To be Argued by:
ALAN S. FRIEDMAN
(Time Requested: 30 Minutes)

APL-2018-00160
Bronx County Clerk's Index No. 309820/11

Court of Appeals
of the
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 APPELLANT CAROL HENRY

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PRELIMINARY STATEMENT

In *Putnam v. Stout* (38 NY2d 607 [1976]), this Court adopted an exception to the "out-of-possession owner" rule, which had previously insulated owners from liability to third-parties for accidents occurring on leased property. The *Putnam*–Court recognized that changing principles of law dictated that a limitation needed to be placed on that general rule. As such, the Court determined that an owner could not claim to be out-of-possession where, although it had leased the property it nevertheless agreed in the lease "or otherwise" to maintain the area where the plaintiff was injured.

In the present case, however, both the Supreme Court and the Appellate Division have interpreted *Putnam* to expand protection in favor of an owner who has claimed to be out-of-possession despite its contractual obligation to keep the leased property in good repair. The lower courts did so simply because the agreement to maintain was not contained in the lease or a contract directly between the owner and tenant. As will be explained, however, since the facts of this case fit squarely within the rationale and social factors supporting *Putnam*'s limitation on the out-of-possession owner rule, the lower courts should be reversed.

Carol Henry, a licensed practical nurse, slipped and fell on accumulated water on the top floor of a nursing home that had been constructed by Hamilton Equities, Inc., Hamilton Equities Company and Suzan Chait-Grandt as administrator of the estate of Joel Chait (the "Hamilton defendants") using a mortgage insured by the Federal Housing Authority. Ms. Henry suffered a fractured hip in the fall that required a total hip replacement, and she has been totally disabled from work since the accident. It is undisputed that the condition was created by the recurrent intrusion of rainwater through the nursing home's dilapidated, thirty year-old roof. The Hamilton defendants denied a duty to maintain the roof, however, claiming that they were "out-of-possession" owners who had leased the nursing home to Ms. Henry's employer, Grand Manor Nursing & Rehabilitation Center ("Grand Manor"). Thus, according to them, Grand Manor was solely responsible for such repairs.

Notably, however, because they had used an FHA mortgage the Hamilton defendants had also entered into a Regulatory Agreement with the United States Department for Housing and Urban Development ("HUD"). As part of the Regulatory Agreement, the Hamilton defendants expressly agreed to maintain the nursing home in good repair and condition, a duty which FHA Assistant Commissioner Michael Klion has attested was non-delegable. In fact, HUD

continuously held the Hamilton defendants directly accountable for the condition of the property through periodic health and safety inspections, after which the Hamilton defendants would receive a "Summary Report" indicating: "We… remind you of your ongoing responsibility to maintain this property in a manner that is decent, safe, sanitary and in good repair" (A. 1311 [emphasis added]).

Also relevant, the Regulatory Agreement created a "replacement fund" that was established and held in escrow for anyone to access to pay for maintenance of the facility. Grand Manor was informed that it could make withdrawals from the replacement fund, which it did on at least one occasion to pay for an upgrade of the facility's sprinklers. Finally, Grand Manor was informed that if there was any inconsistency between the terms of the lease and any regulatory agreement, then the regulatory agreement would prevail and govern the rights of the parties. In fact, the Regulatory Agreement expressly provided that it would supersede any agreement that was contrary to its provisions.

Nonetheless, citing *Putnam* (38 NY2d 607), both the Supreme Court and the Appellate Division determined that the Hamilton defendants were entitled to summary judgment upon finding that (1) the Regulatory Agreement was intended to benefit HUD and the mortgage lender, not third-parties and (2) the Regulatory

Agreement was not the type of contractual obligation to make repairs that would constitute an exception to the general out-of-possession owner rule solely because the agreement was not between owner and tenant.

By analyzing whether third-parties were intended beneficiaries of the HUD Regulatory Agreement, the lower courts erred by adding another element to the *Putnam*-rule, which previously required only that: (1) there is a contract to keep the land in repair; (2) the disrepair of land creates an unreasonable risk to persons upon the land; and (3) the lessor failed to exercise reasonable care to perform his contract. *Putnam*, 38 NY2d at 617.

Nevertheless, even if the contract to maintain must specifically contemplate protection to third parties, the lower courts' finding that the Regulatory Agreement was not such a contract is contrary to the evidence. HUD itself was created to benefit third-parties by strengthening communities and improving quality of life. The subject property was a 240-bed nursing home that had been purposefully built from inception by the Hamilton defendants. Financing for the project was governed by a HUD Regulatory Agreement that was specifically created for "Multi-Family Housing Projects" as defined by the FHA. The Agreement alerted the Hamilton defendants that periodic inspections of the facility for health and

safety deficiencies would be made by HUD. Therefore, the Regulatory Agreement did not solely benefit HUD and the mortgage lender, as the Agreement also contemplated protection to third-parties.

Moreover, as can be seen, the courts narrowly construed *Putnam* to require that the contract to maintain the premises must exist directly between the owner and lessee, whereas the contract to maintain the nursing home in the present case existed between the Hamilton defendants and HUD. It is respectfully submitted that the lower courts erred by narrowly applying the *Putnam*-exception such that they have essentially reverted back to the pre-*Putnam* general rule broadly favoring alleged out-of-possession owners. A plain reading of this Court's decision in *Putnam* demonstrates that the holding was not limited to contracts directly between owners and lessees for the maintenance of leased property. In fact, this Court explicitly stated that the doctrine was premised on a "covenant in the lease or otherwise to keep the land in repair." *Putnam*, 38 NY2d at 617 (emphasis added).

