," made to a guarantor of a mortgage taken on the premises, when the operative lease with the tenant places the sole and exclusive obligation to make repairs on the tenant?

A. No. Under Putnam, in order for such out-of-possession property owner liability to exist based upon a covenant to repair, the covenant to repair must be between the property owner and the tenant.

STATEMENT OF FACTS

A. The Alleged Accident

The Appellant alleges that on May 18, 2011, while working as a licensed practical nurse on the top floor of the Grand Manor Facility, she fell in a puddle of water in the hallway that purportedly accumulated because of a leaky roof. [A90-91, 276, 295-96, 338, 543, 621-23, 629, 976]. Specifically, the Appellant alleges that the leak flowed from the roof into the sixth floor ceiling and then down a wall before collecting in a puddle on the floor at the accident site. [A296-97, 326, 358, 624-27].

The Appellant contends that it is "undisputed" that the alleged condition was created by the recurrent intrusion of rainwater through the nursing home's roof. However, this is not so. In the video of the accident, which depicts the area where the Appellant fell, numerous persons are seen traversing the area prior to the Appellant's fall without issue, suggesting that her fall was the result of her simply losing her footing, or a transient condition that existed for only a short period of time before she fell. [A1341].

B. The HUD Agreement

As conceded by the Appellant, the Hamilton Respondents constructed the Grand Manor Facility at the request of Grand Manor, who leased the premises from the Hamilton Respondents by way of the Grand Manor Lease. [A708, 1166]. In connection with the construction of the Grand Manor Facility, the Hamilton Respondents obtained a mortgage from mortgagee Regdor Corp.,

which HUD guaranteed pursuant to the HUD Agreement. [A1288-1297]. As is common in mortgage-related agreements,[3] the HUD Agreement contained a provision requiring the mortgagor to maintain the mortgaged premises in "good repair and condition." [A1290].

The trial court correctly found that the purpose of the HUD Agreement was to "protect HUD's interest in the financial integrity of the property, for which HUD has guaranteed a multi-million dollar mortgage." [A15]. Similarly, the appellate court held that the purpose of the covenant was "to protect the integrity of the building that was subject to the mortgage guaranteed by HUD." [A1526]. Both courts correctly found that the HUD Agreement was not intended to benefit third parties, such as the Appellant, injured on the premises. [A15, 1526]. The affidavit of the Appellant's purported expert, Michael Klion, supports these holdings, inasmuch as Mr. Klion agrees that the purpose of the HUD Agreement is to "protect both the physical asset as well as the fiscal integrity of the property." [A1300, ¶ 8].

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[3] *See, e.g.*, *Mortgage, Security Agreement and Assignment of Leases and Rents*, NEW YORK CITY BAR ASSOCIATION, https://www2.nycbar.org/RealEstate/Forms/Mortgage_word.doc (last visited Dec. 19, 2018); Forms from Steinman's Bergerman & Roth, *Subordinate Mortgage of Commercial Property*, LexisNexis Form 140-106.22; *Sample Mortgage Document*, TRANSLEGAL, https://www.translegal.com/wp-content/uploads/real_property_appendix_1.pdf (last visited Dec. 19, 2018); Forms from Steinman's Bergerman and Roth, *Mortgagor Obligated to Maintain Mortgaged Premises in Good Repair*, LexisNexis Form 140-108.44; LexisNexis Real Property Law Forms, *Commercial Building Note and Mortgage—Building Equipment Included as Collateral—Parties Rights Regarding Rent Defined—No Recourse Against Borrower—New York*, LexisNexis Form 285-B.18.

Additionally, contrary to the Appellant's characterization of the HUD Agreement and Mr. Klion's conclusory assertions, nothing in the agreement states that the obligation to maintain the premises in good repair cannot be delegated to another party. In fact, the agreement specifically contemplates and allows the mortgagor to enter into management contracts for the mortgaged premises. [A1280, ¶ 9]. In any event, to the extent a non-delegable duty does exist under the HUD Agreement, the consequence of breaching that duty would be a default resulting in acceleration of the indebtedness due, and not tort liability in favor of a third party. [A1281, ¶ 11].

C. The Hamilton/Grand Manor Relationship

As noted above, Hamilton Equities, Inc. leased the Grand Manor Facility to Grand Manor. [A1166-1221]. The lease became effective on September 1, 1978, and it does not expire until June 30, 2026. [A1166, 1238]. It is undisputed that the Grand Manor Lease, which provides as follows, obligates Grand Manor to repair and maintain the leased premises:

ARTICLE VII

REPAIRS, REPLACEMENTS AND MAINTENANCE

SECTION 7.1

> During the full term of this lease, the Lessee shall, at its sole cost and expense, maintain and keep all parts of the leased premises and all of its fixtures, furniture, machines, equipment and appurtenances in a good state of repair and condition . . . .

[A1185, Art. VII]. The Hamilton Respondents retained only a limited right to re-enter in order to make repairs resulting from Grand Manor's failure to perform its covenants under the Grand Manor Lease. [A1191, Art. XI]. Significantly however, the provision allowing for a limited right of re-entry also provides that "nothing herein shall be construed as making it obligatory upon the part of Lessor to make such repairs or to perform such work." [A1191, § 11.1]. Additionally, pursuant to § 8.2 of the Grand Manor Lease, the Hamilton Respondents gave their standing consent to any repair required by a governmental authority. [A1187-88]. Pursuant to § 9.1, Grand Manor also acknowledged its required compliance with applicable governmental regulations. [A1188].

Consistent with their status as out-of-possession property owners, for a nearly thirty-year period beginning in approximately 1983, the Hamilton Respondents never visited the Grand Manor Facility, or had any other involvement with the premises. [A705-706, 760].[4]

D. HUD Inspections of the Grand Manor Facility

In accordance with the HUD Agreement, HUD conducted inspections of the Grand Manor Facility at regular intervals, and generated corresponding reports. The Appellant details only the reports from inspections performed on January 30, 2007 and January 16, 2008 in her brief, and erroneously contends

[4] In fact, Suzan Chait-Grandt, one of the Hamilton Respondents, and the only individual named in this suit, had virtually no involvement with the Grand Manor Facility whatsoever. [A809, 815, 818, 819, 828-829, 842, 844-846, 853-854, 859, 862, 865**]**.

that those reports demonstrate that the Hamilton Respondents had notice of the allegedly defective condition that purportedly caused her injury.

