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Bronx County Clerk's Index No. 309820/11

Court of Appeals
of the
State of New York

CAROL HENRY,

Plaintiff-Appellant,

– against –

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

Defendants-Respondents-Cross-Appellants,

– and –

RAFAE CONSTRUCTION, CORP. and AP CONSTRUCTION, INC.,

Defendants-Cross-Respondents.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS OF THE STATE OF NEW YORK

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CAROL HENRY,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents-Appellants,

-and-

RAFAE CONSTRUCTION CORP. AND AP CONSTRUCTION, INC.,

Defendants-Respondents.

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NOTICE <u>OF MOTION</u>

Bronx County Index No.: 309820/11

PLEASE TAKE NOTICE, that upon the annexed affirmation of Alan S. Friedman, Esq., dated May 31, 2018, the exhibits annexed thereto, including the Appendices on Appeal and briefs submitted to the Appellate Division, First Department, as well as all of the pleadings and proceedings had and held herein, Plaintiff-Appellant, CAROL HENRY, will move this Court pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR § 500.22 at Court of appeals Hall, 20 Eagle Street, Albany, New York on June 11, 2018, for an order granting CAROL HENRY leave to appeal to this Court from the Decision and Order of the Appellate Division, First

Department dated May 1, 2018, together with such other and further relief as this

Court deems is just and proper.

Dated: New York, New York
May 31, 2018

Yours, etc.

ALAN S. FRIEDMAN, ESQ.

By:
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COURT OF APPEALS OF THE STATE OF NEW YORK

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CAROL HENRY,

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

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---x

AFFIRMATION IN SUPPORT

Bronx County Index No.: 309820/11

ALAN S. FRIEDMAN, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the truth of the following under penalty of perjury:

I am admitted to practice law before the Courts of this State and am the attorney of record for Plaintiff-Appellant, CAROL HENRY. I am familiar with the facts and circumstances pertaining to this matter by virtue of reviewing my file materials as well as being the attorney who drafted the Briefs and argued Ms. Henry's appeal in the Appellate Division, First Department.

I submit this Affirmation in support of Ms. Henry's motion pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR § 500.22 for leave to appeal to this Court from the Decision and Order of the Appellate Division, First Department dated May 1, 2018.

STATEMENT OF THE CASE

Ms. Henry was injured in a fall on accumulated water in a nursing home due to recurrent water leaks through a dilapidated thirty year-old roof. Her claims against the allegedly "out of possession" owners of the building were dismissed by the Supreme Court and that dismissal has now been affirmed by the Appellate Division, First Department on appeal. Ms. Henry's potential appeal thus brings up for review a legal question not expressly ruled upon by this Court in its seminal "out-of-possession owner" decision, *Putnam v. Stout* (38 NY2d 607 [1976]), which has now been definitively opined upon by the First Department.

More specifically, in *Putnam v. Stout* this Court expanded landowner liability by creating an exception to the general rule that out-of-possession landowners are not liable to third-parties for dangerous conditions on their properties. This Court concluded that an owner may nevertheless be held liable

when it has contractually undertaken an obligation to maintain the property and make repairs. This Court premised its holding on the Restatement (Second) of Torts, where, in part, it was indicated that the contract or covenant to repair should be "in the lease or otherwise." *Putnam*, 38 NY2d at 617 (emphasis added). Left open to interpretation by this Court's decision was the question of whether the obligation to repair must be in an agreement directly between owner and lessee.

The Appellate Division has now limited the expansion of liability under *Putnam v. Stout* by definitively concluding 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." Those social policy considerations included "the likelihood that the landlord's promise to make repairs will induce the tenant to forego repair efforts which he otherwise might have made... [and] tenants may often be financially unable to make repairs" *Putnam*, 38 NY2d at 617-18.

As will be explained, *Putnam v. Stout* does not mandate that the agreement to maintain be directly between owner and lessee.

Moreover, in the present case, although the agreement on which Ms. Henry has relied was not entered into between the owner and its lessee, the agreement fulfilled the foregoing policy considerations by imposing a non-delegable duty on the owner to make repairs and create an escrow fund from which the tenant could make withdrawals for repairs. Therefore the First Department was wrong to conclude that this Court's decision in *Putnam v. Stout* requires that the agreement must be directly between landlord and tenant.

As a further consideration, the agreement upon which Ms. Henry has relied was a Regulatory Agreement with the United States Department for Housing and Urban Development ("HUD"). Pursuant to the terms of the Regulatory Agreement, the owners were obligated to maintain the building where Ms. Henry was injured. In fact, the owners were held solely accountable to HUD for the condition of the property, which is consistent with the statement of former HUD Assistant Commissioner Michael Klion, who attested that, as indicated, the <u>duty</u> to repair the property, including the thirty year-old leaking roof, was non-delegable. Thus, while the <u>responsibility</u> to maintain may have been delegated by the owner to its lessee, the owner nevertheless remained obligated to ensure that the premises remained in good repair. Therefore, for this additional reason the First Department

should not have concluded that the obligation to repair must be directly between owner and tenant.