Therefore, since the goal of *Putnam* was to curb an owner's ability to claim to be out-of-possession, and there is no support in *Putnam* for the interpretation of the lower courts, it is respectfully submitted that they must be reversed.

Furthermore, consideration should also be given to the argument that the general rule available to the typical out-of-possession owner should not be applied here because the Regulatory Agreement prohibited the Hamilton defendants from delegating their duty to maintain the nursing home. Even if the Agreement allowed for the Hamilton defendants to delegate the responsibility to maintain the facility that it leased to Grand Manor, former FHA Assistant Commissioner Klion attested that the Hamilton defendants were at all times duty-bound to keep the premises in good repair, and was the sole entity held accountable to HUD through periodic HUD inspections when the facility fell into disrepair. As such, the Hamilton defendants knew that they were responsible to maintain the nursing home; thus they were never truly "out-of-possession." Therefore, the lower courts should not have ignored the non-delegable duty owed by the Hamilton defendants.

Accordingly, 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 defendants' motion for summary judgment dismissing the plaintiff's complaint should be modified to deny the motion, together with such other and further relief as this Court deems is just and proper.

QUESTIONS PRESENTED

1. Pursuant to this Court's decision in *Putnam* (38 NY2d 607), can an out-of-possession owner be held liable to third-parties for dangerous conditions on their property when the landowner has contractually agreed to maintain the property through an agreement that was not directly entered into between the owner and its lessee?

The Supreme Court and Appellate Division concluded that a landowner can only be held liable when the agreement to maintain has been directly entered into with the lessee, claiming that "[t]he social policy considerations cited by the Court of Appeals in *Putnam*… are promoted only where the landlord had a contractual obligation directly to the tenant." Ms. Henry submits that this was error. The HUD Regulatory Agreement at issue in the present case imposed a non-delegable duty on the owner to maintain its property and required the creation of a "replacement fund" from which the owner informed its tenant that it was allowed to make withdrawals for repairs. These facts thus demonstrated that the owner had the obligation to maintain the property, and also fulfilled the *Putnam* policy considerations relied on by the lower courts. Therefore, the Appellate Division should not have affirmed the dismissal of Ms. Henry's claims by solely relying on

the fact that the agreement was not entered into directly between the owner and tenant.

2. Once a landowner has undertaken a contractual, non-delegable obligation to maintain its property can it ever truly be considered "out-of-possession?"

It is respectfully submitted that former Assistant Commissioner Klion's affidavit and the HUD Regulatory Agreement demonstrated that the duty to repair the subject property was non-delegable, which is supported by the policy considerations underpinning FHA insured mortgages and Regulatory Agreements. Thus, while the "responsibility" to maintain may have been delegated by the owner to its lessee, the owner nevertheless remained duty-bound to ensure that the premises remained in good repair – an obligation for which the owner was held directly accountable to HUD. In essence, therefore, the Appellate Division relieved the owner of its duty, essentially permitting the owner to take all of the benefits of the FHA/HUD arrangement, but none of its burdens. Thus, since the owner could not avoid its duty to maintain the property by delegating such responsibility to its tenant, the "out-of-possession" owner exception should not have been applied here.

JURISDICTION

The Order of the Supreme Court, Bronx County (Ruiz, J.) was entered on August 25, 2017 (A. 9-17). Ms. Henry timely served and filed her Notice of Appeal dated September 11, 2017 (A. 5-6). In the underlying Order, the Supreme Court granted summary judgment, in effect dismissing Ms. Henry's complaint and all cross-claims between the defendants (A. 16-17). On appeal, the Appellate Division affirmed summary judgment in favor of the Hamilton defendants. (A. 1525-29). Accordingly, Ms. Henry's appeal was timely and the Decision and Order of the Appellate Division is a final determination. *See* CPLR 5602(a)(1)(i).

The Decision and Order of the Appellate Division was entered on May 1, 2018 and served with Notice of Entry by Defendants-Respondents on that date. Thereafter, on June 1, 2018, Ms. Henry timely served her motion for Leave to Appeal to this Court, bypassing any remedy from the Appellate Division. Therefore, her motion was timely made within 35 days of the Order sought to be appealed from. *See* CPLR 2103(b) and 22 NYCRR § 500.22(b)(2)(i).

On September 6, 2018, this Court granted Ms. Henry's motion for Leave to Appeal (A. 1524) and on September 12, 2018, Ms. Henry timely served and filed her Preliminary Appeal Statement.

STATEMENT OF FACTS

The Hamilton Defendants Built and Leased the Nursing Home Using an FHA/HUD Insured Mortgage

Robert Nova was deposed on behalf of the Hamilton defendants (A. 706-07). Mr. Nova testified that the Hamilton defendants were owners of the nursing home facility where Grand Manor is located (A. 707-08) (A. 712).[1] The Hamilton defendants had constructed the nursing home at the request of Grand Manor (A. 708). The financing to build the nursing home came from the bank through a mortgage that was insured by HUD (A. 723-24).