In that regard, the January 30, 2007 HUD report identifies "Missing/Damaged Components from Downspout/Gutter," at the Grand Manor Facility, a condition defined as non-life-threatening and one costing the same to remedy as a light fixture, fire extinguisher or smoke detector. [A1312-13, 1318]. It does not, however, identify the existence of a roof leak, which is what the Appellant alleges caused the condition that resulted in her injuries. [A1312-1319]. Nor does it document the condition of the premises at the time of her alleged accident several years later. Additionally, to the extent the "downspout/gutter" issue had anything to do with her injury—which is not alleged here—the January 16, 2008 HUD report indicates that by then, Grand Manor had fully resolved the issue. [A1473-80]. Although the report from the January 16, 2008 inspection did identify some instances of mold, as well as some other minor violations (none of which were in the area of the Appellant's alleged accident), Grand Manor had corrected those issues by the time HUD issued its December 4, 2009 inspection report. [A1483-1491].

Although the December 4, 2009 inspection report was the *final HUD report before her accident*, the Appellant makes no more than a passing mention of it in her brief. The reason for this is simple—the report indicates no need for capital improvement, no roof issue, no downspout/gutter issue, and no life-threatening conditions; in sum, it does not support the Appellant's narrative that

the building had been poorly maintained prior to her being injured. [A1483-85]. In fact, the precise opposite is true, as the Grand Manor Facility's score of 90 for this inspection was so exemplary, that it excused the facility from further HUD inspections for a period of three years. [A1483, 1492].

E. Repairs at the Grand Manor Facility

In accordance with the Grand Manor Lease, Grand Manor engaged roof repair companies to repair the Grand Manor Facility roof on at least three occasions. In 2008, Grand Manor's custodian contacted AP Construction, Inc. ("AP") about "some leaks" in the Grand Manor Facility's dayroom/common area. [A1048-1051; 1063-1064, 1067-1068, 1070, 1111]. AP issued a proposal for the repair. [Id.]. Grand Manor again contacted AP about "some leaks," and AP provided a second proposal dated April 6, 2009 for roof repair.[5] [A1077, 1115, 1240-1241]. Based upon this proposal, Grand Manor retained AP to install 300 square feet of roofing over a "leaking area." [A1078].

Similarly, between March 11 and March 12, 2011, AP was again contacted by Grand Manor's custodian about a roof repair, and in response, provided another proposal. [A235, 1090-1091, 1105-1107]. Ultimately, Grand Manor chose not to hire AP at that time, and in May 2011, *prior* to the Appellant's

[5] Notably, this work was performed in April 2009, well after the HUD reports that the Appellant relies on to establish notice in this action. [A1078]. Thus, even if the HUD reports provided notice of the condition that allegedly caused the Appellant's injuries—which they do not—that condition was subsequently remedied.

accident occurring, Grand Manor contracted with another roofing company, Rafae Construction Corp. ("Rafae"), for the work. [A-900-904, 907, 939].

Thus, as the record evidence in this action conclusively demonstrates, pursuant to its contractual obligations as set forth in the Grand Manor Lease, Grand Manor regularly made repairs to the building, including the roof.

F. Lower Court Proceedings

1. *The Trial Court's Decision*

By Order of the Honorable Norma Ruiz dated August 23, 2017, the trial court granted the summary judgment motion of the Hamilton Respondents. [A16]. In its well-reasoned decision, the trial court observed the general principle that "an out-of-possession landlord will not be 'liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant.'" [A13]. Specifically, the court concluded, that as out-of-possession property owners, the Hamilton Respondents could not be held liable under a negligence theory unless one of the two exceptions to the general rule applied:

> The first exception applies where the out-of-possession landlord is 'contractually obligated to make repairs and/or maintain the premises.' The second applies where the out-of-possession landlord maintains a 'right to reenter, inspect and make needed repairs at the tenant's expense *and* liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.'

[A13].

With respect to the first exception, the trial court flatly rejected the Appellant's contention that the Hamilton Respondents could be liable to her

because of the covenants contained in the HUD Agreement. Instead, it held that "the contractual obligation upon the landlord, for purposes of this exception, arises when the landlord has contracted with *the tenant*, by covenant in the lease or otherwise, to repair or maintain the premises." [A14]. The trial court correctly concluded that this was entirely consistent with the narrow exception carved out by this Court in Putnam v. Stout, and stated as follows:

> In the case at bar, there can be no reasonable argument that the HUD regulatory agreement was designed to afford Grand Manor, as tenant, the benefits discussed in *Putnam*. The purpose of the regulatory agreement is solely to protect HUD's interest in the financial integrity of the property, for which HUD has guaranteed a multi-million dollar mortgage. It is not alleged that Grand Manor, as tenant, was aware of the contractual obligation imposed by HUD or relied on it. Of course, such reliance would be unreasonable given Grand Manor's assent to be solely responsible for repairs. As Grand Manor would not be heard to rely on this agreement, Appellant certainly cannot. Accordingly, the court finds the regulatory agreement does not impose a 'contractual obligation' on the Hamilton defendants sufficient to trigger this exception to the well-settled out-of-possession landlord doctrine.

[A15].

With respect to the second exception to the general rule, the trial court held that, other than "conclusory allegations in the complaint that allege the Hamilton defendants violated 24 CFR §§ 5.701 and 5.703(a) and (b), Appellant utterly fails to raise a triable issue of fact as to whether the condition complained of, i.e. the leaky roof, is a significant structural or design defect that violated a specific statutory provision." [A16]. It further held that, even assuming that the Appellant had asserted those regulatory provisions as grounds for applying the

second exception, those regulatory provisions were "general safety provisions" insufficient to defeat summary judgment. [A16].

Thus, because neither exception to the general rule regarding out-of-possession property owner liability applied regardless of Putnam, the trial court correctly granted summary judgment in favor of the Hamilton Respondents. [A16].[6]

2. *The Appellate Court's Decision*

After an April 10, 2018 oral argument, on May 1, 2018, the Appellate Division First Department unanimously affirmed the trial court's ruling. [A1525-27]. In doing so, it held as follows:

> Here, the motion court properly declined to impose a duty to Appellant on Hamilton based on the HUD Agreement that guaranteed defendant Hamilton Equities Company's mortgage. As Appellant's expert indicated, the purpose of paragraph 7 of the HUD Agreement was to protect the integrity of the building that was subject to the mortgage guaranteed by HUD. Thus, the intention was to benefit HUD and the bank, not third-parties injured on the premises.
>
> Moreover, the HUD Agreement's requirement to establish an escrow fund for repairs that was accessible by the tenant suggests that HUD and Hamilton Equities intended to delegate the duty to repair to the tenant. The social policy considerations cited by the Court of Appeals in *Putnam v. Stout* (38 N.Y.2d 607, 617-618), are promoted only where the landlord had a contractual obligation directly to the tenant.

