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Bronx County Clerk's Index No. 309820/11

Court of Appeals

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.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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COURT OF APPEALS OF THE STATE OF NEW YORK

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-against-

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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,

Defendants-Respondents-Cross-Appellants,

-and-

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

Defendants-Cross-Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

Defendants-Respondents-Cross-Appellants Hamilton Equities, Inc., Hamilton Equities Company, and Suzan Chait-Grandt, as Administrator of the Estate of Joel Chait (collectively referred to as the "Hamilton Respondents")[1] submit this memorandum of law in opposition to Appellant Carol Henry's ("Appellant Henry") Motion for Leave to Appeal.

[1] By Appellant Henry's own admission, she did not appeal the trial court's decision granting summary judgment in favor of Chait Hamilton Management Corporation (""Chait Hamilton") to the Appellate Division, First Department (May 31, 2018 Affirmation of Alan S. Friedman the "Friedman Aff." at p. 6). As the non-liability of Chait Hamilton has thus been finally determined, Chait Hamilton is not a party to this brief.

PRELIMINARY STATEMENT

Here, the Hamilton Respondents oppose Appellant Henry's motion for permission for leave to appeal, which asks this Court to review a May 1, 2018 decision of the New York Supreme Court Appellate Division First Department ("Appellate Division.") That decision, which was issued shortly after an April 10, 2018 oral argument, unanimously affirmed the New York Supreme Court, Bronx County (the "trial court") decision by the Honorable Norma Ruiz, which was entered on or about August 25, 2017.

Neither the trial court decision, nor the Appellate Davison decision, raises issues that are novel or of public importance, nor do they present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. *See* 22 NYCRR §500.22 (4). Rather, the trial court's decision granting summary judgment in favor of the Hamilton Respondents, and the Appellate Division's subsequent affirmance of that decision were both correct, and consistent with many years of legal precedent. Accordingly, it is respectfully submitted that Appellant Henry's motion should be denied in its entirety.

As the trial court correctly held (as affirmed by the Appellate Division), consistent with longstanding New York authority, "an out-of-possession landlord [such as the Hamilton Respondents] will not be 'liable for negligence with respect

to the condition of property after its transfer and control to a tenant." (A-13,[2] quoting *Babich v. R.G.T. Rest. Corp.*, 75 AD3d 439, 440 (1st Dept. 2017)). As the trial court further correctly held (and the Appellate Division also affirmed), there are but two exceptions to this general rule:

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

(A-13 (citations omitted)).

As noted in the trial court decision, Appellant Henry chose "to rest all her eggs in one basket, asserting only that the first exception to the rule applies, seemingly abandoning the latter." (A-16).

With respect to the first exception, the trial court properly concluded that the applicable terms of the operative lease (hereinafter, the "Grand Manor Lease") for the Grand Manor Nursing & Rehabilitation Center (hereinafter "Grand Manor Facility") imposed no obligation on the part of the Hamilton Respondents to repair or maintain the premises in which Appellant Henry is alleged to have sustained her injuries. Rather, as the court correctly held, pursuant to the express terms of the

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[2] "A-__" indicates a citation to the Appendix filed in the proceedings before the Appellate Division.

Grand Manor Lease, that the Hamilton Respondents were out-of-possession landlords with only a limited right of re-entry.

Thus, because the Hamilton Respondents were out-of-possession landlords with only a limited right of re-entry, in order for Appellant Henry to potentially hold them liable for her injuries, she was required to establish, pursuant to the second exception referenced by the trial court, that her injuries resulted from a significant structural or design defect that is contrary to a specific statutory safety provision. However, there was absolutely no factual support for the application of this exception, which she conceded, as the trial court correctly noted in its memorandum decision.