Mr. Nova identified a lease agreement dated July 30, 1974 between Hamilton Equities Inc. and Grand Manor (A. 717). According to "Article VII Repairs, Replacements and Maintenance:"

[1] Hamilton Equities Inc. is a general partner of Hamilton Equities Company (A. 713). Suzan Chait-Grandt owns a half interest of Hamilton Equities (A. 731). Chait-Hamilton Management Corp. is the property manager (A. 732).

> Section 7.1
>
> During the full term of this lease, [Grand Manor] shall, at its sole cost and expense, maintain and keep all parts of the leased premises… in a good state of repair and condition…

(A. 1185). According to "Article XI Inspection and Occupancy of Premises by Lessor:"

> Section 11.1
>
> **[**Hamilton**]** and its authorized representative shall, at all reasonable times and in a reasonable manner, have the right to enter the leased premises for the following purposes only:
>
> * * *
>
> (c) Making repairs or additions to the leased premises and performing any other work therein resulting from [Grand Manor's] failure to perform its covenants herein contained; but nothing **herein** contained shall be construed as making it obligatory upon the part of [Hamilton] to make such repairs or to perform such work.

(A. 1191 [emphasis added]).[2] Mr. Nova agreed that this provision meant that the Hamilton defendants had the right to perform maintenance that Grand Manor had failed to perform (A. 764).

[2] As will be explained, while the lease agreement did not make it "obligatory" that Hamilton make repairs, the HUD Regulatory Agreement did impose that duty upon Hamilton and the Regulatory Agreement explicitly supersedes the lease agreement.

Mr. Nova also identified an amendment to the lease executed in 1978 (A. 718), which added under "Article XXV Contributions by the Parties to FHA Escrow Fund:"

> Section 25.1
>
> [Hamilton] has advised [Grand Manor] that it is unable to obtain conventional financing and is proceeding to finance the Grand Manor project through the Federal Housing Administration ("FHA"). The FHA requires that a replacement fund be established and held in escrow for a health related facility after completion of the construction…
>
> Section 25.2
>
> It is understood and agreed that only [Grand Manor] may withdraw from such fund for the purposes for which such fund is established…

(A. 1227-28 [emphasis added]). The amendment further provided under "Article XXVII FHA or HUD Regulatory Agreements:"

> Section 27.1
>
> In the event of any inconsistency with respect to the terms, provisions and conditions of this Agreement and the FHA and/or HUD regulatory agreements, the FHA and/or HUD regulatory agreements will prevail and govern the rights of the parties.

(A. 1230).

Hamilton's Duty to Maintain the Nursing Home Pursuant to a HUD Regulatory Agreement

The Hamilton defendants had, in fact, entered into a Regulatory Agreement with HUD.[3] The Hamilton defendants warranted that they had not and would not defy the terms of the HUD Regulatory Agreement and that the Regulatory Agreement superseded any other agreements to the contrary:

> Owners warrant that they have not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling to the rights and obligations set forth and supersede any other requirements in conflict herewith.

(A. 1282 [emphasis added).

As relevant to this appeal, as well as the foregoing provision, the Regulatory Agreement mandated that: "[Hamilton] shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition" (A. 1280). The Agreement further provided that:

> [Hamilton] shall establish or continue to maintain a reserve fund for replacements by the allocation to such

[3] HUD's current mission statement provides: "The mission of the Department of Housing and Urban Development (HUD) is to create strong, sustainable, inclusive communities and quality affordable homes for all. HUD is working to strengthen the housing market to bolster the economy and protect consumers; meet the need for quality affordable rental homes; utilize housing as a platform for improving quality of life; and build inclusive and sustainable communities free from discrimination." https://www.grants.gov/learn-grants/grant-making-agencies/department-of-housing-and-urban-development.html

> reserve fund… an amount equal to $4,081.75 per month… Disbursements from such fund, whether for the purpose of effecting replacement of structural elements… or for any other purpose, may be made only after receiving the consent in writing of the Secretary…

(A. 1278 [emphasis added]).

Mr. Nova testified that under HUD rules a portion of the nursing home's rent was supposed to be paid into a "replacement/reserve fund" each month (A. 739) and that monies were withdrawn from this fund by Grand Manor on at least one occasion for the sprinkler system in the nursing home (A. 738).

Michael Klion attested that he was employed by HUD for 36 years as an Assistant Commissioner (A. 1298). Commissioner Klion attested that the purpose of the Regulatory Agreement was "to protect both the physical asset as well as the fiscal integrity of the property" (A. 1300). As such, the Agreement was intended to describe the requirements that owners of multi-family properties such as nursing homes must follow to accomplish this purpose (A. 1300). In this case, the Agreement provided, *inter alia*, that the Hamilton defendants were required to maintain the property in good repair (A. 1302).

Having reviewed the relevant HUD Regulatory Agreements, Commissioner Klion attested: "if maintenance and/or repairs have not been performed by a tenant then Hamilton Equities Company is obligated under the provisions of the Regulatory Agreements… to have such maintenance and/or repairs done" (A. 1302).

Commissioner Klion specifically attested that the Hamilton defendants were "ultimately responsible to maintain the property in good repair" and that the Hamilton defendants' duty in this regard was "non-delegable even if Hamilton Equities Company… leases out the entire property" (A. 1302), a fact that, as will be explained in Point II, *infra*, is buttressed by the Code of Federal Regulations.