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[6] In granting summary judgment in favor of the Hamilton Respondents, the trial court also granted the unopposed summary judgment motions of Rafae and AP and consequently, dismissed cross-claims against those parties asserted by the Hamilton Respondents. [A16]. To the extent that this Court reverses the decisions below and denies the Hamilton Respondents' motion for summary judgment, it is respectfully submitted that the Hamilton Respondents' cross-claims against Rafae and AP should be reinstated.

[A1526].

As demonstrated throughout this brief, the lower courts correctly held that the narrow Putnam exception to the general rule regarding out-of-possession property owner liability did not apply to the covenant contained within the HUD Agreement. Furthermore, those courts correctly held that the second general exception to out-of-possession property owner liability regarding specific statutory violations was not met here either. Finally, even if, as the Appellant argues, the Hamilton Respondents never fully divested themselves of control of the premises—which is demonstrably untrue—summary judgment was still correctly granted in the Hamilton Respondent's favor, since the Hamilton Respondents did not have notice of the condition that allegedly caused the Appellant's accident.

For all these reasons, the Court of Appeals should affirm the decisions below, granting summary judgment to the Hamilton Respondents, and dismissing the Appellant's complaint.

ARGUMENT

POINT I

THE LOWER COURTS PROPERLY APPLIED THIS COURT'S HOLDING IN *PUTNAM V. STOUT*

In arguing for reversal of the lower court decisions, the Appellant has demonstrated a profound misunderstanding of New York's current doctrine of out-of-possession property owner liability. Accordingly, what she actually seeks, under the guise of applying Putnam as written, is an expansion of the Putnam holding that would go well beyond anything that the Putnam court ever intended. As demonstrated below, the lower courts properly found that Putnam creates only a narrow exception to the general rule of property owner liability, which does not apply here, thus requiring further affirmance of the decisions granting and affirming summary judgment in favor of the Hamilton Respondents.

A. The Out-of-possession Property Owner Liability Doctrine Prior to *Putnam*

In order to understand fully the scope of Putnam and its effect on the doctrine of out-of-possession property owner liability, it is necessary to examine the state of the law leading up to the Putnam decision. A review of the Putnam decision itself, as well as the precedent it overruled, is highly instructive in that regard. The Putnam court observed that, with limited exception, the general rule of out-of-possession property owner liability is that "a landlord is not liable for conditions upon the land after the transfer of possession [to the tenant]." Putnam,

38 N.Y. 2d at 616-17 (citing Campbell v. Elsie S. Holding Co., 251 N.Y. 446 (1929)).

Prior to Putnam, however, this limitation on liability applied even where the out-of-possession property owner had expressly represented to its tenant that it would keep the premises in good repair. See Putnam, 38 N.Y.2d at 610. The genesis of this owner-protective rule was an earlier case, also decided by the Court of Appeals, styled Cullings v. Goetz, 256 N.Y. 287 (1931). The Cullings case involved a suit for personal injuries against the owner of the property where the plaintiff was injured. Id. at 289. The issue framed by the Cullings court was whether liability could be imposed upon the property owner based on a covenant to repair that had been made by the property owner *directly to the tenant*. Id.

In resolving the issue, the Cullings court applied the then-existing rule that a "covenant to repair does not impose upon the lessor a liability in tort at the suit of the lessee or of others lawfully on the land in the right of the lessee." Id. at 290. Thus, at the time that Cullings was decided, and up until the Putnam decision, an out-of-possession property owner (such as the Hamilton Respondents) could covenant *directly with a tenant* (such as Grand Manor) to make repairs, and remain completely free of any liability for injuries to third-parties on the premises.

B. *Putnam* and its Impact on the Out-of-possession Property Owner Doctrine

Like Cullings, the Putnam case involved a claim for personal injuries against an out-of-possession property owner, where the owner had made a covenant, directly to the tenant, to maintain the property in good repair. Putnam, 38 N.Y.2d at 610-11, 613-14. The Putnam court opted to reexamine the Cullings rule, to the extent that it barred claims against out-of-possession property owners in such instances. See id. at 614 ("[T]he time has come, we think, to reevaluate our adherence to the *Cullings* rule and reappraise the modern trend towards assessing liability *solely upon the basis of the covenant to repair* [emphasis added].").

Ultimately, the Putnam court overruled Cullings, and "adopt[ed] the rule that a lessor may be liable for harm caused to others upon his land with the permission of the lessee, on the basis of his contract to keep the premises in good repair." Id. at 610. The Putnam court observed that the rationale supporting the Cullings decision, issued approximately four decades prior, did not comport with modern theories of liability, and held that "[t]he modern trend of decision is toward holding the lessor liable to his tenants or those upon the land with the tenant's permission where the *landlord has breached his covenant to repair*." Id. at 616 (emphasis added).

Putnam then adopted the three-part test for out-of-possession property owner liability set forth in § 357 of the Restatement (Second) of Torts, which provides as follows:

> A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
>
> (c) the lessor fails to exercise reasonable care to perform his contract.

Restatement, Torts 2d § 357.

In adopting the Restatement rule, the Putnam court cited to, and relied upon, a "combination of factors" underlying the Restatement rule, as set forth in the Restatement commentary:

> First, the lessor has agreed, for a consideration, to keep the premises in repair; secondly, the likelihood that the landlord's promise to make repairs will induce the tenant to forego repair efforts which he otherwise might have made; thirdly, the lessor retains a reversionary interest in the land and by his contract may be regarded as retaining and assuming the responsibility of keeping his premises in safe condition; finally, various social policy factors must be considered: (a) tenants may often be financially unable to make repairs; (b) their possession is for a limited term and thus the incentive to make repairs is significantly less than that of a landlord; and (c) in return for his pecuniary benefit from the relationship, the landlord could properly be expected to assume certain obligations with respect to the safety of the others.

Putnam, 38 N.Y.2d at 617-18.[7]

In light of the above, the scope of Putnam's holding is clear. The general rule remains that "a landlord is not liable for conditions upon the land after the transfer of possession [to the tenant]." Putnam, 38 N.Y.2d at 616-17. The Putnam decision simply ensures that a property owner may not covenant directly to his tenant to maintain the property in good repair, and then completely avoid tort liability for conditions on the property when that covenant is breached.

