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

APL-2018-00160
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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.

REPLY BRIEF FOR APPELLANT CAROL HENRY

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PRELIMINARY STATEMENT

In her Appellant's Brief, Ms. Henry demonstrated that *Putnam v Stout* (38 NY2d 607 [1976]) narrowed the ability of a property owner to avoid tort liability by claiming to be "out-of-possession" with no responsibility to maintain his property. Ms. Henry further demonstrated that the new *Putnam*-rule directly applied to the Hamilton Equities, Inc., Hamilton Equities Company and Suzan Chait-Grandt as administrator of the estate of Joel Chait ("Hamilton"). Although Hamilton alleged itself to be an out-of-possession owner of the nursing home where Ms. Henry was severely injured when she slipped and fell on accumulated rainwater that had entered the nursing home through the thirty-year-old dilapidated roof, the record demonstrated that Hamilton had an ongoing contractual obligation to maintain the property in good repair. Therefore, pursuant to *Putnam*, Hamilton could be held liable to Ms. Henry for her injuries.

Accordingly, so much of the orders of the Supreme Court and the Appellate Division which dismissed/affirmed dismissal of Ms. Henry's claims against Hamilton should be reversed and the complaint reinstated.

Hamilton's Brief offers no meaningful response to Ms. Henry's arguments. Instead, Hamilton is mostly critical of this Court's adoption of the Restatement rule

in *Putnam*, claiming that many of the *Putnam* factors create liability for virtually all out-of-possession owners. Hamilton has also erroneously argued that *Putnam* created a narrow exception that only imposes liability in limited circumstances, and that the law still generally favors an owner being able to avoid responsibility for the condition of its property. To the contrary, in fact, the *Putnam*-Court explicitly recognized that the law no longer favored the owner's ability to escape such responsibility. As observed by the Appellate Division, "[a]s the law of premises liability has developed in this State, it has moved inexorably, by statute and common law, in the direction of providing greater protection to persons on premises." *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 11 (2d Dept 2011) (emphasis added). Therefore, *Putnam* did not create a narrow exception to the general rule, instead it narrowed an overly-broad, outdated legal concept to rightfully hold an owner responsible for the condition of its property where it has entered into a contract to repair.[1]

Additionally, Hamilton has failed to offer any support for its argument that the contract to repair must be entered directly between owner and tenant. In fact,

[1] Another "exception" to Hamilton's proposed rule favoring non-liability is that an owner may be held liable where it has reserved the right to re-enter the premises to make repairs and the alleged dangerous condition constitutes a statutory violation or a structural or design defect. *See e.g. Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 (1st Dept 2010). Yet another "exception" that allows for the imposition of liability is a situation where, although no contract exists, the owner nevertheless assumed the responsibility to repair by a course of conduct. *See Ritto v Goldberg*, 27 NY2d 887, 889 (1970)

by its repeated reliance on *Cullings v Goetz*, 256 NY 287 (1931), Hamilton has unintentionally underscored the argument that *Putnam* did away with any such requirement. Hamilton has observed that, before *Putnam*, the general rule had been that owners who had covenanted directly with their tenants to maintain leased property were immune from tort liability (App. Br., p. 2). As discussed, *Putnam* ultimately narrowed the general rule by allowing the owner to be held liable for its failure to fulfill a contractual obligation to maintain his property. In so holding, the *Putnam*-Court simultaneously recognized that the agreement to maintain may be found in something other than the lease that had been entered between owner and tenant. More specifically, the *Putnam*-Court explicitly included the words "or otherwise" to hold future owners liable where they might "covenant in the lease or otherwise to keep the land in repair."

In a desperate attempt to avoid the implications of *Putnam*, Hamilton has offered the unpreserved, unsupported "expert" opinion of its attorney via an argument that was not raised in the trial court and is therefore unpreserved for review by this Court. The contract in which Hamilton agreed to maintain their property in good repair was a Regulatory Agreement between Hamilton and the United States Department for Housing and Urban Development ("HUD"). According to Hamilton's counsel, the HUD Regulatory Agreement was a

"boilerplate" mortgage document (Resp. Br., p. 4). Of course, counsel has no expertise to make such a claim, but nevertheless a careful review of the Regulatory Agreement demonstrates that it was not a typical, boilerplate mortgage agreement.