In fact, to the extent that the lease agreement contemplated that the Hamilton defendants were not obligated to make repairs that Grand Manor failed to make (A. 1191), such provision was at odds with the Regulatory Agreement (A. 1280). Where there was a conflict between the two agreements, the lease explicitly acknowledged that the Regulatory Agreement would govern (A. 1230). Indeed, the Regulatory Agreement explicitly indicated that it was "paramount and controlling" and superseded the lease (A. 1282).

HUD's "Health & Safety" Inspections Put The Hamilton Defendants on Notice of the Deteriorating Condition of Their Property

At all relevant times HUD held the Hamilton defendants responsible to maintain the property. Pursuant to the HUD Regulatory Agreement (A. 1280), HUD would periodically inspect the nursing home for "any exigent health and safety (EH&S) deficiencies at the time of the inspection" (A. 1310; 1471). These included both "Non-Life Threatening" and "Life Threatening" deficiencies (A. 1312; 1473). "Health & Safety" was specifically defined to include "air quality, electrical hazards, elevator, emergency/fire exits, flammable materials, garbage and debris, hazards, infestation" (A. 1318). The Hamilton defendants (or their agent, Chait-Hamilton) would be provided with a "Physical Inspection Summary Report" after each inspection indicating: "We… remind you of your ongoing responsibility to maintain this property in a manner that is decent, safe, sanitary and in good repair" (A. 1311; 1482).

Mr. Nova identified an affidavit that he had prepared for litigation between the Hamilton defendants and Grand Manor, to which he testified that everything in the affidavit was correct (A. 753-54). The affidavit included an acknowledgement that the Hamilton defendants had been receiving reports from HUD regarding health and safety inspections of the facility, including inspections that had been

performed on January 30, 2007 and January 16, 2008 (A. 1322-23). Mr. Nova further attested to the following:

> 7. By my letter dated December 12, 2006, Exhibit "B" hereto, on behalf of Defendant Hamilton Equities Inc., I advised [Grand Manor] of numerous deficiencies in [Grand Manor's] maintenance of the property and its tenancy.
>
> 8. Because of these deficiencies Hamilton Equities Inc. advised [Grand Manor] that no renewal of the lease would occur.
>
> 9. Apparently, [Grand Manor] took no meaningful steps to cure the defects in the lease described in the 12/12/2006 letter.

(A. 1321).

Mr. Nova then noted the multiple deficiencies that were found by HUD throughout 2007 and 2008, which included "Missing/Damaged Components from Downspouts/Gutter" on the roof and "Water Stains/Water Damage/Mold/Mildew" on the walls (A. 1313 [2007] and A. 1475 [2008]). Mr. Nova attested that "[t]his tenancy can not continue as such and this Court should deem the tenancy terminated" (A. 1323). Yet Mr. Nova and the Hamilton defendants did nothing further, other than to continue litigating with Grand Manor.

It is notable that the particular litigation in which the affidavit was given by Mr. Nova[4] has a disposition date of November 7, 2011, which was six months after Ms. Henry's accident.

In between the HUD inspection in January of 2008 and the HUD inspection in December 2009, AP Construction Inc. was retained (in April 2009) to perform a "limited roof repair" (A. 1244). This was so despite the fact that AP had recommended that a complete replacement of the thirty year-old roof was required (A. 1240, 1242, 1244). Ms. Henry and her coworkers also testified/attested that "repairs" would be made to the interior of the facility by simply re-painting walls (A. 311; 318; 1333; 1336) and replacing ceiling tiles (A. 312; 315; 319; 1333; 1336). Clearly these "repairs" would have obscured evidence of water damage from the HUD inspectors.

Ms. Henry Fell on Water from a Recurring Leak
In the Hamilton Defendants' Dilapidated Roof

Ms. Henry testified that on May 18, 2011 she was employed as a licensed practical nurse by Grand Manor Nursing Home (A. 256). She was working on the

[4] *Grand Manor Health Related Facility, Inc. v. Hamilton Equities Inc.*, et al, Supreme Court, Bronx County Index No. 301880/08.

sixth floor of the property at the time of her accident (A. 261). The roof of the building was located directly above the sixth floor (A. 337).

The accident occurred when Ms. Henry slipped on water on the linoleum floor (A. 296) as she was pushing a resident in a wheelchair (A. 280). Ms. Henry was taking the resident back to her room (A. 282). Ms. Henry was looking at the back of the resident while pushing the wheelchair (A. 287). Ms. Henry's right foot slipped, causing her to fall on her right side (A. 287-88).

After she fell Ms. Henry noticed there was water surrounding her on the floor (A. 290). She was "sitting in a pool of water" (A. 290). The water had come from the ceiling on the side where it meets the wall (A. 296). She could see that the wall itself was wet (A. 297; 326) and there was water coming down the wall from the ceiling (A. 358).

Ms. Henry was shown 26 photographs that were taken at Grand Manor in August 2011, three months after the accident (A. 305). She identified some areas of water damage (A. 306; 317; 319; 320), as well as other areas that had been re-painted (A. 311; 318) or where ceiling tiles had been replaced (A. 312; 315; 319). The areas that showed water damage had been in that condition for the entire two

year period that Ms. Henry worked at Grand Manor (A. 328-29). She testified that the damage was from a recurring leak:

> The condition of the wall was due to water damage because any time it rained on the floor that's what would happen.
>
> * * *
>
> When it rains we would call housekeeping or maintenance to come in and put up the cones and mop up the water that was there, so in essence that's how we complained about it.

(A.329).