PROCEDURAL HISTORY

Ms. Henry seeks leave to appeal to this Court from the Decision and Order of the Appellate Division, First Department dated and entered May 1, 2018, and served with Notice of Entry by Defendants-Respondents on that date (see Exhibit "A").

This motion is timely, having been made within 35 days of the Order sought to be appealed from and Ms. Henry did not seek permission for leave to appeal from the Appellate Division. See CPLR 2103(b) and 22 NYCRR § 500.22(b)(2)(i).

The underlying Order of the Supreme Court, Bronx County (Ruiz, J.) dated August 23, 2017 and entered on August 25, 2017, along with Ms. Henry's Notice of Appeal dated September 11, 2017 is annexed hereto as Exhibit "B."

JURISDICTION

In the underlying Order, the Supreme Court granted summary judgment to all of the defendants, thus, in effect, dismissing Ms. Henry's complaint and all cross-claims between the defendants. See Ex. B, pp. 7-8 ["All claims and cross-claims are hereby dismissed"]).

On appeal, the Appellate Division affirmed summary judgment in favor of Defendants-Respondents-Appellants Hamilton Equities, Inc., Hamilton Equities Company, and Suzan Chait-Grandt, as administrator of the estate of Joel Chait (collectively, the "Hamilton defendants"). See Ex. A.

As limited by her Brief, Ms. Henry did not appeal from the award of summary judgment in favor of Chait-Hamilton Management Corporation. See Brief for Plaintiff-Appellant.

The Hamilton defendants' cross-appeal was limited to arguments that if the complaint were reinstated against them, then their cross-claims against codefendants AP Construction and Rafae Construction should also be reinstated. See Brief for Defendants-Respondents-Appellants at pp. 43-49. Since the Appellate Division did not reinstate the complaint against the

Hamilton defendants, it did not make a determination on the cross-appeal. As such, the cross-claims remain dismissed.

Accordingly, the Decision and Order of the Appellate Division is a final determination from which leave to appeal may be granted. See CPLR 5602(a)(1)(i).

QUESTIONS PRESENTED

The following questions of law involve issues of public importance that have not been directly addressed by this Court, and are likely to continue recurring in the future given that the "out-of-possession" owner doctrine is an area of law frequently encountered by the courts of this State.[1]

1. When this Court decided *Putnam v. Stout*, did it intend to hold that an out-of-possession owner will only be held liable when it has directly agreed with its lessee to maintain leased property, or did this Court intend to hold that an owner may also be held liable even when the agreement to maintain was not directly entered into with its lessee?

[1] In fact, the First Department decided another out-of-possession owner case less than one year ago in which it held to the contrary of the present case that an elevator maintenance agreement between an owner and elevator repair company may be sufficient to defeat the out-of-possession owner exception to liability. *Rojas v. New York Elevator & Elec. Corp.*, 150 AD3d 537 (1st Dep't 2017).

Answer: Ms. Henry respectfully submits that the Regulatory Agreement at issue in the present case, albeit entered into between the Hamilton defendants and HUD, satisfied all of the social policy considerations underpinning the holding of this Court in *Putnam v. Stout*. As such, the First Department should not have conclusively stated that *Putnam v. Stout* only applies when the owner has directly entered into an agreement to maintain with its tenant. Therefore, leave to appeal is warranted.

2. In answering Question "1," it is submitted that this Court should also consider whether an owner who has a non-delegable duty to maintain its property can it ever be considered out of possession for purposes of the "out-of-possession owner" exception.

Answer: Ms. Henry respectfully submits that because HUD imposed upon the Hamilton defendants the non-delegable duty to maintain its property in good repair and held the Hamilton defendants directly accountable for any failure to maintain the property this fact demonstrates that the Hamilton defendants were never truly "out-of-possession" owners.

DISCLOSURE PURSUANT TO 22 NYCRR § 500.1(f)

Ms. Henry states that she is an individual and not a corporation or other business entity, and thus is not required to file a disclosure statement pursuant to 22 NYCRR § 5001.(f).

STATEMENT OF FACTS

Ms. Henry Was Injured in Hamilton's Building

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 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). 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).[2] 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).

The Hamilton Defendants Constructed 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).[3] The Hamilton defendants had constructed the nursing home at the request of Bert and Saul Liebman, which Hamilton then leased to the Liebmans as 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).

[2] The Appendix is replete with proof of the dilapidated condition of the over thirty-year-old roof, including the testimony of witnesses on behalf of two separate roofing companies, as well as multiple proposals for roof replacement/repair, the details of which do not need to be recited here because there has been no dispute that the roof leaked.

[3] 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).

Mr. Nova identified a lease agreement dated July 30, 1974 between Hamilton Equities Inc. and Saul Liebman d/b/a Grand Manor health Related Facility (A. 717). According to "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… in a good state of repair and condition…

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

> Section 11.1
>
> Lessor [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) <u>Making repairs</u> or additions to the leased premises and performing any other work therein <u>resulting from Lessee's [Grand Manor's] failure to perform</u> its covenants herein contained; but nothing herein contained shall be construed as making it obligatory upon the part of Lessor [Hamilton] to make such repairs or to perform such work.