Counsel does not claim that the alleged "boilerplate" mortgage agreements on which he has relied also contained provisions that would allow for inspection at any time by HUD inspectors. Here, paragraph "7" of the Regulatory Agreement provided that Hamilton must maintain the premises "in good repair and condition" (A. 1280), and at paragraph 9(c) that the property was "subject to examination and inspection at any reasonable time by the Secretary or his duly authorized agents" (A. 1280). Hamilton's attorney has admitted on page 11 of the Respondents' Brief that "[i]n accordance with the HUD Agreement, HUD conducted inspections of the Grand Manor Facility at regular intervals, and generated corresponding reports."

Likewise, counsel has not suggested that his alleged "boilerplate" mortgage agreements contain an obligation on the part of the mortgagor to create and make continuing monthly deposits into an escrow fund for the purpose of maintaining the property. Here, paragraph 2(a) of the Regulatory Agreement provides that Hamilton was required to establish and maintain a reserve fund, depositing $4,081.75 per month into that account (A. 1278). Hamilton made this fund

available to its tenant, plaintiff's employer, Grand Manor Nursing & Rehabilitation Center ("Grand Manor"), to make repairs to the property as needed.

Furthermore, while claiming that the inspection and escrow-fund "provisions protect the lender, and in this case, the guarantor of the mortgage, from devaluation of the mortgage collateral" (Resp. Br., p. 4), counsel's assertion fails to take into consideration that the HUD inspections were not only property-related, they were predominately Health and Safety related which had nothing to do with the value of the mortgage collateral.

Finally, while counsel has referred to the HUD Regulatory Agreement as a "separate contract" apart from Hamilton's lease with Grand Manor (Resp. Br., p. 4), that would be irrelevant because, as explained, *Putnam* expressly contemplated an agreement to maintain that was separate and apart from the lease. Nonetheless, Hamilton cannot deny that its tenant, Grand Manor was aware of this "separate contract," which was specifically identified in the lease between Hamilton and Grand Manor. Nor does referring to the Agreement as a "separate contract" alter the fact that Hamilton and Grand Manor were abundantly aware that any conflict between the Agreement and the lease would result in the Agreement governing the

rights and obligations of the parties. In fact, as to Hamilton, the Agreement superseded the lease.

These facts make it absurd for Hamilton to claim that HUD was "some attenuated third party" to the Hamilton-Grand Manor relationship (Resp. Br., p. 5). That is a gross mischaracterization of HUD's role in the construction of the nursing home. Hamilton and Grand Manor had entered into an agreement for Hamilton to build the nursing home and the only means by which it could be accomplished was through HUD's guarantee of Hamilton's mortgage. Former HUD Assistant Commissioner Michael Klion attested that without the Regulatory Agreement there would not have been a mortgage (A. 1300). Grand Manor was immediately made aware of this fact by amendment of the Hamilton-Grand Manor lease. Therefore, HUD was essentially the "foundation" on which the nursing home was built and was hardly "attenuated" from the Hamilton-Grand Manor transaction.

Accordingly, even if counsel for Hamilton had the expertise to make the claim that the HUD Regulatory Agreement was a "boilerplate" mortgage document unrelated to the lease agreement, he utterly failed to support his claim in this regard.

Much of what Hamilton argued was not supported with expert opinion, facts or law. For example, Hamilton has claimed that application of *Putnam* would lead to "unfettered tort liability" (Resp. Br., p. 4), but it has failed to explain how its tort liability would be "unfettered." Ms. Henry has argued only that Hamilton should be held responsible for its failure to maintain the property that it had contracted with HUD to maintain and was the sole entity who was held accountable to HUD when the property needed repairs. Nothing more – nothing less. Thus, there is likewise no support for the assertion that holding Hamilton to its contractual obligation to maintain would "broaden [*Putnam*'s] application to a point that would render the generally accepted limitations on out-of-possession property owner liability illusory and meaningless" (Resp. Br., p. 2), or that "the exception would swallow the rule" (Resp. Br., p. 6).

Hamilton has likewise failed to rely on any case law that would suggest that a property owner who has undertaken a contractual duty to repair its property can avoid liability solely by making its tenant responsible for repairs. To the contrary, the law is clear that owners are generally responsible for the maintenance of their property, with the limited exception where they have been able to fully divest themselves of any obligation to maintain. Here, that was especially not the

situation where Ms. Henry's expert attested that Hamilton could never truly divest itself of that responsibility, and therefore was never truly "out-of-possession."

Since Hamilton has offered nothing to refute the application of *Putnam* to the present case, 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 Hamilton's 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.