Ms. Henry testified that it had been raining on the day of the accident (A. 334-35), a fact that was confirmed by the plaintiff's expert meteorologist (A. 1349-54).

Ms. Henry suffered a femoral neck fracture in her right hip that required open reduction and internal fixation. Eventually, Ms. Henry underwent a total hip arthroplasty (A. 214-16). She has been totally disabled from work since the accident.

The Hamilton Defendants' Motion for Summary Judgment

As a result of her fall, Ms. Henry commenced an action against the Hamilton defendants, their property manager, Chait-Hamilton Management, and the roofing companies that had been retained to repair the dilapidated roof.

Thereafter, the Hamilton defendants moved for summary judgment on the basis that they were out-of-possession owners who had reserved a limited right of re-entry, but did not have an obligation to perform maintenance or repairs (A. 204).

In opposition to the motion, Ms. Henry argued that the HUD Agreement obligated the Hamilton defendants to maintain the facility in good repair and condition, and that the Hamilton defendants had retained a right of re-entry to inspect the facility to make any repairs that Grand Manor had failed to make (A. 1251-53). Moreover, the Hamilton defendants were on notice of water intrusion at the facility based on the fact that Mr. Nova had acknowledged receiving the HUD Report which identified problems with the roof and water stains on the walls (A. 1253). Ms. Henry thus argued that an out-of-possession landlord may nevertheless be held liable for a dangerous condition such as a leaking roof that creates a slipping hazard, when the owner has entered into a contract to maintain the

premises and that the HUD Regulatory Agreement was such a contract (A. 1269-71).

On Reply, the Hamilton defendants asserted that the Agreement did not impose a non-delegable duty upon them to maintain the property because paragraph 9(a) of the Agreement permitted the use of an undefined "management contract" (A. 1465). Of course, such an argument ignores the fact that a "management contract" does not fully divest an owner of its duty to maintain the property, nor does the property manager fully assume such responsibility. Indeed, the fact that a property manager ordinarily does not assume such responsibility is what formed the basis for Chait-Hamilton Management's argument that it cannot be held liable to the present plaintiff because it was merely the property manager for the facility with no duty to actually maintain the facility.

The Order of the Supreme Court

By Decision and Order dated August 23, 2017 and entered in the Office of the Clerk on August 25, 2017, the Supreme Court, Bronx County (Hon. Norma Ruiz, J.S.C.) granted the Hamilton defendants' motion. The court below initially observed that

> [g]enerally, 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" (*Babich v. R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]). There are two exceptions to this general rule… (*Sapp v. S.J.C. 308 Lenox Ave. Family Ltd. Partnership*, 150 AD3d 525, 527 [1st Dept 2017]). The first exception applies where the out-of-possession landlord is "contractually obligated to make repairs and/or maintain the premises" (*id.*, citing *Johnson v. Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996]).

(A. 13).

Reviewing the decision of this Court in *Putnam* (38 NY2d 607, 611), however, the lower court noted that the *Putnam* Court had "highlighted the reciprocal benefits that a contractual obligation to repair and maintain the premises affords both landlord and tenant" (A. 14). The lower court focused on two issues in particular, (1) "the existence of the contractual obligation may 'induce the tenant to forego repair efforts which [the tenant] might have made,'" and (2) "social policy factors to be considered include that 'tenants may often be financially unable to make repairs'" (A. 15). Thus, the lower court observed that "[t]hese considerations naturally assume that the obligation is contractually owed to the tenant and the tenant is at least aware and relies on the landlord" (A. 15).

In granting the Hamilton defendants' motion, the court found that

> [i]n 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, plaintiff 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.

(A.15).

The court below had no reason to summarily conclude that the sole purpose of the Regulatory Agreement was to protect HUD's interest in the financial integrity of the property.

The court below also erroneously determined that Grand Manor was not aware of, and did not benefit from the Regulatory Agreement. The Agreement expressly included a provision that required the creation and maintenance of a replacement fund to care for the property and Grand Manor was made aware of this fact by amendment to the lease. Grand Manor was further aware that it had the

ability to make withdrawals from the replacement fund; which it did on at least one occasion to perform sprinkler work at the facility.

The Appellate Division's Decision and Order

Ms. Henry thus appealed the Supreme Court's Order. By Decision and Order dated and entered May 1, 2018, the Appellate Division, First Department affirmed the order appealed from (A. 1525-29). The Appellate Division found that (1) the Regulatory Agreement was intended to protect HUD and the bank and not to benefit third-parties injured on the property; (2) HUD's requirement that an escrow fund be made available to Grand Manor to make repairs suggested that the duty to repair could be delegated from the Hamilton defendants to Grand Manor; and (3) "[t]he social policy considerations cited by the Court of Appeals in *Putnam...*, are promoted only where the landlord had a contractual obligation directly to the tenant" (A. 1526).

(1) The Appellate Division's finding that the Regulatory Agreement was not intended to benefit third-parties is both irrelevant and contrary to the record evidence. As will be explained, the legal standard expressed by this Court in *Putnam* did not include a requirement that the agreement to maintain leased property was intended to benefit third-parties, only that the failure to maintain

created a risk of harm to third-parties. Further, as Commissioner Klion attested, the Agreement was intended to protect the physical integrity of the structure, i.e. a 240 bed nursing home**,** not just its "fiscal" integrity. Further, on multiple occasions HUD repeatedly mandated the remediation of "exigent health and safety" conditions that were detrimental to the health and well-being of the residents and staff, including both life threatening and non-life threatening deficiencies. In fact, HUD continually reminded the Hamilton defendants of their obligation to keep the property "safe" and free from hazards (A. 1311).