C. Appellant Seeks an Unwarranted Extension of *Putnam* that was Never Contemplated by the New York Court of Appeals

The Appellant now argues for an extension of the Putnam holding that this Court could not possibly have intended or desired. The crux of the Appellant's argument is that, because the first prong of the three-part test in Putnam indicates that liability may be premised on a covenant made in the lease "or otherwise," the Court of Appeals intended to hold any landlord, who entered into any agreement containing a covenant to maintain premises in good repair (including

[7] The Restatement commentary itself is actually slightly more expansive than the excerpt summarized in Putnam. In that regard, the Restatement explains that the rule set forth in § 357 is an exception to the general rule of non-liability on the part of an out-of-possession property owner, and has been rejected by the majority of courts considering it. See Restat 2d of Torts, § 357, comments *a, b*. Moreover, the Restatement commentary provides that while increased liability for property owners may be appropriate where the lessor has received consideration to repair the premises, the rule "has no application where the lessor does not contract to repair, but merely reserves the privilege to enter and make repairs if he sees fit to do so." Restat 2d of Torts, § 357, comment *b*(1). Similarly, the rule will not apply "where there is no contractual obligation, but merely a gratuitous promise to repair, made after the lessee has entered into possession." Id.

a mortgage guarantee agreement entered into between a property owner and a mortgage guarantor), liable in tort for injuries to third parties.

The facts of Putnam alone completely negate this argument. In that regard, Putnam (and even Cullings), involved covenants made by the property owner *directly to the tenant*. Nothing in the Putnam decision indicates the intent to extend its holding beyond the facts that were before the Court at the time. Moreover, as discussed in detail below, the Appellant's argument is further belied by the fact that (i) the factors relied on by the Putnam court weigh against any finding of liability against the Hamilton Respondents; and (ii) courts interpreting and applying the Putnam holding have exclusively applied it to covenants between the out-of-possession owner and the tenant.

1. *The Policy Factors Relied upon in* Putnam *Preclude a Finding of Liability against the Hamilton Respondents*

As discussed above, Putnam relied heavily on the "combination of factors" underlying § 357 of the Restatement, which the Putnam court found to support "an increased burden on a lessor who contracts to keep the land in repair." Putnam, 38 N.Y.2d at 617. A review of each of these factors demonstrates that the Putnam court could not have intended to impose such an "increased burden" on property owners such as the Hamilton Respondents.

The first factor identified by the Putnam court is that "[t]he lessor has agreed, for a consideration, to keep the premises in repair." Putnam, 38 N.Y.2d

at 617. This factor weighs against a finding of liability whether one looks at the Grand Manor Lease by itself, or in combination with the HUD Agreement.

As far as the Grand Manor Lease is concerned, it simply provides the Hamilton Respondents with the ability to re-enter the property in order to make repairs, which, as the Restatement commentary indicates, does not implicate the rule stated therein. [A1191, Art. XI]. See Restat. 2d of Torts, § 357, comment *b*(1) (The rule . . . has no application where the lessor does not contract to repair, but *merely reserves the privilege to enter and make repairs if he sees fit to do so* [emphasis added].").

Moreover, while the Appellant correctly notes that the Hamilton Respondents had "reserved their right to re-enter the premises to '[m]ak[e] repairs . . . and perform[] any other work therein resulting from Lessee's [Grand Manor's] failure to perform its covenants herein contained," [App. Br., at 36], she conveniently omits the portion of that same lease provision which provides that "nothing herein contained shall be construed as making it obligatory upon the part of Lessor to make such repairs or to perform such work." [A1191, § 11.1].[8]

The result should remain the same even when one considers the HUD Agreement. The Appellant attempts to argue here that the "mortgage was the

[8] In any event, it is well settled that "a landlord's reservation of the right to enter the leased premises to make repairs or correct improper conditions does not impose liability for a subsequently arising dangerous condition." See Brooks v. Dupont Assoc., Inc., 164 A.D.2d 847, 848 (1st Dep't 1990).

consideration given to the Hamilton defendants in exchange for maintaining the property." [App. Br., p. 35]. However, HUD did not provide the mortgage—it only guaranteed it. [A1288, 1297]. Regdor Corp. is the actual mortgagee, and it is undisputed that Regdor Corp. is not a party to either the Grand Manor Lease, or the HUD Agreement. [A1288]. Nothing in Putnam or the Restatement suggests that the "consideration" this factor contemplates could come from a third party mortgagee (such as Regdor Corp.) who is a stranger to both (i) the lease agreement; and (ii) the document containing the purported covenant to maintain the property in good repair (the HUD Agreement). Thus, this factor weighs in favor of the Hamilton Respondents.[9]

The second factor underlying the Putnam decision is "[t]he likelihood that the landlord's promise to make repairs will induce the tenant to forego repair efforts which he otherwise might have made." Putnam, 38 N.Y.2d at 617. Again, this argument fails whether one solely considers the Grand Manor Lease, or examines both the Grand Manor Lease and the HUD Agreement.

As an initial matter, it is undisputed that the Grand Manor Lease placed no obligation on the Hamilton Respondents to make repairs to the premises. Accordingly, Grand Manor was *not* induced to forego making repairs on its property—rather, it was the party in the best position to make such repairs, and

[9] In any event, even if the Appellant had argued that the mortgage *guarantee* constituted "consideration" for the purposes of this factor, the result would remain the same. Putnam and the Restatement clearly refer to the consideration received from the tenant in the form of rent, in exchange for the property owner's covenant directly to the tenant. Thus, this factor still weighs in favor of the Hamilton Respondents.

did in fact routinely make repairs to the premises. As noted above, Grand Manor retained AP to repair the subject roof in 2008, and it retained Rafae to do the same just *two weeks prior to the accident*. [A235, 900-904, 907, 939 1048-1051; 1063-1064, 1067-1068, 1070, 1077-78, 1090-91, 1105-07, 1111, 1115, 1240-41]. The Hamilton Respondents, on the other hand, did not have any input or involvement with any of these repairs, and in fact had no meaningful presence at the Grand Manor Facility for decades. [A705-706, 760].