ARGUMENT

POINT I

THE HUD AGREEMENT WAS NOT A "BOILERPLATE MORTGAGE-RELATED" DOCUMENT

Hamilton has argued that the application of *Putnam* here "would extend to essentially any property owner whose property was subject to a mortgage agreement (see infra at p. 9 n.3) or a mortgage guarantee agreement. Such a result would also undoubtedly lead to a slew of new litigation, higher rents, higher property insurance premiums, and other undue burdens and costs." (Resp. Br., pp. 5-6). Hamilton has premised this argument on the suggestion that, "[a]s is

common in mortgage-related agreements, the HUD Agreement contained a provision requiring the mortgagor to maintain the mortgaged premises in 'good repair and condition'" (Resp. Br., p. 9). These suggestions, however, were not raised in the Supreme Court (A. 194-205 [Affirmation in Support]; A. 1460-70 [Affirmation in Reply]). Therefore, they have not been preserved for review by this Court despite the fact that they were raised in the Appellate Division. *See e.g. Wilson v Galicia Contracting & Restoration Corp.*, 10 NY3d 827, 829 (2008) ("the requirement of preservation is not simply a meaningless technical barrier to review").

In addition, the suggestions made by Hamilton's attorney must be given no weight because the attorney is not an expert in the field of mortgages or mortgage-related documents. In fact, the attorney is with the firm "Kennedy's CMK LLP," "a global insurance practice."[2] The law is clear that an attorney may not proffer an opinion outside of his expertise. *See e.g. Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 34 (2011) (merely stating in an attorney's affirmation that everyone was aware that the product was dangerous was insufficient to entitle defendants to summary judgment); *Contacare, Inc. v Ciba-Geigy Corp.*, 49 AD3d 1215, 1216 (4th Dept 2008) (attorney was not an expert in the relevant field).

[2] https://www.kennedyslaw.com/news/kennedys-and-carroll-mcnulty-kull-llc-complete-merger-creating-global-insurance-firm

Accordingly, even if Hamilton's argument that the HUD Regulatory Agreement was "boilerplate" was preserved, which it was not, it constitutes nothing more than the unsupportable conclusions of its attorney and therefore should not be considered.[3]

Furthermore, as detailed above, the Regulatory Agreement contained numerous provisions that counsel has never suggested were part of his alleged "boilerplate" mortgage documents. These provisions included the periodic inspection by HUD for health and safety deficiencies, as well as the creation of an escrow fund for maintenance of the property. HUD further followed-up on its inspections to ensure that the deficiencies it found were remedied. Counsel has not given any indication that a typical mortgage lender would similarly act in this capacity to require the safe keeping of the mortgaged property.

Therefore, even if the "expert" opinion of Hamilton's attorney were considered, it is abundantly clear that his opinion was utterly lacking in foundation and not entitled to be given any weight.

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[3] Counsel therefore lacks any credibility where he asserts that former HUD Assistant Commissioner Michael Klion is a "purported expert" who has made only "conclusory assertions" (Resp. Br., pp. 9-10). Mr. Klion was employed by HUD from 1967 to 2003 (A. 1307). The Regulatory Agreement at issue here was dated October 4, 1978 (A. 1278). As such, Mr. Klion has the credentials and expertise on which to base his attestations regarding the Agreement at issue.

POINT II

HAMILTON "BURIED ITS HEAD IN THE SAND" WITH REGARD TO ITS DUTY TO MAINTAIN THE PROPERTY

While Hamilton has argued that the application of *Putnam* to agreements to maintain property that are not entered between owner and tenant would result in "unfettered liability," increased insurance premiums and increased rents, it is in no position to make these arguments where it utterly ignored its duty as a property owner and the fact that its thirty-year-old nursing home was falling into disrepair. This was not a situation where Hamilton acted as a "typical" out-of-possession owner unaware of what was going on with its property. Here, Hamilton was routinely given reports regarding the condition of its facility. Rather than do anything about those conditions, which it was contractually obligated to do under the Regulatory Agreement and the common-law, Hamilton instead chose to take a "head-in-the-sand" approach to its duty to maintain the property.

The danger in promoting such behavior has been eloquently summed up by counsel for Hamilton: "Consistent with their status as out-of-possession property owners, for a nearly thirty-year period beginning in approximately 1983, the Hamilton Respondents never visited the Grand Manor Facility, or had any other involvement with the premises" (Resp. Br., p. 11 [emphasis added]). In other words, Hamilton purposefully absented itself from the property despite the fact that

it owed a duty to maintain the facility and was repeatedly made aware by HUD that the facility was falling into disrepair (A. 1310-19). In fact, Hamilton's principal, Robert Nova, attested that he was aware of the problems with the facility and did nothing about them (A. 1321-23).