(2) The Appellate Division's finding that it was HUD's requirement that an escrow fund be made available to Grand Manor is also contrary to record evidence. The Regulatory Agreement contemplated only that an escrow fund was to be created. It did not specifically indicate who could withdraw from the fund, only that withdrawals needed approval from the Secretary. It was the Hamilton defendants that voluntarily made the fund available to Grand Manor.

(3) Contrary to the "policy considerations" found by the Appellate Division, the HUD Regulatory Agreement, of which Grand Manor was aware, specifically imposed upon the Hamilton defendants the obligation to make repairs that Grand Manor refused to make, which is the first *Putnam*-policy consideration.

The replacement fund also provided the Hamilton defendants/Grand Manor with the financial means to make repairs if Grand Manor were otherwise financially unable to do so, which is the second *Putnam*-policy consideration. Therefore, the Appellate Division erred in its findings and should not have opined that the policy considerations supporting *Putnam* could only be fulfilled by a direct contractual relationship between landlord and tenant, because the Regulatory Agreement at issue in the present case fulfilled those considerations.

ARGUMENT

POINT I

PUTNAM CONTEMPLATES THAT AN OWNER CAN BE HELD LIABLE BASED ON AN OUTSIDE AGREEMENT TO MAINTAIN PROPERTY

Both the Supreme Court and the Appellate Division perceived that the sole purpose of the HUD Regulatory Agreement in the present case was to protect HUD and the mortgage lender, not third-parties, and that the *Putnam* Court only intended to impose liability on out-of-possession owners who had directly agreed with their tenants to maintain the leased property.

Significantly, however, nothing in this Court's decision in *Putnam* could be construed as adding a requirement that the agreement to maintain must be intended to benefit third-parties. Nevertheless, the record evidence stands in stark contrast to the perception that the duty to maintain the property pursuant to the HUD Regulatory Agreement was only intended "to benefit HUD and the bank," not third-parties. The sole purpose and mission statement of HUD is to promote sustainable housing for the express purpose of building communities and improving quality of life. The Regulatory Agreement was specifically sought after, and obtained by the Hamilton defendants on the basis that they were constructing a nursing home facility in one such community.

Moreover, and significantly, the Regulatory Agreement expressly provided for periodic inspections of the facility, which were performed by HUD inspectors who were looking for "Health and Safety deficiencies," including life threatening and non-life threatening hazards. After the inspections, HUD continuously followed up with the Hamilton defendants to ensure that repairs were made (A. 1310-1319; 1471-1491). Given the nature and purpose of the Regulatory Agreement and the periodic health and safety inspections conducted by HUD, the lower courts wrongly concluded that the Agreement was not intended to benefit third-parties.

That leaves only the question of whether the lower courts have correctly interpreted *Putnam* to impose liability on an out-of-possession owner only when it has directly agreed with its lessee to maintain the property.

In *Putnam*, an easement existed in which the property owner, Steigler, had agreed to maintain "in good repair" the driveway area where the plaintiff had fallen. *Putnam,* 38 NY2d at 613. By this Court's explicit reference to the easement, it can be assumed, therefore, that Steigler's duty to maintain the driveway arose solely from its contractual obligation under the easement. By comparison in the present case, the Hamilton defendants' duty arose both from its

ownership of the property and its contractual obligations under the Regulatory Agreement. In *Putnam*, Steigler also agreed as part of its lease with the tenant, Grand Union, to make "necessary repairs" other than incidental repairs to the interior of the premises. *Id.* at 613.

The *Putnam*-Court questioned whether the allegedly out-of-possession owner, Steigler, was liable to the injured plaintiff. The Court first observed that the rationales that had supported the out-of-possession owner rule "no longer retain[ed] the vitality they may once have had." *Id.* at 615. Thus, the Court further observed that,

> in the case of harm occurring to third parties who have come upon property with the invitation or license of the occupier, and often with the knowledge and consent of the landowner, consideration must be given to protecting these persons from injury, rather than adhering to technical, out-moded rules of contract.

Id. at 615 (emphasis added).

In the present case, of course, the Hamilton defendants were fully aware of, and consented to Ms. Henry's presence on the property as the facility was purposefully built by the Hamilton defendants to be a nursing home, which included both residents and staff to care for those residents. It would also seem that by suggesting that Ms. Henry was not a third-party beneficiary to the

Regulatory Agreement, and by requiring that the agreement to maintain property must be between landlord and lessee, the lower courts adhered to similar "technical, out-moded rules of contract." These facts, standing alone, severely undermine the lower courts' decision to relieve the Hamilton defendants of the obligation to maintain the nursing home "in good repair," as was required by the Regulatory Agreement.

Moreover, in recognition of these changing principles of law, the *Putnam*-Court explicitly stated 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). Thus, in creating an "exception" to the out-dated, general rule, the Court chose to "adopt the Restatement formulation as the rule to be applied." *Id.* at 617. According to the Restatement (Second) of Torts, an owner/lessor could be held liable if it has

> (a) … 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.

Putnam, 38 NY2d at 617 (emphasis added). Ultimately, the *Putnam*-Court held that "a landlord may be liable for injuries to persons coming onto his land with the consent of his lessee solely on the basis of his contract or covenant to keep the premises in repair." *Id.* 618.