Instead, Appellant Henry concocted an argument below that centered upon a provision in an agreement between the Hamilton Respondents and the U.S. Department of Housing and Urban Development (the "HUD Agreement"), the undisputed purpose of which is to protect the mortgagee's interest in the financial integrity of the property, and which is commonly included in a standard mortgage agreement.[3] According to Appellate Henry, the presence of this provision in the HUD Agreement somehow altered the express terms of the Grand Manor Lease, and imposed a repair obligation upon the Hamilton Respondents that they clearly

[3] Specifically, the HUD Agreement provision states in pertinent part that the "Owner shall maintain the mortgaged premises . . . in good-repair and condition." (A-1280, ¶7).

did not assume under the Grand Manor Lease. Not surprisingly, after reviewing Appellant Henry's arguments in this regard, first the trial court, and then the Appellate Division, correctly concluded that a duty to make repairs and maintain the premises did not exist in favor of Appellant Henry, and that summary judgment was properly granted in favor of the Hamilton Respondents. This finding was, of course, completely consistent with many years of binding New York precedent on the subject since the Court of Appeals seminal decision in *Putnam v. Stout*, 38 N.Y.2d 607 (1976).

STATEMENT OF FACTS

Appellant Henry's Accident

Appellant Henry alleges that on May 18, 2011, she was working as a licensed practical nurse on the top floor of the Grand Manor Facility. (A-276, 338, 543). She further alleges that on that date she fell in a puddle of water in the sixth floor hallway that purportedly resulted from a leaky roof. (A-90-91, 295-296, 621-623, 629, 643). Appellant Henry alleges that the leak flowed from the roof into the sixth floor ceiling and then down a wall before collecting in a puddle on the floor at the accident site. (A-296-297, 326, 358, 624-627, 638).[4]

[4] Although the trial court accepted these allegations as true for purposes of Appellant Henry's opposition to the Motion for Summary, a video of Appellant Henry's accident (A-1341) tells quite a different story. In that video, before Appellant Henry fell, numerous persons are seen traversing the area in which Appellant Henry slipped, suggesting that her fall was the result of her simply losing her footing, or a transient condition that existed for only a short period of time before her fall.

She further alleges that this condition had occurred before, and that each time this condition occurred, she and her fellow staffers would call their co-workers on the Grand Manor Facility's housekeeping/maintenance crew to mop up the water (or place a towel or wet floor sign over the wet area) without ever notifying anyone else about the claimed wall and ceiling condition. (A-329-332, 336-337, 340-341, 349-351, 354-355, 634-636, 645-646).

The Hamilton Respondents' Ownership & Management Interests

For a period spanning nearly thirty years, beginning in approximately 1983, none of the Hamilton Respondents visited the Grand Manor Facility. (A-705-706, 760). Moreover, respondent Suzan Chait-Grandt, the only individual named in the suit, had an ownership interest that came about only as a result of her husband Joel Chait dying in 1987. She had virtually no involvement with the Grand Manor Facility.[5] (A-809, 815, 818, 819, 828-829, 842, 844-846, 853-854, 859, 862, 865).

The Grand Manor Lease

The Grand Manor Lease provided that the Grand Manor Net Lessee (then-tenants Saul Liebman and Bert Liebman d/b/a Grand Manor Health Related Facility) was required to maintain and repair the Grand Manor Facility at its own

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[5] By deed dated May 14, 1982, defendant Hamilton Equities Company (a limited partnership) sold one-half of its property interest to Joel J. Chait. This transfer made them tenants in common for the subject property. (A-711-713, 729-730, 1234-1236). Defendant Hamilton Equities Inc. is the general partner of the limited partnership Hamilton Equities Company. The sole limited partner in Hamilton Equities Company is Robert Nova. (A-713-714, 774).

expense, and whenever deemed necessary by HUD (as the entity guaranteeing the Grand Manor Facility mortgage), and must replace any component at its own cost. (A-1185-1186, § 7.1). This same Grand Manor Lease provided that the Hamilton Respondents were not required to maintain, repair or replace any part of the Grand Manor Facility. (A-1186-1187, § 7.3).