(A. 1191 [emphasis added]). 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).

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
>
> Lessor [Hamilton] has advised Lessee [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 Lessee [Grand Manor] may withdraw from such fund for the purposes for which such fund is established...

(A. 1227-28). 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).

The Regulatory Agreement Obligated Hamilton To Maintain the Nursing Home

The Hamilton defendants had, in fact, entered into a Regulatory Agreement with HUD. The Agreement provided that:

> Owners [Hamilton] shall establish or continue to maintain a reserve fund for replacements by the allocation to such 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]). The Agreement further provided that: "Owners [Hamilton] shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition" (A. 1280).

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 on at least one occasion for the sprinkler system in the nursing home (A. 738).

According to former HUD Assistant Commissioner Michael Klion, HUD's Regulatory Agreement was intended to describe the requirements that owners of multi-family properties such as nursing homes must follow (A. 1300). The Regulatory Agreement was intended "to protect both the physical asset as well as the fiscal integrity of the property" (A. 1300). Mr. Klion further attested that "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). Mr. Klion concluded that the Hamilton defendants were therefore "ultimately responsible to maintain the property in good repair" (A. 1302 [emphasis added]).

Thus, while maintenance of the property could have been performed by others, Mr. Klion's attestation remains unchallenged that the ultimate duty to maintain the property could not be delegated by the Hamilton defendants.

Indeed, at all relevant times HUD held the Hamilton defendants responsible to maintain the property. 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 inspections of the facility, including inspections that had been performed on January 30, 2007 and January 16, 2008 (A. 1322-23). He 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]) and thus stated 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.

Moreover, in between the HUD inspection in January of 2008 and the HUD inspection in December 2009, AP Construction Inc. was retained in April of 2009 to perform a "limited roof repair" (A. 1244), 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.

The Supreme Court's Decision and Order

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 summary judgment to the Hamilton defendants. Reviewing the decision of this Court in *Putnam v. Stout* (38 NY2d 607), the court observed that this Court had "highlighted the reciprocal benefits that a contractual obligation to repair and maintain the premises affords both landlord and tenant" (Ex. B, A. 14). Here, the court focused on two issues in particular, (1) "that 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'" (Ex. B, A. 15). Thus, the 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" (Ex. B, 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*... 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.

(Ex. B, A. 15).

Of course, Ms. Henry had demonstrated both that Grand Manor was aware of the Regulatory Agreement because the Regulatory Agreement was explicitly referred to in Grand Manor's lease and that Grand Manor relied on the Agreement when it withdrew funds from the escrow account to make repairs to the facility's sprinklers.

The Appellate Division's Decision and Order

By Decision and Order dated and entered May 1, 2018, the Appellate Division, First Department affirmed the order appealed from (Ex. A). The First Department found that (1) the HUD Agreement was not intended to benefit third-parties injured on the property and (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. Finally, the First Department opined that

> [t]he social policy considerations cited by the Court of Appeals in *Putnam v. Stout* (38 NY2d 607, 617-618 [1976]), are promoted only where the landlord had a contractual obligation directly to the tenant.

(Ex. A).

Contrary to these findings, however, the 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 fund also provided Grand Manor with the financial means to make repairs if it were otherwise financially unable to do so, which is the second *Putnam*-policy consideration. Therefore, the First Department should not have opined that the policy considerations supporting *Putnam v. Stout* could <u>only</u> be fulfilled by a direct contractual relationship between landlord and

tenant, because the Regulatory Agreement at issue in the present case also fulfilled those considerations.

ARGUMENT

LEAVE TO APPEAL IS WARRANTED

As indicated, Ms. Henry's appeal concerns the holding of this Court in *Putnam v. Stout* and the interpretation given that holding by the First Department. In short, this Court is being asked to decide if the *Putnam*-Court held that the out-of-possession owner defense may only be overcome by an agreement to maintain property that was directly entered into between owner and lessee. Or, in the alternative, would it be sufficient for a plaintiff to demonstrate that the owner had "otherwise" contracted to maintain the property in an agreement with someone other than the lessee.

It is respectfully submitted that the holding of this Court in *Putnam v. Stout,* along with the underlying policy rationale, supports a finding that the owner needs only agree to maintain the property, regardless of who entered into the agreement with the owner.

Consideration should also be given to the fact that, in the present case, the Hamilton defendants could not fully divest themselves of the responsibility to maintain the property, and therefore they should not be considered out-of-possession owners to which the general rule of non-liability for dangerous conditions would apply.

Putnam v. Stout Contemplates That an Owner Can Be Held Liable Based On an Outside Agreement to Maintain the Property

In *Putnam v. Stout*, this Court adopted the Restatement (Second) of Torts, that an owner/lessor can 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).

Here, all three elements of the rule were satisfied. First, the Regulatory Agreement expressly indicated that the Hamilton defendants were obligated to maintain the property in good repair and condition. 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, a question of fact exists as to whether the Hamilton defendants failed to exercise reasonable care to fulfill their contractual obligation, 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. Indeed, 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.