Specifically, with regard to the roof leak that contributed to Ms. Henry's accident and injury, Hamilton cavalierly claims that it "did not have any input or involvement with any of these [roof] repairs, and in fact had no meaningful presence at the Grand Manor Facility for decades" (Resp. Br., p. 26). Rather than "fix" the facility generally, or the roof specifically, Hamilton instead chose to litigate with Grand Manor. This Court should be made aware that litigation between Grand Manor and Hamilton dates back as far as 1982, at least, and leads up to, and past, the date of the accident in which Ms. Henry was severely injured. *See Grand Manor Health Related Facility v Hamilton Equities, Inc.*, 90 AD2d 1003, [1st Dept 1982]; 114 AD2d 776 [1st Dept 1985]; 147 AD2d 118 [1st Dept 1989]; 65 AD3d 445 [1st Dept 2009]; 71 AD3d 493 [1st Dept 2010]; 85 AD3d 695 [1st Dept 2011]; 122 AD3d 481 [1st Dept 2014]).

What makes this behavior even more shocking is that Hamilton had expressly reserved the right to reenter the facility to make repairs that Grand Manor failed to make. Robert Nova testified on behalf of Hamilton:

> Q. But the lessor had the right to go into the property and do an inspection, correct?
>
> A. Yes.
>
> Q. And the lessor, meaning Hamilton Equities, had the right to go in and correct any repairs or do any maintenance that the lessee wasn't taking care of, correct?
>
> A. Yes.

(A. 764).

Accordingly, while Hamilton has suggested that there is danger in applying *Putnam* to contracts not entered between owner and tenant, there is a far greater danger in allowing an owner to bury its head in the sand despite owing a contractual (and common-law) duty to maintain his property. *Vasquez v. Urbahn Assocs. Inc.*, 79 AD3d 493, 498 (1st Dept 2010) (Roman, J., in dissent, observing that owners should not be encouraged to take a head-in-the-sand approach to their obligation to ensure the safety of individuals on their property).

Therefore, once again, Hamilton has failed to overcome the fact that the application of *Putnam* is warranted here.

POINT III

THIS COURT'S DEPARTURE FROM *CULLINGS* UNDERSCORES MS. HENRY'S ARGUMENT THAT *PUTNAM* WAS NOT INTENDED TO BE A LIMITED EXCEPTION

Hamilton has admitted that, prior to Putnam, there was only a "limited exception" to the general rule that out-of-possession owners could not be held liable for dangerous conditions on their property (Resp. Br., p. 18). It has further admitted that this "limited exception" did not even apply when the owner had contracted with its tenant to maintain the property (Resp. Br., p. 19). Stated otherwise, the rule favoring owners was so overly-broad that this Court felt compelled to step in and narrow the rule by expanding the "limited" circumstances under which an owner claiming to be out-of-possession could nevertheless be held liable for the condition of its property.

Hamilton has acknowledged that *Cullings* had broadly applied the "out-of-possession owner" rule in favor of the owner even where the owner may have contracted directly with its tenant to maintain the property (Resp. Br., p. 19). In narrowing this overly-broad rule by imposing liability on the owner where it

contracted with its tenant to maintain the leased property, this Court could have stopped there and gone no further, thus creating only a "limited" exception. Instead this Court determined that the covenant to maintain could be contained in the lease "or otherwise." The limited rule allowing an out-of-possession owner to avoid liability is now generally stated:

> In the absence of a statute imposing liability per se (*see Elliott v. City of New York*, 95 N.Y.2d 730, 734, 724 N.Y.S.2d 397, 747 N.E.2d 760; *Juarez v. Wavecrest Mgt. Team Ltd.,* 88 N.Y.2d 628, 638, 649 N.Y.S.2d 115, 672 N.E.2d 135) or a contractual obligation to repair and maintain the premises (*Putnam v. Stout*, 38 N.Y.2d 607, 381 N.Y.S.2d 848, 345 N.E.2d 319; *Manning v. New York Tel. Co.*, 157 A.D.2d 264, 266, 555 N.Y.S.2d 720), an out-of-possession owner can[not] be held liable for a subsequent injury resulting from a dangerous condition in the building.

Davis v HSS Properties Corp., 1 AD3d 153, 154 (1st Dept 2003); *Villarreal v CJAM Assocs., LLC*, 125 AD3d 644, 645 (2d Dept 2015) ("An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct"). Therefore, the Appellate Courts view the *Putnam* rule more broadly than the interpretation given to it by Hamilton and its assertion that after *Putnam* "[t]he general rule remain[ed]"

demonstrates a gross disregard for the holding of the *Putnam*-Court (Resp. Br., p. 22).