The Grand Manor Lease further provided that the Hamilton Respondents had a right of re-entry limited to repair or work required if the Grand Manor Net Lessee failed to perform its leasehold duties, while explicitly providing that the Hamilton Respondents had no contractual obligation to repair or perform such work. (A-1191, § 11.1). Pursuant to § 8.2 of the Grand Manor Lease, the Hamilton Respondents gave their standing consent to any repair required by a governmental authority. (A-1187-1188, § 8.2) and pursuant to § 9.1, the Grand Manor Net Lessee acknowledged its required compliance with applicable governmental regulations. (A-1188-1189, § 9.1).

The HUD Agreement and Grand Manor Facility Inspections

In the October 4, 1978 Regulatory Agreement for Multi-Family Housing Projects (previously defined herein as the "HUD Agreement"), HUD essentially guaranteed the mortgage on the Grand Manor Facility, and in turn, was given the right to periodically inspect the premises. As Appellant Henry points out in the Friedman Aff. at p. 15 (and in the proceedings below), a January 30, 2007 HUD-

generated Grand Manor Facility Inspection identified "Missing/Damaged Components from Downspout/Gutter," at the Grand Manor Facility. (A-1313).[6] That report does not, however, indicate the existence of a roof leak, which is what Appellant Henry alleges caused the condition that resulted in her injuries. (*Id.*) Nor does it document the condition of the premises at the time of her alleged accident several years later.

On January 16, 2008, the Grand Manor Facility was inspected again, and by that time, the downspout/gutter issues had been fully resolved by the Grand Manor Lessee. (A-1473-1480). Although the report from the January 16, 2008 inspection did identify some instances of mold at the Grand Manor Facility, which Appellant Henry references in the Friedman Aff. (and in the proceedings below), as well as some other minor violations (none of which were in the area of Appellant Henry's alleged accident), those too were corrected by the Grand Manor Lessee before the Grand Manor Facility was again inspected by HUD on December 4, 2009. (A-1483-1491).

The HUD-generated report from December 4, 2009, which was the final HUD report before Appellant Henry's accident (and which she chose to simply ignore in the proceedings below), identified no need for capital improvement, no roof issue, no downspout/gutter issue, and no life-threatening conditions. (A-1483-

[6] This report defines this condition as non-life-threatening condition and one costing the same to remedy as a light fixture, fire extinguisher or smoke detector. (A-1312-1313, 1318).

1485). In fact, the Grand Manor Facility's score of 90 for this inspection was so exemplary, that it was excused from further HUD inspection for a period of three years. (A-1483, 1492). Sadly, without any factual basis for doing so, Appellant Henry alleges in the Friedman Aff. at p. 16 that this exemplary inspection report was somehow obtained only after the Grand Manor Lessee somehow duped the HUD inspectors into believing that actual repairs had been made to the Grand Manor Facility when according to Appellant Henry, only "cosmetic" changes had occurred. Even if this were true – as previously indicated, this argument is unsupported by the evidence – it is undisputed that in accordance with the express terms of the Grand Manor Lease, the Grand Manor Lessee was the party that was responsible for, and undertook the repairs to premises, not the Hamilton Respondents. Moreover, none of the HUD reports in the record indicate any roof issues whatsoever.

The Grand Manor Facility Roof Repairs

Consistent with its obligations under the Grand Manor Lease, whenever it deemed roof repairs to be necessary, the Grand Manor Lessee contracted with roof repair companies to make them. In 2008, when Grand Manor Facility's custodian (employed by the Grand Manor Net Lessee) contacted defendant-respondent AP Construction, Inc. ("AP") about "some leaks" in the Grand Manor Facility's dayroom/common area, AP issued a proposal for related roof repair. (A-1048-

1051; 1063-1064, 1067-1068, 1070, 1111). After the Grand Manor Net Lessee again contacted AP about "some leaks," AP provided a second proposal dated April 6, 2009 for roof repair. (A-1077, 1115, 1240-1241). Based upon this proposal, the Grand Manor Net Lessee retained AP to install 300 square feet of roofing over a "leaking area." (A-1078).