Both the Supreme Court and the Appellate Division nevertheless determined that the policy rationale supporting the Restatement rule limited the exception to situations where the owner and tenant have directly entered into an agreement to have the owner maintain the property.

As can be seen from the foregoing, however, 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. *Putnam*,

38 NY2d at 617. In fact, just last year the First Department held in *Rojas v. New York Elevator & Elec. Corp.* (150 AD3d 537 [1st Dep't 2017]) that an out-of-possession owner was potentially liable to a housekeeper who was injured by a mis-leveled elevator in the hotel where she was working despite the fact that the owner had not entered into an agreement with the hotel to maintain the property. Instead, the owner had entered into a separate agreement with an elevator maintenance company, which formed the basis for the First Department's denial of summary judgment to the owner.

Indeed, the error of the lower courts' interpretation is glaringly obvious because 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 v. Stout*, 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. Thus, it would appear that both the Supreme Court and the Appellate Division have unnecessarily elevated the policy factors underpinning the rule above the rule itself.

The lower courts have also failed to consider that the policy factors likewise support a finding that the agreement to maintain property does not need to be entered into directly between owner and tenant. These factors included "the likelihood that the landlord's promise to make repairs will induce the tenant to forego repair efforts which he otherwise might have made... [and] tenants may often be financially unable to make repairs" *Putnam*, 38 NY2d at 617-18. Here, Ms. Henry demonstrated that both of these factors were fulfilled by the Regulatory Agreement, and therefore the Regulatory Agreement was sufficient to overcome the out-of-possession owner defense.

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). Although the Hamilton defendants were not obligated to make repairs, the lease nevertheless contemplated a situation where the Hamilton defendants would make such repairs. Mr. Nova admitted this fact during his deposition.

The property was also routinely inspected by HUD, and the Hamilton defendants were routinely apprised of their obligations to make repairs to the property, including repairing leaks and water damage. Although the Hamilton defendants passed along the HUD notices to Grand Manor that did not absolve them of their responsibility under either the Regulatory Agreement or the lease agreement to make repairs that Grand Manor had failed to make. Thus, just like the owner-defendant in *Rojas*, the Hamilton defendants could not claim to be an out-of-possession owner while simultaneously being contractually obligated under the Regulatory Agreement to ensure that the property was well maintained.

More importantly, the Regulatory Agreement and lease expressly gave Grand Manor the ability to pay for repairs. Pursuant to the terms of the Regulatory 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. The amendment to the lease gave Grand Manor the ability to access the escrow fund, which Robert Nova testified it did on at least one occasion in order to perform sprinkler work at the premises. At a minimum, therefore, Grand Manor had, in fact, benefitted directly from the terms of the Regulatory Agreement.

Therefore, contrary to the findings of the lower courts, the "*Putnam* factors," which were not part of the rule adopted by this Court, were nevertheless satisfied by the Regulatory Agreement.

The Hamilton Defendants Could Not Divest Themselves of Control

The rationale for allowing an out-of-possession owner to avoid responsibility for dangerous conditions on its property is premised on the notion that the owner has divested itself of control over the property. 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. Michael Klion, former HUD Assistant Commissioner, attested that this duty was non-delegable. Therefore, once the Hamilton defendants executed the Regulatory Agreement, they were obligated to ensure that the property was well maintained regardless of whether they delegated any such responsibility to Grand Manor.

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.

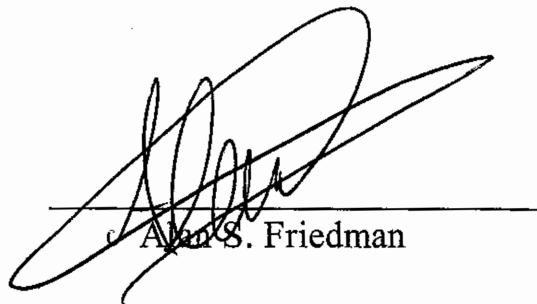
Simply stated, there is no support for the Appellate Division's "suggestion" that the "duty" to repair was delegated to Grand Manor (Ex. A). At best, the Hamilton defendants may have attempted to delegate the responsibility to Grand Manor to make repairs, but that did not absolve them from their own obligations. Therefore, because the Hamilton defendants remained in control of their property they are not entitled to assert the out-of-possession owner exemption.

CONCLUSION

Based on all the foregoing, leave to appeal to this Court is warranted to determine whether *Putnam v. Stout* mandates that for an out of possession owner to be held liable it must be shown that the owner directly entered into a contract with its tenant to maintain the property.

WHEREFORE, the motion by Plaintiff-Appellant CAROL HENRY pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR § 500.22 should be granted and leave to appeal taken to this Court from the Decision and Order of the Appellate Division, First Department entered May 1, 2018, on the questions of law presented, together with such other and further relief as this Court deems is just and proper.