Indeed, the fallacy of Hamilton's argument is revealed by its repeated emphasis on case law discussing the landlord's "*covenant to repair,*" "contract to keep the premises in good repair" and "*breach[ed] his covenant to repair*" (Resp. Br., p. 20 [emphasis in original]). The language of this obligation is no different than the obligation imposed on Hamilton by the Regulatory Agreement to keep the premises "in good repair and condition" (A. 1280). Hamilton must therefore tacitly recognize that the Regulatory Agreement fulfills the required elements of the *Putnam* rule.

Hamilton has further criticized this Court by observing that "[t]he Restatement commentary itself is actually slightly more expansive than the excerpt summarized in *Putnam*," further observing that "the exception to the general rule of non-liability… has been rejected by the majority of courts considering it" (Resp. Br., p. 22, n.7). This Court observed in *Putnam*, however, that *by 1976* at least 18 States had already adopted the *Putnam* rule. Moreover, four States were inclined toward adopting the rule and one State had gone farther than the rule and

completely eliminated the out-of-possession owner exemption. *Putnam*, 38 NY2d at 617, FN6. Therefore, Hamilton's criticisms are unfounded.

Hamilton has also pretended to know what this Court was thinking when it decided *Putnam*. It has argued: "The Appellant now argues for an extension of the Putnam holding that this Court could not possibly have intended or desired" (Resp. Br., p. 22). Significantly, however, had this Court decided *Putnam* strictly on the facts directly before it, which is what Hamilton has suggested, then this Court would have explicitly limited its holding to contracts directly entered between landlord and tenant. Hamilton has noted that "Putnam (and even Cullings), involved covenants made by the property owner *directly to the tenant*" (Resp. Br., p. 23 [emphasis in original]).

The fact that the *Putnam*-Court did not expressly limit its holding to contracts directly between owner and tenant demonstrates that this Court did not intend or desire the *Putnam* holding to be so limited. It is therefore utterly baseless for Hamilton to suggest that "[n]othing in the Putnam decision indicates the intent to extend its holding beyond the facts that were before the Court at the time" (Resp. Br., p. 23).

Even if the *Putnam*-Court had desired a limited application of the *Putnam*-rule, which seems counter-intuitive given the shift in the law to promote the protection of persons on property, this Court may still hold otherwise. Just as *Putnam* modified *Cullings*, so too could this Court modify *Putnam*. As will be explained, there is nothing in the law or public policy that would prevent this Court from holding that an owner can be held liable where it has undertaken an obligation to maintain his property in a contract that was not entered with his tenant.

The Putnam Elements

Addressing the *Putnam* elements, Hamilton has failed to defeat Ms. Henry's showing that all three elements were satisfied here. Once again, the elements are that (1) a contract exists to keep the land in repair; (2) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and (d) the lessor failed to exercise reasonable care to perform his contract. *Putnam*, 38 NY2d at 617.

With regard to the first element, the only element that Hamilton has truly addressed, Ms. Henry demonstrated both that Hamilton had reserved a right to re-enter the nursing home to make repairs that Grand Manor failed to make and that

Hamilton was obligated by the Regulatory Agreement to do so. Hamilton has incorrectly stated that Ms. Henry "conveniently omits the portion of that same lease provision which provides that 'nothing herein contained shall be construed as making [the right to repair] obligatory'" (Resp. Br., p. 24). The entire provision was quoted by Ms. Henry on page 11 of the Appellant's Brief, and the alleged "omitted" portion was directly discussed by Ms. Henry on pages 11, 15 and 32 of her Brief. Ms. Henry acknowledged that the lease did not obligate Hamilton to make repairs, however the Regulatory Agreement did impose such an obligation and where the two agreements were in conflict the terms of the Regulatory Agreement governed.

The Putnam Factors

Next, Ms. Henry demonstrated that all the factors underpinning the *Putnam* rule were also satisfied here. Once again they are:

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

> for his pecuniary benefit from the relationship, the landlord could properly be expected to assume certain obligations with respect to the safety of the others.

Putnam, 38 NY2d at 617-18.

Regarding the receipt of consideration in exchange for agreeing to maintain the property, it is meaningless for Hamilton to assert as a distinction that "HUD did not provide the mortgage—it only guaranteed it" Resp. Br., p. 25). Hamilton acknowledged in the Grand Manor lease that this project would not have happened had HUD not guaranteed the mortgage. In fact, Hamilton informed Grand Manor that financing was secured through the FHA because Hamilton was "unable to obtain conventional financing and is proceeding to finance the Grand Manor project through the Federal Housing Administration" (A. 1227). And, former HUD Assistant Commissioner Michael Klion attested that "[a] Multifamily Housing HUD-insured Mortgage cannot close unless a Regulatory Agreement has been executed by the owner of the property and HUD" (A. 1300).