Between March 11 and March 12, 2011, AP was contacted again by Grand Manor Facility's custodian about a roof repair and provided another proposal. (A-235, 1090-1091, 1105-1107). However, instead of retaining AP, the Grand Manor Net Lessee hired defendant-respondent Rafae Construction Corp. ("Rafae") to repair the Grand Manor Facility roof. (A-900-902, 904, 907, 939). The contract was signed by defendant-respondent Rafae on May 3, 2011 and by the Grand Manor Net Lessee on May 4, 2011, approximately two weeks prior to Appellant Henry's May 18, 2011 accident. (SA-924).[7]

POINT I

THE CONTRACTUAL OBLIGATIONS BETWEEN THE HAMILTON RESPONDENTS & THE GRAND MANOR NET LESSEE WERE NOT ALTERED BY THE HUD AGREEMENT

In seeking leave to appeal to this court, Appellant Henry argues, as she did below, that because HUD had guaranteed the mortgage pursuant to the HUD

[7] "SA-___" indicates a citation to the Supplemental Appendix filed in the proceedings before the Appellate Division.

Agreement, which contained a general covenant to keep the premises in "good repair," then contrary to the express term of the Grand Manor Lease, the Hamilton Respondents, and not the Grand Manor Lessee was obligated make all repairs at the Grand Manor Facility. In making this argument, Appellant Henry asserts that the HUD Agreement provision, which is not unique to HUD-backed loans,[8] effectively altered the express terms of the Grand Manor Lease obligations between the Hamilton Respondents and the Grand Manor Net Lessee, and ultimately, the Hamilton Respondents' duty to Appellant Henry.

A. Appellant Henry's Arguments were Properly Rejected Below

In considering Appellant Henry's assertions that the express negotiated terms of the Grand Manor Lease should be completely disregarded because of the HUD Agreement, the trial court thoroughly reviewed the history behind the rule protecting out-of-possession landlords from liability, and correctly concluded that this argument was without merit. The Appellate Division then correctly affirmed this sound and well-reasoned decision.

As discussed in the trial court's decision, for many years, under New York law, out-of-possession landlords were essentially immune from suit by third parties injured on premises they had leased to others. *Cullings v. Goetz,* 256 N.Y.287

[8] As further discussed herein, the provision contained in the HUD Agreement providing for the owners to maintain the mortgaged premises "in good repair and condition." (A-1280, ¶7) is a provision that is commonly contained in standard mortgage contracts.

(1931). However, in 1976, in *Putnam v. Stout*, 38 N.Y.2d 607, 611 (1976), this Court, guided by the Restatement 2nd of Torts, recognized an exception to the longstanding general rule, but in situations where the landowner contracted with the tenant in the lease, or assumed a duty *dehors* the lease, to repair the leased property.[9]

In its decision, the trial court focused upon the *Putnam* court's stated reasons for adopting the Restatement rule. Specifically, it stressed the rationale behind the *Putnam* holding, that this new rule was necessary in situations where the lessor had contractually assumed a repair obligation to the tenant, because such promises "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.'" (A-15) (quoting *Putnam*). The trial court then correctly found that "these considerations naturally assume that the obligation is contractually owed to the tenant *and* that the tenant is at least aware *and* relies on the landlord." (A-15) (emphasis added). In other words, the *Putnam* rule seeks to provide certainty as to contracting parties' responsibilities to each other, based