Dated: New York, New York
May 31, 2018



Alan S. Friedman

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

---X

CAROL HENRY,

Plaintiff-Appellant,

Index No. 309820/2011

-against-

NOTICE OF ENTRY

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

Defendants-Respondents-Appellants,

-and-

RAFAE CONSTRUCTION, CORP. and AP CONSTRUCTION, INC.

Defendants-Respondents,

---X

PLEASE TAKE NOTICE that the within is a true copy of the **5/1/18** decision and order of the Appellate Division, First Department, affirming the **8/23/17** decision and order granting the summary judgment motion of defendants HAMILTON EQUITIES, INC., HAMILTON EQUITIES COMPANY, CHAIT-HAMILTON MANAGEMENT CORPORATION AND SUZAN CHAIT-GRANDT, AS ADMINISTRATOR OF THE ESTATE OF JOEL CHAIT and dismissing the cross-claims against said parties, duly entered in the office of the Clerk of the within named Court on **5/1/18**.

Dated: New York, New York
May 1, 2018

Carol Lee Chevalier
By: Carol Lee Chevalier Esq.
KENNEDYS CMK LLP
Attorneys for Defendants-Respondents-Appellants
HAMILTON EQUITIES, INC., HAMILTON EQUITIES COMPANY, SUZAN CHAIT-GRANT, AS ADMINISTRATOR OF THE ESTATE OF JOEL CHAIT and CHAIT-HAMILTON MANAGEMENT CORPORATION
570 Lexington Avenue
Eighth Floor
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(646) 625-4005

TO: ALAN S. FRIEDMAN ESQ.
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AHMUTY DEMERS &MCMANUS
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O'TOOLE SCRIVO FERNANDEZ
WEINER VAN LIEU LLC
Attorneys for Defendant-Respondent
AP CONSTRUCTION, INC.
14 Village Park Road
Cedar Grove, New Jersey 07009
(973) 239-5700

Renwick, J.P., Tom, Andrias, Webber, Kahn, JJ.

6423 Carol Henry, Index 309820/11
Plaintiff-Appellant,

-against-

Hamilton Equities, Inc., et al.,
Defendants-Respondents-Appellants,

Rafae Construction Corp., et al.,
Defendants-Respondents.

Alan S. Friedman, New York, for appellant.

Kennedys CMK LLP, New York (Michael J. Tricarico of counsel), for respondents-appellants.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Rafae Construction Corp., respondent.

O'Toole Scrivo Fernandez Weiner Van Lieu LLC, New York (Sean C. Callahan of counsel), for AP Construction, Inc., respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about August 25, 2017, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Hamilton Equities, Inc., Hamilton Equities Company, and Suzan Chait-Grandt, as administrator of the estate of Joel Chait, for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it: (1) is contractually obligated by lease or otherwise

to make repairs or maintain the premises, or (2) has a contractual right to re-enter, inspect and make needed repairs, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision (*see Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]).

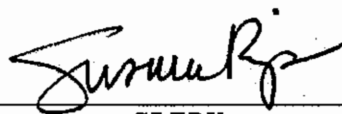
Here, the motion court properly declined to impose a duty to plaintiff on Hamilton based on the HUD Agreement that guaranteed defendant Hamilton Equities Company's mortgage. As plaintiff's expert indicated, the purpose of paragraph 7 of the HUD Agreement was to protect the integrity of the building that 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 NY2d 607, 617-618 [1976]), are promoted only where the landlord had a contractual obligation directly to the tenant.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 1, 2018



CLERK

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Massiel Consuegra, being duly sworn, deposes and says:

I am not a party to the action, I am over 18 years of age, and reside in New York County, New York.

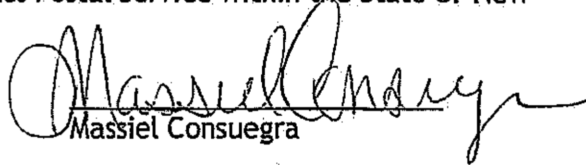
On May 1, 2018, I served the within **ORDER WITH NOTICE OF ENTRY** upon the following firms:

ALAN S. FRIEDMAN ESQ.
Attorneys for Plaintiff-Appellant
875 Avenue of the Americas
Suite 1802
New York, New York 10001

AHMUTY DEMERS &MCMANUS
Attorneys for Defendant-Respondent
RAFAE CONSTRUCTION CORP.
200 I.U. Willets Road
Albertson, New York 11507

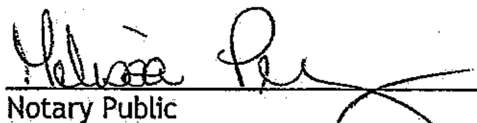
O'TOOLE SCRIVO FERNANDEZ
WEINER VAN LIEU LLC
Attorneys for Defendant-Respondent
AP CONSTRUCTION, INC.
14 Village Park Road
Cedar Grove, New Jersey 07009

at the address designated for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed envelope in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.