With respect to the Grand Manor Lease, the Appellant attempts to argue that "the lease agreement specifically contemplated a situation where the Hamilton defendants would make repairs that were not made by Grand Manor." (App. Br., p. 35). Again, it is undisputed this was merely a *right, but not an obligation,* to re-enter and repair in the event that Grand Manor failed to do so. [A1191, § 11.1].

With respect to the HUD Agreement, the Appellant has failed to put forth any proof that Grand Manor was aware of the covenant therein, noting only that Grand Manor "was aware of the Agreement's existence." [App. Br., at 36]. It is unclear then how Grand Manor could have been induced to forego making repairs on its property if it was not aware of the existence of the supposed repair requirement in the HUD Agreement. However, even assuming arguendo that Grand Manor was aware of each and every term of the HUD Agreement, the facts of this case clearly establish that it did not forego making repairs in reliance upon that agreement. In fact, it is undisputed that Grand Manor clearly understood its

repair obligations, and directly contracted to make repairs to the roof in question on multiple occasions. [A235, 900-904, 907, 939 1048-1051; 1063-1064, 1067-1068, 1070, 1077-78, 1090-91, 1105-07, 1111, 1115, 1240-41].

Moreover, in discussing this factor, the commentary to § 357 of the Restatement refers to the "special relation between the parties, and the peculiar likelihood that the *lessee will rely upon the lessor to make repairs*." Restat 2d of Torts, § 357, comment *b*(2). It is clear that the Restatement is referring to the special relationship between the property owner and the tenant, *not* the property owner and a random third party, such as HUD. Thus, this factor weighs in favor of the Hamilton Respondents whether one looks to the Grand Manor Lease or the HUD Agreement.

The Appellant's arguments on this point highlight the absurdity of its position with respect to the <u>Putnam</u> exception. Under the Appellant's reading of <u>Putnam</u>, the duties and liabilities of sophisticated contracting parties become far less clear. If the Appellant were successful here, New York tenants could, going forward, assume obligations in their lease agreements to maintain the premises in good repair, and then avoid making the repairs in reliance on some covenant made by the owner to a completely unrelated third party. The result would be less repairs being made, more injuries, and more litigation. This is precisely the result that <u>Putnam</u> sought to avoid. However, if <u>Putnam</u> is applied as intended, the duties between a property owner and tenant are crystal clear—if, in an

agreement with the property owner, the tenant assumes a repair obligation, then the tenant must properly fulfil that obligation, or face liability, and vice versa.

The third Putnam factor is that "[t]he lessor retains a reversionary interest in the land and by his contract may be regarded as retaining and assuming the responsibility of keeping his premises in safe condition." Putnam, 38 N.Y.2d at 617. Again, this factor weighs against a finding of liability whether one looks either solely to the Grand Manor Lease, or the Grand Manor Lease coupled with the HUD Agreement.

Needless to say, the reversionary interest factor would not be implicated by the HUD Agreement, which is not a leasehold agreement. With respect to the Grand Manor Lease, the Appellant argues that this factor is satisfied, because upon termination of the lease, the premises would be surrendered and redelivered to the lessor.

Of course, if this factor alone were sufficient to impose liability on the part of a property owner, then the entire doctrine of out-of-possession property owner liability would cease to exist, since presumably every lease reserves a future interest in the leased property for the property owner. In any event, the Grand Manor Lease is not the typical commercial lease where a tenant takes possession of an existing structure in a series of tenancies for a short period. The Grand Manor Facility was constructed at Grand Manor's request, which the Appellant of course concedes. [App. Br., at 10]. Moreover, the Grand Manor Lease commenced on or about September 1, 1978, and an estoppel certificate to the

lease indicates that it does not currently expire until June 30, 2026. [A1166, 1238]. The Appellant even concedes later in her brief, that "the present case is a bit of an anomaly because it concerns the *long-term lease of a nursing home*." [App. Br., at 37]. Thus, this factor is largely irrelevant whether one looks solely to the Grand Manor Lease, or the Grand Manor Lease and the HUD Agreement.

Additionally, the Putnam Court relied upon social policy factors set forth in the Restatement. The first factor was that "tenants may often be financially unable to make repairs." Putnam, 38 N.Y.2d at 617. This factor is not present here. The Appellant argues that the creation of the reserve fund in the HUD Agreement, and the granting of access to Grand Manor of the fund, favors her argument. This is simply not correct.

The existence of the reserve fund completely alleviates the potential social hazard of a tenant being unable to afford repairs. In that regard, Grand Manor had *sole access* to funds it might not otherwise have had in order to make repairs. [A1228]. The Grand Manor Lease specifically provided that "[i]t is understood and agreed that *only Lessee* may withdraw from such fund for the purposes for which the fund is established." [Id. (emphasis added)]. Thus, Grand Manor cannot posture itself as the financially woe-stricken tenant on one hand, and then concede that it has access to an ever-growing fund established and contributed to by the Hamilton Respondents for repairs on the other.

The second social policy factor is that the tenant's "possession is for a limited term and thus the incentive to make repairs is significantly less than that

of a landlord." The Appellant concedes that she has no argument here, and as indicated above, this is a long-term lease of a nursing home. Grand Manor, the long-term tenant, is the one with the incentive to repair the premises, and in fact, did make such repairs, including repairs to the roof, over the lifetime of the Grand Manor Lease.

The final Putnam social policy factor is that "in return for his pecuniary benefit from the relationship, the landlord could properly be expected to assume certain obligations with respect to the safety of the others." Putnam, 38 N.Y.2d at 617. The Appellant argues that, because the facility was a nursing home, the Hamilton Respondents were "acutely aware that the safety of others, the residents and staff of the facility, was therefore paramount to Grand Manor's ability to fill beds and earn the rent that was ultimately paid to the Hamilton defendants." [App. Br., at 37]. The Appellant also argues that this is evident because HUD reports were sent to the Hamilton Respondents and the property manager, but not Grand Manor. [App. Br., at 38]. Therefore, the Appellant asserts that "it is abundantly clear that the Hamilton defendants were aware that their pecuniary benefit in the property was directly affected by the safety of third-parties, and thus the final Putnam factor is fully satisfied here."

By the Appellant's logic, this factor would be satisfied in virtually *any* lease, since every property owner's pecuniary benefit in a leasehold will be affected to some extent by the safety of third parties. Here though, other than a privilege to re-enter the premises in the event Grand Manor failed to make

repairs, the Hamilton Respondents had no affirmative obligation to inspect or repair. [A1191, § 11.1]. Rather, it was Grand Manor that *voluntarily assumed* the *sole obligation* to repair the premises pursuant to the Grand Manor Lease. [A1185, Art. VII]. Additionally, to the extent any repairs were required by governmental authorities, Grand Manor did not even need to obtain the Hamilton Defendants' consent before proceeding. [A1187-88, § 8.2].