Moreover, the opening paragraph of the Regulatory Agreement states the following:

> <u>In consideration</u> of the endorsement for insurance by the Secretary of the above described note or in consideration of the consent of the Secretary to the transfer of the mortgaged property… and in order to comply with the

> requirements of the National Housing Act… Owners agree for themselves… that in connection with the mortgaged property and the project operated thereon… Secretary shall be the owner, holder or reinsurer of the mortgage…:

(A1278). The term "Secretary" was defined as the "Secretary of Housing and Urban Development" (A. 1278). Therefore, quite obviously the HUD Agreement was the consideration in exchange for Hamilton agreeing to maintain the property.

There is also no support for yet another baseless assertion by Hamilton that "Putnam and the Restatement clearly refer to the consideration received from the tenant in the form of rent" (Resp. Br., p. 25, n.9). The *Putnam*-Court never discussed the issue of the type of consideration that was necessary, nor does the Restatement. In fact, the Restatement explicitly states: "The contract need not, however, be a covenant or other term of the lease, and it is sufficient if it is made by the lessor, as such, after possession is transferred" (Restatement (Second) of Torts § 357 [1965]), again, without discussion of rent relief.

Hamilton has further argued, incorrectly, that "[w]ith respect to the HUD Agreement, the Appellant has failed to put forth any proof that Grand Manor was aware of the covenant [to maintain] therein" such that Grand Manor might forego repairs on the belief that same would be made by Hamilton (Resp. Br., p. 26).

Hamilton not only made Grand Manor aware of the Agreement's existence, it also relied on the Agreement in its litigation with Grand Manor. Hamilton argued that, for all intents and purposes Grand Manor became Hamilton under the Agreement. Hamilton's Robert Nova attested:

> [Grand Manor] is in violation of its obligations as a tenant pursuant to, inter alia, the Department of Housing and Urban Development Regulatory Agreements for Nursing Homes. Annexed hereto as Exhibit "C" is a copy of said Agreement. [Grand Manor] has failed to maintain the property in good repair.

(A. 1322). He further attested:

> This conduct by [Grand Manor] is in direct violation of the lease Article 27. This clearly violates the HUD regulatory agreement, which, pursuant to Article 27, will supersede and govern the rights of the parties.

(A. 1323).

Hamilton is therefore judicially estopped from taking the contrary position in this litigation that Grand Manor was not expressly aware of Hamilton's duty to maintain the property in good repair pursuant to the terms of the Regulatory Agreement. *See e.g. Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 (2d Dept 1995) (doctrine of judicial estoppel prevents a party from taking a position contrary to prior litigation simply because his interests have changed).

The assertion that Grand Manor allegedly failed "to maintain the property in good repair" was a quotation from the Regulatory Agreement and the duty that was imposed on the Hamilton defendants, not Grand Manor (A. 1322). Thus, as of the writing of Mr. Nova's affidavit, June 18, 2008 (A. 1327), which was three years before Ms. Henry's accident, Grand Manor was explicitly made aware of their "supposed repair requirement in the HUD Agreement" (Resp. Br., p. 26).

Regarding the ability to forego making repairs, Hamilton has argued that "the facts of this case clearly establish[ed] that [Grand Manor] did not forego making repairs in reliance upon [the Regulatory Agreement]. In fact, it is undisputed that Grand Manor clearly understood its repair obligations, and directly contracted to make repairs to the roof in question on multiple occasions" (Resp. Br., pp. 26-27). Had the roof been repaired prior to this accident, however, the accident would not have happened. In fact, the evidence demonstrated that the thirty-year-old roof was in need of replacement, not repair. Just as Grand Manor had done with regard to withdrawing money from the escrow funds to pay for sprinkler replacement, Grand Manor could have done so for the roof replacement. Yet, once again, rather than do what was right, both Hamilton and Grand Manor litigated with each other over their respective responsibilities under the lease.

Hamilton has further argued that "[i]f the Appellant were successful here, New York tenants could, going forward, assume obligations in their lease agreements to maintain the premises in good repair, and then avoid making the repairs in reliance on some covenant made by the owner to a completely unrelated third party. The result would be less repairs being made, more injuries, and more litigation" (Resp. Br., p. 27). That is precisely what happened here where the roof was not repaired, there was an injury and all Grand Manor and Hamilton have done for over thirty years is litigate.