Massiel Consuegra

Sworn to before me this
1st day of May, 2018



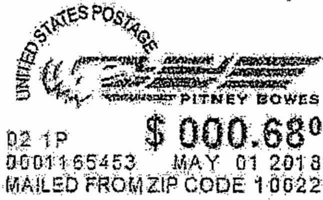
Notary Public

MELISSA PEREZ
NOTARY PUBLIC, State of New York
No. 01PE6221207
Qualified in Westchester County
Commission Expires April 26, 2022

ΛK LLP

570 Lexington Avenue
8th Floor
New York, New York 10022

FIRST-CLASS



ALAN S. FRIEDMAN ESQ.
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New York, New York 10001

100133575 C058

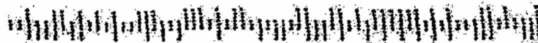

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX   Index #:309820/11

---x

CAROL HENRY,

Plaintiff,   NOTICE OF APPEAL

-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.,

Defendants.

SIRS:

PLEASE TAKE NOTICE that Plaintiff-Appellant hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, from the Decision/Order of the Honorable Justice Norma Ruiz, J.S.C. dated August 23, 2017, and entered by the Bronx County Clerk on August 25, 2017, which granted the Motion for Summary Judgment made by defendants HAMILTON EQUITIES, INC., HAMILTON EQUITIES COMPANY, SUZAN CHAIT-GRANDT, AS ADMINISTRATOR OF THE ESTATE OF JOEL CHAIT and, CHAIT-HAMILTON MANAGEMENT CORPORATION and from each and every part of the Court's Decision.

Dated: New York, New York
September 11, 2017

ALAN S. FRIEDMAN, ESQ.
Attorney for Plaintiff/Appellant
875 Avenue of the Americas
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212-244-5424

To: KENNEDY'S CMK LLP
Attorneys for Defendants
Hamilton Equities Inc. Hamilton Equities Company,
Suzan Chait-Grandt, as Administrator of the Estate of
Joel Chait and Chait-Hamilton Management Corporation
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D'Amato & Lynch
Attorneys for Defendants
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212-269-0927

Ahmuty, Demers & McManus
Attorney for Defendants
Rafae Construction, Corp.
200 I.U. Willets Road
Albertson, New York 11507
516-294-5433

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX   Index #:309820/11

-- x

CAROL HENRY,

Plaintiff,   PRE-ARGUMENT STATEMENT

-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.,

Defendants.

----

1. The full names of the original parties are stated in the caption.

2. Name, address and telephone number of counsel for Plaintiff-Appellant:

ALAN S. FRIEDMAN, ESQ.
875 Avenue of the Americas
Suite 1802
New York, New York 10001
212-244-5424

3. Names, address and telephone number of counsel for Defendants-Respondents:

KENNEDY'S CMK LLP
Attorneys for Defendants
Hamilton Equities Inc. Hamilton Equities Company, Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait and Chait-Hamilton Management Corporation
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Ahmuty, Demers & McManus
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516-294-5433

4. This appeal is from the Decision Justice Norma Ruiz of the Supreme Court, Bronx County rendered on August 23, 2017 and entered by the Bronx County Clerk on August 25, 2017.

5. Defendants-respondents Hamilton Equities Inc. Hamilton Equities Company, Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait and Chait-Hamilton Management Corporation served Plaintiff-appellant, with the Notice of Entry of the Order, by regular mail on August 30, 2017, a copy of which is annexed hereto.

6. There is no related action in this Court or any other Court of competent jurisdiction.

7. The nature and object of the underlying action concerns an action for negligence.

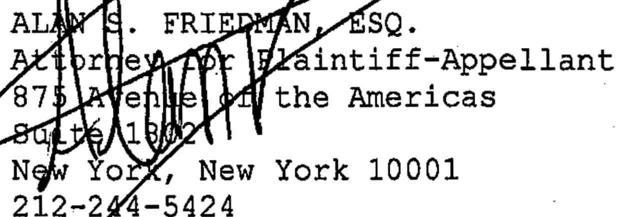
8. Plaintiff-Appellant appeals from Justice Norma Ruiz's Decision dated August 23, 2017, and entered by the

Bronx County Clerk on August 25, 2017 granting defendants-respondents Hamilton Equities Inc. Hamilton Equities Company, Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait and Chait-Hamilton Management Corporation motion for summary judgment and from each and every part of the Decision/Order dated August 23, 2017.

9. The portion of the Decision which is the subject of this appeal should be reversed on the grounds inter-alia that the summary judgment motion of defendants-respondents Hamilton Equities Inc. Hamilton Equities Company, Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait and Chait-Hamilton Management Corporation should have been denied.

10. The appeal is from the Decision of Justice Norma Ruiz dated August 23, 2017 and there were no minutes taken.

Dated: New York, New York
September 11, 2017



ALAN S. FRIEDMAN, ESQ.
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To: KENNEDY'S CMK LLP
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516-294-5433

PART 22

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

(1)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
---X

HENRY,CAROL

Index №. 0309820/2011

-against-

Hon. NORMA RUIZ ,

HAMILTON EQUITIES INC.