Moreover, the lease was executed with those obligations in place. Therefore, the rent charged to Grand Manor took into account the respective obligations of the parties, and if the Hamilton Respondents were going to take on additional and extraordinary liabilities such as the maintenance of the property, they could have charged additional rent to do so. Thus, the pecuniary benefit conferred upon the Hamilton Respondents (i.e., the rent charged), takes into account the obligations that Grand Manor and the Hamilton Respondents both agreed to assume in entering into the relationship.

Finally, the fact that HUD reports were sent to the Hamilton Respondents is immaterial. It would be expected that HUD would send the reports to the Hamilton Respondents, since it is Hamilton Equities Company, and not Grand Manor, who is a party to the HUD Agreement. [A1288-1297]. In any event, this does not change the fact that Grand Manor, by way of the Grand Manor Lease, assumed the burden of making repairs, and therefore this Putnam factor also weighs in favor of the Hamilton Defendants.

2. *Cases Interpreting* Putnam *Have Exclusively Found its Holding to Apply to Agreements Directly Between the Out-of-possession Property Owner and Tenant*

The Appellant does not cite to a single case to support her skewed vision of the Putnam holding.[10] That is because cases applying Putnam have uniformly held that the covenant to maintain the premises in good repair must exist between the property owner and its tenant.

New York decisions have been no exception. See, e.g., Cherubini v. Testa, 130 A.D.2d 380, 382 (1st Dept. 1987) (holding that although agreement to repair was not assumed in a lease, lessor had "otherwise" verbally agreed with the tenant that he would maintain the accident site stairway); Hagensen v. Ferro, Kuba, Mangano, Sklyar, Gacavino & Lake, P.C., 2012 N.Y. Misc. LEXIS 6522 (Sup. Ct. N.Y. Cty. Jan. 3, 2012), *aff'd*, 108 A.D.3d 410 (1st Dept. 2013) (landlord otherwise orally promised lessee it would hire someone to clean up and maintain the premises, including the driveway, raising triable issue of fact); Colon v. Mandelbaum, 244 A.D.2d 292 (1st Dept. 1997) (appellants allegedly made complaints to defendants about excessively hot water throughout the period of their occupancy and defendants promised the appellants they would rectify the problem).

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[10] Notably, the Appellant has abandoned her argument made before the lower courts, that Rojas v. New York Elevator & Elec. Corp., 150 A.D.3d 537 (1st Dep't 2017) supports her position. This was the correct decision, as that case simply denied summary judgment to the property owner based upon the fact that the lease submitted in conjunction with the motion for summary judgment was illegible, and not because the property owner was found to have assumed a repair obligation by way of an agreement with a third party. Id.

Similarly, cases outside of New York relying on § 357 of the Restatement, upon which Putnam was based, have consistently applied the underlying rationale to situations where an agreement to repair was made between the property owner and tenant. See, e.g., Williams v. Pennlake Realty Assoc., 1999 Pa. Dist. & Cnty. Dec. LEXIS 142 (Aug. 9, 1999) (while the landlord did not agree in the lease to make repairs, it "otherwise" agreed "to make repairs by creating a procedure for repairing tenants' apartments and having their maintenance department perform those repairs upon notification of the dangerous conditions on the premises."); Kelly by Kelly v. Ickes, 427 Pa. Super 542, 552 (Pa. Super. Ct. 1993 (holding that the "or otherwise" part of the rule might apply where "[the tenant] and [the landlord] could have entered into a contractual agreement for the repair of the staircase that was independent of the lease"); Mitchell v. Simmons, 164 N.J. Super. 511 (N.J. Super. Ct. 1978) ("if the jury had found that [the property owner] had partially performed his undertaking to supply linoleum for areas in need of flooring and made repeated oral promises, in response to [tenant's] persistent adjurations, to supply more for the dangerous hallway 'later,' there was an enforceable 'contract *** otherwise to keep' the apartment floor repaired within the meaning of §357 of the *Restatement*.").

Thus, it is uniformly accepted both by New York courts and courts in other jurisdictions that, while the covenant at issue does not necessarily need to be in a lease agreement, the narrow Putnam/Restatement exception only applies to covenants made between the out-of-possession property owner and the tenant.

D. <u>The Lower Courts Properly Declined to Apply the *Putnam* Exception in this Case</u>

In light of the above, the lower courts correctly held that the narrow exception announced in <u>Putnam</u>—i.e., that out-of-possession property owner liability may be premised on covenants made in the lease "or otherwise"—does not apply to covenants made in third party agreements such as the HUD Agreement. [A14]. Rather, as the trial court observed, "the contractual obligation upon the landlord, for purposes of this exception, arises when the landlord has contracted with *the tenant*, by covenant in the lease or otherwise, to repair or maintain the premises." [A14]. Nonetheless, the Appellant argues that the lower courts erred in ruling as such, and asserts that the three-part test adopted in <u>Putnam</u> was satisfied here.

With respect to the first prong of the <u>Putnam</u> test, which requires that "the lessor . . . has contracted by a covenant in the lease or otherwise to keep the land in repair," the Appellant rightfully concedes that "nothing contained within the lease should be construed as obligating the Hamilton defendants to make . . . repairs." [App. Br., p. 32]. The Appellant is thus constrained to argue that this prong is satisfied by the covenant in the HUD Agreement. However, as outlined extensively above, <u>Putnam</u> was decided in the context of an agreement between a property owner and a tenant, and nothing in <u>Putnam</u> or the Restatement even remotely suggests that liability should be imposed upon the out-of-possession property owners here. Under the Grand Manor Lease, and as evidenced by their

actions toward each other (i.e. Grand Manor's repeated roof repair efforts), the parties obligations to each other were clearly delineated and well understood.

The existence of the HUD Agreement between HUD (a stranger to the lease) and the Hamilton Respondents did not change that understanding, and the Appellant offers nothing to support a conclusion to the contrary. Nor does she offer any support for her contention that a general covenant to keep premises in "good repair" contained in a separate agreement between a property owner and a third party can somehow alter the existing agreement between a property owner and its tenant. Indeed, the cases decided after Putnam (as well as those in other jurisdictions interpreting § 357 of the Restatement) make clear that although the covenant to maintain the property in good repair need not necessarily be contained in the lease itself, at the very least, it must be between the property owner and tenant.