Here, all three elements of the Restatement rule were satisfied. First, the Regulatory Agreement expressly indicated that the Hamilton defendants were obligated to maintain the property in good repair and condition. As part of the lease agreement with Grand Manor, the Hamilton defendants also carved-out the right to enter the premises to make repairs that Grand Manor failed to make. Although the lease indicated that nothing contained within the lease should be construed as obligating the Hamilton defendants to make those repairs, it was the Regulatory Agreement that had imposed such an obligation. Critically, the lease recognized that where the terms of the lease conflicted with the Regulatory Agreement, the terms of the Agreement would govern. Likewise, the Regulatory Agreement explicitly indicated that it was "paramount and controlling" and superseded any provision of any other agreement that was contrary to the terms of the Regulatory Agreement.

Second, the disrepair of the thirty-year-old roof resulted in a recurrent leak that would allow rainwater to accumulate on the linoleum floor of the nursing home, which, had the Hamilton defendants fulfilled their obligation to maintain, would not have created an unreasonable risk of harm to Ms. Henry, her coworkers or the residents of the nursing home.

Third, while Ms. Henry would submit that the Hamilton defendants utterly failed to exercise reasonable care to fulfill their contractual obligation to maintain the nursing home in good repair, at least a question of fact exists as on this issue. HUD repeatedly made the Hamilton defendants aware of defects in the property that included problems with the roof and water stains on the walls. Robert Nova attested that as early as December 2006 the Hamilton defendants were aware that the property was not being maintained properly and they had threatened Grand Manor with non-renewal of its lease. Whether the Hamilton defendants should have completed the repair as they were obligated to do by the Regulatory Agreement and could have done under the lease, and whether their decision to sue Grand Manor instead was "reasonable," can be decided by a jury.

Therefore, each of the foregoing Restatement elements was satisfied. As indicated, however, the courts below nevertheless determined that the first element

of the rule would only be satisfied by a situation where the owner and tenant had directly agreed for the owner to maintain the property. As can be seen from the foregoing, there was no such requirement in the Restatement formulation, nor was such a requirement adopted by this Court. Instead, the Restatement had explicitly contemplated a situation where the covenant to repair would "otherwise" be outside of the lease agreement.

Indeed, the error of the lower courts' interpretation is glaringly obvious. Under the courts' decisions any owner who contracts for the maintenance of its property can avoid liability as an "out-of-possession" owner so long as the agreement to maintain is not between the owner and tenant. Such an interpretation flies in the face of the express purpose of *Putnam*, which was to limit the out-of-possession owner defense and make the owner responsible for injuries caused by repairs that the owner agreed to make.

According to the lower courts, however, their interpretation was purportedly supported by the factors that the *Putnam*-Court had indicated were the underpinning of the rule. These factors included:

> 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.

Id. at 617-18.

All of the "Putnam factors" are present here. For example, it is undisputed that the Hamilton defendants could not secure financing for the construction of the nursing home, which caused a significant delay to the project. Ultimately, they were able to obtain an FHA insured mortgage, in exchange for which they entered into a Regulatory Agreement that required the Hamilton defendants to maintain the property in good repair. Therefore, the mortgage was the consideration given to the Hamilton defendants in exchange for maintaining the property, which satisfies the first Putnam factor.

Regarding Grand Manor's ability to forego making repairs, the lease agreement specifically contemplated a situation where the Hamilton defendants would make repairs that were not made by Grand Manor. The Hamilton defendants had expressly 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" (A. 1191). Assuming arguendo that Grand Manor was not explicitly aware of the requirement in the Regulatory Agreement that the Hamilton defendants were obligated to maintain the property (at the very least Grand Manor was aware of the Agreement's existence), the lease nevertheless contemplated a situation where the Hamilton defendants would make such repairs. Mr. Nova admitted this fact during his deposition. Therefore, the second factor is also satisfied.

Regarding the Hamilton defendants' revisionary interest in the property, the lease agreement provided that "Lessee shall, upon the termination of this lease, surrender and redeliver to the Lessor the leased premises" (A. 1188-89). As indicated in the Restatement, this factor, standing alone, demonstrates that the owner has retained and assumed the responsibility to keep the premises safe. *Id.* at 617. Therefore, the third *Putnam* factor has been satisfied.

Regarding the social policy factors, including that a tenant may be unable to afford repairs, the Regulatory Agreement gave the Hamilton defendants the ability to pay for repairs. Pursuant to the terms of the Agreement, the Hamilton defendants were obligated to create a "reserve fund" that was to be used to make repairs to the

property. The Agreement mandated that more than $4,000 was to be deposited into the fund each month (more than $1,200,000 over the 304-month lease). It was the Hamilton defendants, through the lease agreement, who voluntarily gave Grand Manor access to the fund. By allowing Grand Manor access to these funds, the Hamilton defendants had essentially agreed to pay for repairs to the property thus allaying any concern that Grand Manor might be unable to pay for such repairs.

Regarding whether the tenant's possession was only for a "limited term," such that it might not have an incentive to maintain the property, the present case is a bit of an anomaly because it concerns the long-term lease of a nursing home.

The final *Putnam* 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 others," *Id.* at 617-18. From the outset of the project the parties were aware that they were constructing a 240-bed nursing home facility. The Hamilton defendants 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. In fact, the rent collected by the Hamilton defendants was calculated on a per-bed basis.