Hamilton's criticism in this regard is not truly directed at Ms. Henry, it is directed at the holding of the *Putnam*-Court and the Restatement rule on which the holding was based. An ordinary tenant may forego making repairs where it reasonably believes that its landlord would fulfill that obligation – as provided for in the lease which reserved the landlord's right to re-enter the property to make repairs that the tenant failed to make. Under those circumstances, the ordinary landlord would be aware that the property was properly being maintained because he would have done so himself or hired a contractor to do so.

Here, however, because of the acrimonious relationship between the parties and the fact that Hamilton took a "head-in-the-sand" approach to the management

of its property, both of these "ordinary" assumptions were missing. Instead, all that Grand Manor and Hamilton have done over the last thirty years is sue each other over who should make more profit. As explained in the lower courts, Ms. Henry is therefore an innocent third-party who has been caught in the middle of the battle between Grand Manor and Hamilton.[4]

Moreover, Hamilton has not addressed Ms. Henry's argument that pursuant to the terms of the Regulatory Agreement, Hamilton was obligated to create a "reserve fund" that was to be used to make repairs to the property. The Regulatory 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 Hamilton, through the lease agreement, who voluntarily gave Grand Manor access to the fund. By allowing Grand Manor access to these funds, Hamilton 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.

Finally, there is also no policy consideration that would require a contract directly between owner and tenant. If the agreement to maintain were entered into

[4] Curiously, Hamilton claims that the application of *Putnam* would make "the duties and liabilities of sophisticated contracting parties… far less clear" (Resp. Br., p. 27). Here, however, the duties and liabilities of Grand Manor and Hamilton were so unclear that the parties have been litigating with each other for over 30 years.

between a third-party unrelated to the landlord-tenant relationship, and such contract was never disclosed to the tenant (unlike the present case where Hamilton has relied on the fact that Grand Manor was made aware of the Regulatory Agreement), the worst-case-scenario would be that the tenant and the owner's contractor would have overlapping obligations to maintain the property. There is no harm in that.

In this regard, Ms. Henry did not abandon her reliance on *Rojas v New York Elevator & Elec. Corp.*, 150 AD3d 537 (1st Dep't 2017) (Resp. Br., p. 32, n.10). *Rojas* was not cited in the Appellant's Brief because Ms. Henry rightly predicted that Hamilton would attempt to detract from the relevant issue before this Court by relying on the nonsensical argument that *Rojas* was decided on the legibility of the lease presented to the Court. The First Department clearly stated in its decision that its holding was based at least in part on the "the record [which] shows that 45 West executed a repair contract with defendant New York Elevator & Electric Corporation." *Id.* at 537. Stated otherwise, its holding was based on the notion that the owner could not be considered "out-of-possession" with no responsibility to maintain where it had contracted with a service company to maintain the elevators.

Regarding Hamilton's reversionary interest in the facility, that is not the "sole" factor in determining whether Hamilton is entitled to benefit from the out-of-possession owner exemption. But, Hamilton has again taken a position contrary to that which it took in the litigation with Grand Manor. Hamilton notes that that the lease expires in 2026, thus suggesting that Hamilton did not have a true "interest" in reclaiming the property. Significantly, however, Robert Nova attested in 2008 (once again, before Ms. Henry was injured) that Grand Manor was on a month-to-month tenancy and that Hamilton was taking steps to evict Grand Manor (A. 1321).

Regarding Hamilton's pecuniary interest in the land, Hamilton again takes issue with the policy considerations underpinning the Restatement rule, not Ms. Henry's arguments. Hamilton once again complains that "this factor would be satisfied in virtually any lease, since every property owner's pecuniary benefit in a leasehold will be affected to some extent by the safety of third parties" (Resp. Br., p. 30). Ms. Henry did not make the rule, she has just explained why all the elements of *Putnam*, as well as all the social policy concerns of the Restatement, were entirely met in the present case.

Since Hamilton has failed to overcome the fact that *Putnam* applies here regardless of the fact that Hamilton's contractual obligation to maintain the premises was entered between Hamilton and HUD, Hamilton thus owed a duty to Ms. Henry and the only question that remains is whether Hamilton breached the duty owed.