Thus, as the trial and appellate courts here correctly held, the covenants contained in the HUD Agreement were between HUD and the Hamilton Respondents, and in no way altered the lease covenants existing between Grand Manor and the Hamilton Respondents.[11] The HUD Agreement intended to benefit HUD and the mortgagee, and to preserve the nursing home as mortgage

[11] Moreover, a breach of the covenant to maintain the property in good repair under the HUD Agreement would not result in tort liability on the part of the Hamilton Respondents. Rather, the remedy for such a breach would be an acceleration of the mortgage debt due. [A1281, ¶ 11].

collateral in the event of a default.[12] [A15, 1526]. In that regard, Mr. Klion, the Appellant's purported expert, admits that, the HUD Agreement and its requirements are meant simply to "protect both the physical asset as well as the fiscal integrity of the property." [A1300, ¶ 8]. Indeed, provisions like these are common in mortgage agreements,[13] and holding that such a common provision could form the basis for imposing out-of-possession property owner liability would open the floodgates of litigation, resulting in a parade of horribles, in the form of increased insurance premiums, rents, and other related costs.

The Appellant attempts to argue that the HUD Agreement explicitly indicates that it is "paramount and controlling" and that it supersedes any provision of any other agreement; and that "the lease recognized that where the terms of the lease conflicted with the HUD Agreement, the terms of the Agreement would govern." Thus, the Appellant argues that since the HUD Agreement contained a covenant to maintain the property in good repair, and the

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[12] In that regard, the Appellant does not even attempt to show that she qualifies as a third party beneficiary under the HUD Agreement, which would be her only conceivable avenue for even potentially recovering against the Hamilton Respondents. In any event, it is clear that the Appellant cannot meet the high standard for third party beneficiary recovery under New York law. See, e.g. Cal. Pub. Ret. Sys. v. Shearman & Sterling, 95 N.Y.2d 427 (2000) (to recover as a third party beneficiary, a party must show a valid, binding contract between other parties, that the contract was intended for third party beneficiary's benefit and this benefit was sufficiently immediate, not incidental); O'Gorman v. Gold Shield Sec. & Investigation, 221 A.D.2d 325 (2nd Dept. 1995) (plaintiff, the tenant's employee, could not establish that the contract between premises' out-of-possession owner and security contractor was intended to confer a direct benefit on him). See also See Grand Manor Health Related Facility, Inc. v. Hamilton Equities, Inc., 941 F. Supp. 2d 406, (S.D.N.Y. 2013) ("Tenants are not generally third party beneficiaries to regulatory agreements between HUD and property owners.").

[13] See supra at p. 9 n.3.

Grand Manor Lease passed that obligation on to Grand Manor, the two agreements conflict, and the HUD Agreement controls.

However, the Grand Manor Lease and the HUD Agreement do not conflict. Nothing in the HUD Agreement precludes the obligation to keep the premises in good repair from being be passed on to another party, i.e., the lessee. In fact, the HUD Agreement *explicitly allows* for the use of management contracts, indicating that the purported duty is in fact delegable. [A1280, ¶ 9]. Thus, the Hamilton Respondents were free to pass along the obligation to repair from the HUD Agreement onto a third party, such as a tenant, who would be in the best position to ensure that the repairs were undertaken, and that the work was properly performed.[14] Such arrangements are not inconsistent with the terms of the HUD Agreement, and thus, there is no need to determine whether the provisions of the HUD Agreement "supersede" those of the Grand Manor Lease.

Additionally, even if the Appellant could establish the first prong of the Putnam test, the remaining elements are not satisfied. In that regard, the second element of the Putnam test requires the Appellant to show that there was an "unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented." Notably, while the trial court accepted the Appellant's allegations of the leaking roof as true for the purposes of the motion

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[14] As the party in that position, Grand Manor did in fact undertake to make the repairs to the roof, further signifying a lack of conflict between the HUD Agreement and the Grand Manor Lease. [A235, 900-904, 907, 939 1048-1051; 1063-1064, 1067-1068, 1070, 1077-78, 1090-91, 1105-07, 1111, 1115, 1240-41].

for summary judgment, the video of the accident demonstrates that no unreasonable risk was created. In the video, prior to the Appellant's fall, numerous persons are seen traversing the area in which she slipped, suggesting that her fall was the result of her simply losing her footing, or a transient condition that existed for only a short period of time before her fall. [A1341]. Thus, an unreasonable risk did not exist.

Moreover, even if an unreasonable risk was present—which it was not—it was Grand Manor's, and not the Hamilton Respondents', obligation under the Grand Manor Lease to repair any allegedly defective condition on the property. [A1185, Art. VII]. Thus, it is hard to imagine how "the performance of the lessor's agreement" would have prevented any allegedly unreasonable risk.

Furthermore, the third element for liability under Putnam is lacking, inasmuch as the Hamilton Respondents have exercised reasonable care in the performance of the Grand Manor Lease. The Appellant argues that the Hamilton Respondents failed to exercise reasonable care, as HUD "repeatedly made the Hamilton defendants aware of defects in the property that included problems with the roof and water stains on the walls." As discussed at length in this brief however (see infra at Point III), the final HUD report prior to the Appellant's accident was highly positive, and the Hamilton Respondents had no notice of the alleged condition; therefore, the Hamilton Respondents did not fail to exercise reasonable care.

In sum, the lower courts correctly held that the narrow Putnam exception does not apply to this case, and thus the result below should be affirmed.

POINT II

THE LOWER COURT CORRECTLY HELD THAT THE SECOND GENERAL EXCEPTION TO THE OUT-OF-POSSESSION PROPERTY OWNER DOCTRINE IS INAPPLICABLE HERE

As correctly stated by the trial court, there are two exceptions to the general rule that an out-of-possession property owner will not be liable for negligence with respect to the condition of its property, i.e., where the property owner is "contractually obligated to make repairs and/or maintain the premises . . . [or] where the out-of-possession landlord maintains a right to reenter, inspect and make needed repairs at the tenant's expense *and* liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." [A13]. See also Sapp v. S.J.C. 308 Lenox Ave. Family Ltd. P'ship, 150 A.D.3d 525, 527, 56 N.Y.S.3d 32, 35 (1st Dep't 2017) (same test)

As demonstrated throughout this brief, there is no question that the first exception does not apply, since Grand Manor bore sole responsibility for keeping the Grand Manor Facility in good repair pursuant to the Grand Manor Lease, and the Putnam case does not abrogate the general rule regarding out-of-possession property owner liability.