Justice.
---X

The following papers numbered 1 to _____ Read on this motion, REARGUE/RENEW/RESETTLE/RECONSI
Noticed on April 28 2015 and duly submitted as No. _____ on the Motion Calendar of _____________

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
______________________ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice: ______
Dated: ______

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 8/23/17

Hon. ______________________
NORMA RUIZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 22

--X

CAROL HENRY

Plaintiff,

- 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., AP CONSTRUCTION, INC.

Defendants,

--X

Index No. 309820/11

Hon. Norma Ruiz

Upon the foregoing papers, defendant AP Construction, Inc. ("AP Construction") moves for an order to renew its prior summary judgment as to all claims and cross-claims. Separately, defendant Rafae Construction Corp. ("Rafae Construction") also seeks summary relief. Defendants Hamilton Equities, Inc., Hamilton Equities Company, Suzan Chait-Grandt (the "Hamilton defendants"), and Chait-Hamilton Management Corporation ("Chait-Hamilton") oppose the motions by AP Construction and Rafae Construction, and move for summary judgment as to plaintiff's claims. For the reasons stated herein, after due consideration of all submissions and respective oppositions submitted thereto, all defendants have demonstrated their entitlement to summary dismissal as a matter of law.

FACTS & PROCEDURAL HISTORY

This matter arises from personal injuries plaintiff suffered as a result of a slip and fall at her place of employment, Grand Manor Nursing & Rehabilitation Center ("Grand Manor") in the Bronx. The physical property in which Grand Manor is housed is owned by the Hamilton defendants. In 1974, the Hamilton defendants entered into a regulatory agreement with the United States Department of Housing and Urban Development ("HUD"), through which HUD agreed to guarantee a mortgage on the property. As relevant here, the regulatory agreement requires the Hamilton defendants to "maintain the mortgaged premises . . . in good repair and condition."

The Hamilton defendants gave possession of the property to Grand Manor pursuant to a leasehold. The lease provides that the tenant, Grand Manor, is solely responsible for the maintenance and repair of the premises. Notwithstanding, the Hamilton defendants enjoy a right to re-enter the premises to make repairs resulting from Grand Manor's failure to perform same. Defendant Chait-Hamilton is a management entity responsible for the collection of rent.

Grand Manor contacted defendant AP Construction in 2009 about making repairs to the roof of the building. AP Construction inspected the roof and issued a proposal to Grand Manor with options for the roof to be replaced in part or in its entirety. Grand Manor declined to have any part of the roof replaced and, instead, hired AP Construction for the limited purpose of patching immediate leaks. As part of this work, AP Construction installed 300 square feet of roofing.

Sometime in 2011, Grand Manor contacted AP Construction to inspect the roof again. AP Construction issued another proposal, but Grand Manor elected to hire a different outfit, defendant Rafae Construction, to perform repairs. On May 4, 2011, Grand Manor entered into a contract with Rafae Construction for the replacement of the entire roof. On May 18, 2011, plaintiff, a licensed practical nurse, was assigned to the sixth floor of Grand Manor. Plaintiff testified that while she was

moving a patient's wheelchair down a hallway, she slipped on a puddle of water that had accumulated due to a leak in Grand Manor's roof. According to plaintiff, this leak in the roof was present for at least two years prior to her accident, and she recalled water would always accumulate on the floor when it rained.

Plaintiff commenced this action by summons and complaint on November 4, 2011. On September 18, 2013, plaintiff amended the complaint to add AP Construction as a defendant. AP Construction moved for summary judgment, which this Court denied as premature. AP Construction now moves to renew its motion. Contemporaneously, Rafae Construction, Chait-Hamilton and the Hamilton defendants moved for summary judgment. The motions are consolidated for disposition.

STANDARD OF REVIEW

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY 2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION AND ANALYSIS

It is undisputed that the Hamilton defendants own the subject property but are not in possession of it. Generally, 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 and the Hamilton defendants have a prima facie burden of demonstrating that neither apply (*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]). 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" (*Sapp*, 150 AD3d at 527 [emphasis added]).

The Hamilton defendants insist that the first exception does not apply. Pointing to the applicable lease, Grand Manor is solely responsible for maintenance and repairs, thus Hamilton does not have a contractual obligation to repair and/or maintain the premises. In response, plaintiff tenders the HUD regulatory agreement which obliges the owner of the property to maintain it in "good repair and condition." Plaintiff offers the affidavit of Michael Klion ("Klion"), a former longtime HUD employee. Klion opines that the regulatory agreement obligates the Hamilton defendants to make repairs to the premises if Grand Manor fails to do so. Relying on Klion, plaintiff insists the HUD agreement's mandate is nondelegable. The Hamilton defendants respond that the obligation to keep the premises in good repair and condition was wholly delegated to Grand Manor and, notwithstanding, cannot serve as a basis for liability herein.

While it is axiomatic that a contractual obligation to repair and maintain the premises can serve to hold an out-of-possession landlord liable for negligence, it appears to be a question of first impression whether a contract such as the regulatory agreement, to which the tenant is not a party nor an intended beneficiary, will suffice. The court finds 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. To arrive at this conclusion, one need only visit the origin of the rule. In *Cullings v Goetz*, the Court of Appeals held that an out-of-possession landlord, even with a covenant in the lease to repair the premises, had no duty in tort to third parties injured on the property, reasoning that the landlord lacked control of the premises (256 NY 287 [1931]).