[9] The continued viability of the out-of-possession owner's defenses to liability is shown by the First Department's holding in *Thomas v. Fairfield Investors*, 273 A.D.2d 118 (1st Dept. 2000). The *Thomas* decision reversed a denial of a motion for summary judgment by the defendant partnership that owned a nursing home where plaintiff was employed. There, the First Department found that the movant was entitled to summary judgment since its lease transferred the property's maintenance and repair obligations to the tenant, and defendant did not retain control of the premises or its operation. The court relied on the out-of-possession landlord's lack of duty to correct defects other than significant structural ones or specific statutory violations.

upon the contractual agreements between them. By way of contrast, Appellant Henry's proposed extension of the *Putnam* holding would have the complete opposite effect, creating significant uncertainty as to the parties' respective responsibilities in spite of the clear contractual terms between them.

Thus, under *Putnam*, where the lessor expressly agrees with the lessee that the lessor retains the responsibility to make repairs, it cannot, to the detriment of the lessee, simply disregard those responsibilities, and avoid liability.[10] This, of course, was not the case here, and as the trial court correctly held (and the Appellate Division correctly confirmed) with respect to Appellant Henry's argument concerning the HUD Agreement:

> In the case at bar, there can be no reasonable argument that the HUD 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 [Appellant Henry] certainly cannot.

Id.

[10] Similarly, where the lessee has contractually assumed the repair responsibility, it cannot simply disregard its obligations to the lessor.

B. The HUD Agreement

As the trial court correctly held (and the Appellate Division confirmed), "(t)he purpose of the HUD 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." (A-15). Appellant Henry nevertheless attempts to co-opt the HUD Agreement's requirement that the Grand Manor Facility be maintained in good repair, into an obligation on the part of the Hamilton Respondents to make all repairs at the premises, and in turn, into a duty in tort to her. However, the HUD Agreement's requirement that the premises be maintained in good repair, is not intended to benefit Appellant Henry, but rather, HUD, and Regdor Corp., the mortgagee. (A-1278). This provision serves solely as a means of preserving the value of the property as mortgage collateral in the case of a default. In fact, Appellant Henry's "expert" Michael Klion admits in his affidavit that this is the purpose of the "maintain in good repair" requirement of the HUD Agreement. (A-1300, ¶8).[11]

Seemingly, without specifically characterizing herself as such, and as recognized in the courts below, Appellant Henry's theory for attempting to recover under the HUD Agreement is that she qualifies as a third-party beneficiary of that

[11] In his affidavit, Mr. Klion discusses a "non-delegable duty" that is contained nowhere in the HUD Agreement itself. In fact, the HUD Agreement specifically allows the owner to enter into management contracts for the premises. (A-1280 ¶11) Nevertheless, even if there were such a non-delegable duty provision contained within the contract, the consequence of breaching that duty would simply be a default resulting in acceleration of the indebtedness due. (A-1281 ¶11).

agreement. However, as the trial court held, and the Appellate Davison later confirmed, the HUD Agreement contains no explicit or implied intent to make injured third-parties beneficiaries under that agreement. *See also Cal. Pub. Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427 (2000) (to recover as a third-party beneficiary, a party must show valid, binding contract between other parties, contract intended for third party beneficiary's benefit and this benefit was sufficiently immediate, not incidental); *O'Gorman v. Gold Shield Sec. & Investigation*, 221 A.D.2d 325 (2nd Dept. 1995) (plaintiff, the tenant's employee, could not establish that the contract between premises' out-of-possession owner and security contractor was intended to confer a direct benefit on him); *Haigler v. New York*, 135 A.D.2d 362 (1st Dept. 1987) (security contractor owed plaintiff no duty as third-party beneficiary for its nonfeasance in failing to prevent object from being thrown from building, even if plaintiff's injury from said nonfeasance was foreseeable).