Likewise, the second exception does not apply. In that regard, it is undisputed that the alleged defect at issue—i.e., the leaking roof—is *not* a structural defect. See, e.g., Devlin v. Blaggards III Restaurant Corp., 80 A.D.3d

497, 497-98 (1st Dept. 2011) (fall on wet floor from leaking air-conditioner vent was not significant structural or design defect that violated specific statutory provision); Oviedo v. Summer Management Co., LLC, 34 Misc.3d 130(A) (App. Term NY County 2011) (leaking air conditioner not structural or design defect, or violation of specific safety statute); Reyes v. Morton Williams Associated Supermarkets, Inc., 50 A.D.3d 496, 497-98 (1st Dept 2008) (out-of-possession property owner not liable for fall resulting from leak in overhead refrigeration pipes).

Moreover, while the Appellant cites 24 CFR §§ 5.701 and 5.703(a) and (b) in support of her argument that the Hamilton Respondents committed statutory violations, these are simply general safety regulations, and not "specific statutory safety provisions" as required to impose liability upon the Hamilton Respondents. See, e.g., See, e.g. Boateng v. Four Plus Corp., 22 A.D.3d 323 (1st Dep't 2005) ("Appellant's assertion that a potential engineer witness would testify that the crumbling cement violated general safety provisions of the New York City Building Code (i.e., Administrative Code of the City of NY §§ 27-127, 27-128) was insufficient to forestall summary judgment since, inter alia, no specific statutory violation was identified."); Sapp v. S.J.C. 308 Lenox Ave. Family Ltd. Partnership, 150 A.D.3d 525, 528 (1st Dep't 2017) ("[P]rovisions, which set forth a general duty of maintenance and repair, are insufficiently specific to impose liability on an out-of-possession landlord").

Thus, the facts at hand do not implicate the second exception to the general rule regarding out-of-possession property owner liability.

POINT III

EVEN IF THE HAMILTON RESPONDENTS COULD NOT DIVEST THEMSELVES OF CONTROL OF THE PREMISES, SUMMARY JUDGMENT WAS STILL PROPERLY GRANTED IN THEIR FAVOR

The Appellant's argument that the Hamilton Respondents never fully divested themselves of control of the Grand Manor Facility essentially repackages and reiterates the same arguments that have already been refuted in this brief. However, even if the Hamilton Respondents were not out-of-possession property owners, summary judgment was still properly granted in their favor, since they did not have notice of the alleged roof leak.

In an effort to establish such notice, the Appellant has relied upon a January 30, 2007 HUD inspection report [A1312], and a June 18, 2008 affidavit of Robert Nova (principal and shareholder of Hamilton Equities Inc., and sole limited partner of Hamilton Equities Company) that was filed in another action. [A1320-27].[15] Both the referenced report and the affidavit significantly pre-date the Appellant's alleged accident, and neither have any bearing on the claimed condition of the accident site at the time of her fall. Moreover, neither identifies

[15] Notably, after a bench trial in that action, the Supreme Court, Bronx County ultimately held that "the building facility was properly maintained. The evidence established the facility to be in good condition and repair, as shown by unannounced NYS Department of Health in-depth inspections and US Department of Housing and Urban Development surveys." See Aug. 16, 2013 Decision and Order, www.bronxcountyclerkinfo.com (Search for index number 301880/2008, Docket Entry 08/21/2013, p. 14-15 thereto).

the roof condition or the purported leak that the Appellant alleges as having caused her accident. As this Court has expressly held in Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994) (citations omitted):

> A "general awareness" that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall . . ., liability could be predicated only on the failure of defendants to remedy the danger presented . . . after actual or constructive notice of the condition.

While HUD found certain violations as referenced in the January 30, 2007 and January 16, 2008 reports, neither report identified a roof leak, or for that matter, referenced the area of the building in which the Appellant's accident is alleged to have occurred. Additionally, the Hamilton Respondents had not visited the Grand Manor facility for a period of almost thirty years. [A705-706, 760]. Moreover, while the Appellant argues that for a period of time far prior to her accident, the Grand Manor Facility was in a general state of disrepair, and that the Hamilton Respondents were aware of this general state of disrepair, she has not identified a single shred of evidence to suggest that the Hamilton Respondents were specifically aware of the alleged roof leak, as required by Piacquadio. Thus, even if the Appellant's arguments were correct regarding the HUD Agreement–which they clearly are not–the existing record fails to establish that the Hamilton Respondents had notice of the condition that is alleged to have caused her injuries.

For final proof of this, one need look no further than the HUD inspection that took place on December 4, 2009, which was the final inspection pre-dating

the Appellant's accident (a fact that the Appellant conveniently ignored in her briefing below). As discussed above, that inspection found the Grand Manor Facility to be clear of any of the alleged issues identified in the January 30, 2007 and January 16, 2008 inspection reports, [A1483–A1491], and identified absolutely no deficiencies with respect to the roof. In fact, most tellingly, the December 4, 2009 HUD inspection report gave the premises an overall score of 90, which was so exemplary that it excused the premises from further inspections for another three years. [A1483, A1493].

Thus, even if this Court were to accept the Appellant's baseless argument that the Hamilton Respondents never fully divested themselves of control over the premises, the Hamilton Respondents were still properly entitled to summary judgment and dismissal of the Appellant's complaint.

CONCLUSION

In light of the above, it is respectfully submitted that the Court of Appeals should affirm the decisions below, granting summary judgment to the Hamilton Respondents and dismissing the complaint.

Dated: New York, New York
December 19, 2018

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MICHAEL J. TRICARICO of
KENNEDYS CMK LLP
Attorneys for Respondents
Hamilton Equities, Inc., Hamilton Equities Company, Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait, and Chait-Hamilton Management Corporation
570 Lexington Avenue, 8th Floor
New York, New York 10022
646-625-3952

Of Counsel:
Michael J. Tricarico

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: New York, New York
December 20, 2018

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MICHAEL J. TRICARICO of
KENNEDYS CMK LLP
Attorneys for Respondents Hamilton Equities, Inc., Hamilton Equities Company, Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait, and Chait-Hamilton Management Corporation
570 Lexington Avenue, 8th Floor
New York, New York 10022
646-625-3952

Of Counsel:
Michael J. Tricarico