POINT IV

QUESTIONS OF FACT REMAIN REGARDING HAMILTON'S NOTICE OF THE RECURRENT LEAKY ROOF

Hamilton has not directly addressed Point II of Ms. Henry's Brief regarding the argument that, although the Regulatory Agreement may have allowed Hamilton the ability to delegate its "responsibility" to maintain the property, Hamilton could never fully divest itself of the "duty" to maintain that property. Hamilton's obligation to maintain was evidenced by the fact that HUD sent the deficiency Summary Reports to Hamilton, not Grand Manor. The Reports also very clearly reminded Hamilton of its ongoing duty to maintain the property "in a manner that is decent, safe, sanitary and in good repair" (A. 1311; 1482). Therefore, the fact remains that at all times throughout Grand Manor's tenancy, Hamilton was obligated to maintain the property in good repair.[5]

[5] Hamilton also notes that the Regulatory Agreement allowed for the use of a property manager, thus arguing that the Agreement contemplated that the duty to maintain could be delegated, but it

As discussed above, rather than fulfill its contractual (and common-law) (*see e.g. Basso v Miller*, 40 NY2d 233 [1976]) duty, Hamilton buried its head in the sand and purposefully absented itself from the property. Even then, Hamilton could not avoid seeing the HUD Summary Reports that were replete with deficiencies regarding "water stains/water damage/mold and mildew" (A. 1310; 1471). These deficiencies existed from at least January 2007 through April 2009.

Hamilton is also wrong to assert that the 2009 Summary Report "does not support the Appellant's narrative that the building had been poorly maintained prior to her being injured" (Resp. Br., pp. 12-13). 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. Thus, it is utterly irrelevant that in December of 2009 the HUD inspectors gave the facility an "exemplary"

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is of no use for Hamilton to rely on this argument where its property manager was simply another Hamilton entity.

score (Resp. Br., p. 13) and the defendants' contention that the "condition was subsequently remedied" (Resp. Br., p. 13 n.5) is an utter fallacy.

In fact, upon closer scrutiny of the "repair" performed by AP Construction it is abundantly apparent that same was done merely to hide these conditions from the HUD inspectors. As indicated, AP Construction had recommended a total roof replacement. At a minimum, they recommended repairing 3,600 square feet of the most-problematic portion of the roof (A. 1240). Ultimately, less than 20% of the problem-area was "repaired," however, as AP Construction's work was limited to patching only 700 square feet of roof (A. 1242).

It is also of no consequence that the Judge who presided over the Grand Manor/Hamilton litigation found the property to be "in good condition and repair" based on the evidence presented (Resp. Br., p. 41, n.15). Hamilton references the Judge's decision at Index Number 301880/2008, Docket Entry 08/21/2013. According to the Judge, evidence was presented in the form of the January 2008 HUD report, which her Honor determined was based on a single incident involving a clogged drain that was an anomaly and was immediately remedied by Grand Manor. *Id.* at p. 15. It is thus irrelevant that the Judge believed the property was maintained in good repair, because the Judge did not consider the history of water

stains/water damage/mold and mildew at the facility that is relevant to this litigation. The Judge was also only considering whether the property had fallen into such significant disrepair that it warranted non-renewal of Grand Manor's lease.

The Judge's opinion, respectfully, is also irrelevant because HUD determined in January 2008 that the property was not being maintained in good repair. According to HUD, "[b]ecause your property received a score of less than 60, the inspection has been referred to the Departmental Enforcement Center for enforcement action" (A. 1471). Therefore, as far as HUD was concerned, the Hamilton defendants had failed to properly maintain the facility.

Furthermore, as explained in the Appellant's Brief, the nature of the defect in question was "of such character or duration that a jury could reasonably conclude that due care would have uncovered them." *Zito v 241 Church St. Corp.*, 223 AD2d 353, 355 (1st Dept 1996), *citing Putnam, supra*. Here, obviously, Hamilton exercised no care, but it did still receive the HUD Summary Reports. As such, "where "a property owner has 'actual knowledge of the tendency of a particular dangerous condition to reoccur, he [or she] is charged with constructive

notice of each specific recurrence of that condition.'" *Bush v Mechanicville Warehouse Corp.*, 69 AD3d 1207, 1208 (2d Dept 2010).

As the Second Department noted in *Bush*, "if credited, plaintiff's proof would permit a jury to find that defendant had constructive notice of the dangerous condition where the accident occurred by virtue of its knowledge of the recurring problems with the roof leaks elsewhere in the warehouse." *Id.* at 1209. Likewise, "evidence of a known recurring and chronic leakage problem with the roof of the warehouse which, although superficially addressed, was never adequately addressed so as to remedy the underlying problem raises a triable issue of fact as to constructive notice." *Id.* Therefore, like the defendant in *Bush*, Hamilton is not entitled to summary judgment on the issue that it allegedly lacked notice of the leaky roof.

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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