In 1976, the Court of Appeals revisited the issue and held that a lessor may be held liable in negligence solely "based upon his contract to keep the premises in good repair," expressly overruling *Cullings* (*see Putnam v Stout*, 38 NY2d 607, 611 [1976]). There, the Court adopted the rule formulated by the Restatement (Second) of Torts, which provides that the out-of-possession landlord may be held liable if it "has contracted by a covenant in the lease or otherwise to keep the land in repair" (*id.* at 617 [citation omitted]). What follows pronouncement of the new rule is significant. Grounding their reasoning in public policy, the Court highlighted the reciprocal benefits that a contractual obligation to repair and maintain the premises affords both landlord and tenant. In particular, the Court noted that the existence of the contractual obligation may "induce the tenant to forego repair efforts which [the tenant] might have made," and social policy factors to be considered include that "tenants may often be financially unable to make repairs" (*id.*). These considerations naturally assume that the obligation is contractually owed to the tenant and the tenant is at least aware and relies on the landlord.

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, 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.

Turning to the second exception, the Hamilton defendants argue that despite their limited right to re-enter the premises, the roof condition is not a "structural or design defect that is contrary to a specific statutory safety provision" (*Sapp*, 150 AD3d at 527). For her part, aside from conclusory allegations in the complaint that allege the Hamilton defendants violated 24 CFR §§ 5.701 and 5.703 (a) and (b),[1] plaintiff 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 design or defect that violated a specific statutory provision. Plaintiff appears to rest all her eggs in one basket, asserting only that the first exception to the general rule applies, seemingly abandoning the latter. Assuming plaintiff did assert 24 CFR §§ 5.701 and 5.703 (a) and (b) as grounds for applying the second exception, which she does not allege in her opposition, the court finds these regulations to be "general safety provisions" that will not suffice to defeat summary judgment (*see Boateng v Four Plus Corp.*, 22 AD3d 323, 324 [1st Dept 2005]; *Dixon v Nur-Hom Realty Corp.*, 254 AD2d 66, 67 [1st Dept 1998]). As neither exception applies, the Hamilton defendants have established prima facie their entitlement to summary judgment as to plaintiff's claims.

CONCLUSION

The Hamilton defendants' motion for summary judgment is granted. Defendant AP Construction's motion to renew is granted within the sound discretion of this court (*see* CPLR § 2221) and upon renewal, their motion for summary judgment is granted with no opposition from plaintiff submitted thereto. Similarly, Chait-Hamilton and Rafae Construction's motions for summary

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[1]Sections 5.701 and 5.703 (a) and (b) are HUD regulations applicable to housing with mortgages secured by HUD. In relevant part, Section 5.703 (b) provides that the building's "doors, fire escapes, foundations, lighting, roofs, walls, and windows, where applicable, must be free of health and safety hazards, operable, and in good repair."

judgment as to plaintiff's claims are also granted, with no opposition from plaintiff. All claims and cross-claims are hereby dismissed.

Any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied. This constitutes the decision and order of the court.

Dated: August 23, 2017

E N T E R,

Norma Ruiz, J.S.C.

AFFIRMATION OF MAILING

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

ALAN FRIEDMAN, an attorney admitted to practice before the Courts of the State of New York, being duly sworn, affirms and says:

Affirmant is not a party to the action, is over eighteen years of age and resides in New York, New York. On September 11, 2017 affirmant served the within Notice of Appeal upon attorneys for the defendants noted below:

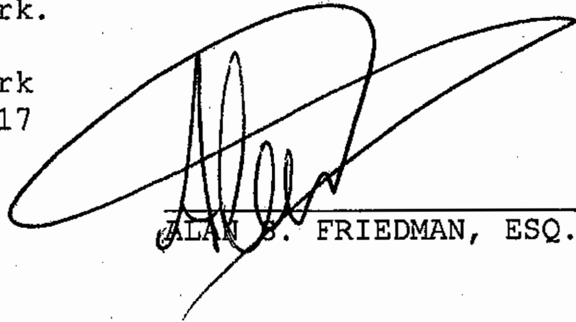
KENNEDY'S CMK LLP
570 Lexington Avenue, 8th Floor
New York, New York 10022

D'Amato & Lynch
Two Financial Center
225 Liberty Street
New York, New York 10281

Ahmuty, Demers & McManus
200 I.U. Willets Road
Albertson, New York 11507

by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care of the United States Postal Service within the State of New York.

Affirmed: New York, New York
September 11, 2017



ALAN S. FRIEDMAN, ESQ.

INDEX NO.: 309820/11

CAROL HENRY,

Plaintiff,

-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.,

Defendants.

ALAN S. FRIEDMAN, ESQ.
Attorney for Plaintiff(s)
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NOTICE OF APPEAL