Moreover, as part of the Regulatory Agreement the Hamilton defendants were obligated to maintain the premises in good repair and aware that the facility would be inspected by HUD. Following these inspections, Summary Reports were sent to the Hamilton defendants and their property manager, Chait-Hamilton, not Grand Manor. Each of these Summary Reports provided detailed deficiencies in the property that affected the health and safety of the residents and staff at the nursing home. Therefore, 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.

Accordingly, irrespective of the fact that the Hamilton defendants agreed to maintain the property leased to Grand Manor via the Regulatory Agreement and not a covenant directly in the parties' lease, each of the *Putnam* factors have been fully satisfied. As such, the lower courts should not, in essence, have resorted back to the pre-*Putnam* general rule that owners who lease property cannot be held liable to injured third-parties. Therefore, the orders appealed from by Ms. Henry, which granted summary judgment to the Hamilton defendants dismissing Ms. Henry's complaint should be reversed and the complaint reinstated.

POINT II

THE HAMILTON DEFENDANTS WERE NEVER TRULY "OUT-OF-POSSESSION"

The original rationale for allowing an out-of-possession owner to avoid responsibility for dangerous conditions on its property was premised on the notion that the owner had divested itself of control over property. *See Putnam*, 38 NY2d 614 ("The rule was sustained on the rationale that the tenant, as occupier of the land, had control of its safety… whereas the landlord had neither control nor possession). In the present case, however, the Hamilton defendants were unable to fully divest themselves of control. As explained, the Regulatory Agreement imposed a duty on the Hamilton defendants to maintain the property in good repair. Michael Klion, former HUD Assistant Commissioner, attested that this duty was non-delegable.

In fact, as a Multi-family Housing Project, the nursing home was governed by 24 C.F.R. § 207.260, "Maintenance and inspection of property." According to the Federal Regulation, the mortgagor, Hamilton, "must maintain"[5] the nursing

[5] "While the word 'shall' is not always imperative (*see Munro v. State of New York*, 223 N.Y. 208, 119 N.E. 44; *Matter of State of New York*, 207 N.Y. 582, 101 N.E. 462), "in the absence of ameliorating or qualifying language or showing of another purpose, the word 'shall' is deemed to be mandatory.' (*Matter of Mulligan v. Murphy*, 19 A.D.2d 218, 223, 241 N.Y.S.2d 529, 534.)' (*People v. Ricken*, 29 A.D.2d 192, 193, 287 N.Y.S.2d 118, 119, affd. on opn. below 27 N.Y.2d 923, 318 N.Y.S.2d 142, 266 N.E.2d 821; *see, also, Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818,

home in accordance with 24 C.F.R. § 5.703, "Physical condition standards for HUD housing that is decent, safe, sanitary and in good repair" (language found in the Summary Reports received by the Hamilton defendants each year) (emphasis added). This section of the Code repeats: "Owners of (Multi-family) housing… must maintain such housing in a manner that meets the physical condition standards set forth in this section." 24 C.F.R. § 5.703 (emphasis added).

Therefore, once the Hamilton defendants undertook the FHA insured mortgage and executed the Regulatory Agreement, they could not delegate the duty to maintain the property to Grand Manor.

Moreover, the amendment to the lease explicitly provided that if there was any conflict between the terms of the lease and the Regulatory Agreement, then the Regulatory Agreement would "prevail and govern the rights of the parties" (A. 1230). The Regulatory Agreement provided that it superseded all agreements that were contrary to its provisions. Although the lease purported to make Grand Manor responsible for maintaining the property, such a provision would be in direct conflict with the Regulatory Agreement. Therefore, since the Regulatory Agreement must prevail (*see e.g. Bank of New York Mellon v WMC Mortg., LLC*,

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79 L.Ed. 1566; Black's Law Dictionary (4th ed.), p. 154.)." *Matter of Aho*, 39 NY2d 241, 251 (1976)

136 AD3d 1, 6 [1st Dep't 2015], aff'd, 28 NY3d 1039 [2016] [finding that a contractual provision that is clear on its face "must be enforced according to the plain meaning of its terms"], the Hamilton defendants kept their duty to maintain the property.

Indeed, insofar as HUD was concerned the Hamilton defendants were solely responsible for maintaining the property. Each year the property was inspected by HUD and each year the Inspection Reports were sent to the Hamilton defendants with a notice to cure the defects that had been discovered during inspection. In fact, only the Hamilton defendants could have certified to HUD that the necessary repairs had been completed. Therefore, the Hamilton defendants had to continually keep their eyes on the property, so-to-speak, and were never truly out-of-possession.

In sum, therefore, the Hamilton defendants remained in control of the property and because Ms. Henry has raised an issue of fact as to whether the Hamilton defendants had actual or constructive notice of the recurring leaky roof, their motion for summary judgment should have been denied.

CONCLUSION

Based on all the foregoing, the Decision and Order of the Supreme Court, Bronx County (Hon. Norma Ruiz, J.S.C.) dated August 23, 2017 and entered in the Office of the Clerk of Bronx County on August 25, 2017, which granted the Hamilton defendants' motion for summary judgment, and the Decision and Order of the Appellate Division, First Department dated May 1, 2018, which affirmed the Supreme Court, should be modified to deny the motion and reinstate the plaintiff's complaint, together with such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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