It is undisputed that the Grand Manor Lease itself did not contain a covenant requiring the Hamilton Respondents to repair (A-1185-1186 § 7.1; A-1186-1187, § 7.3; A-1188-1189, § 9.1; A-1191, § 11.1). Nor did the Hamilton Respondents "otherwise" undertake any repair duties at the Grand Manor Facility. (A-235, 900-902, 907-909, 927, 939, 1048-1051, 1063-1064, 1067-1068, 1070, 1077-1078, 1090-1091, 1105-1107, 1111, 1115, 1240-1241). And, as the trial court correctly

concluded (and the Appellate Division correctly confirmed), "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 maintain the premises." (A-14) (emphasis in original).

Nevertheless, Appellant Henry argues that because the Restatement's exception to the general rule of liability applies in situations where the lessor has contracted by a covenant in the lease "or otherwise" to repair, and the HUD Agreement contained the following language: "Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto in good repair and condition" (A-1280), the Hamilton Respondents had "otherwise" agreed to repair the premises.

In support of this argument, Appellant Henry relies solely upon her misinterpretation of the First Department's decision in *Rojas v. New York El. & Elec. Corp.*, 150 A.D.3d 537 (1st Dept. 2017). In *Rojas*, this Court affirmed the lower court's denial of the defendant property owner's motion for summary judgment. It did so based upon the fact that the defendant had failed to make a prima facie showing that it was an out-of-possession landlord with no obligation to make repairs. *Id.* at 537. In reaching this conclusion, the Court noted that the lease the landlord produced was illegible, and that the landlord had executed a repair contract with an elevator repair contractor for the premises. *Id.* The Court's

decision was not based upon the fact that the elevator contract altered the contractual relationship between the lessor and the lessee. Rather, because the lease between the lessor and the lessee was illegible, the presence of the elevator agreement provided evidence as to what the lease terms may have required, thus allowing the case to proceed to a jury. *Id.*

Here, on the other hand, there is no doubt as to the terms of the Grand Manor Lease between the Hamilton Respondents and the Grand Manor Net Lessee. Moreover, it is undisputed that the Hamilton Respondents never contracted for the repair of the Grand Manor Facility roof. Rather, the Grand Manor Lessee endeavored to repair the roof at least three times before Appellant Henry's accident. As a consequence, *Rojas* is of absolutely no import here, and the Hamilton Respondents are unaware of any authority whatsoever that would support Appellant Henry's position, nor has Appellant Henry provided any.

As the trial court correctly concluded, and the Appellate Division confirmed, the intended effect of the *Putnam* Court's adoption of the Restatement 2nd of Torts, as reflected in numerous subsequent New York decisions, was that the covenant to repair must exist between *the landlord and the tenant*. For example, while the *Cherubini v. Testa*, 130 A.D.2d 380, 382 (1st Dept. 1987) decision cited in Appellant Henry's briefings below includes an example of a repair obligation being "otherwise" assumed by the lessor, it is still factually similar to *Putnam* in

that the covenant to repair at issue still existed between the lessor and lessee. Although that repair obligation was not assumed in a lease, the court found that the lessor had "otherwise" verbally agreed with the tenant that he would maintain the accident site stairway. *See also Hagensen v. Ferro, Kuba, Mangano, Sklyar, Gacavino & Lake, P.C.*, 2012 N.Y. Misc. LEXIS 6522 (Sup. Ct. N.Y. Cty. Jan. 3, 2012), *aff'd*, 108 A.D.3d 410 (1st Dept. 2013) (landlord otherwise orally promised lessee it would hire someone to clean up and maintain the premises, including the driveway, raising triable issue of fact); *Colon v. Mandelbaum*, 244 A.D.2d 292 (1st Dept. 1997) (plaintiffs allegedly made complaints to defendants about excessively hot water throughout the period of their occupancy and defendants promised plaintiffs they would rectify the problem).

Moreover, if the phrase "otherwise" as utilized in the Restatement 2nd, and as adopted by *Putnam*, were found to apply to anything other than an agreement between the lessor and lessee, the *Putnam* decision would effectively be turned on its head. An agreement to maintain mortgaged premises in good repair is a common one required by mortgagees as a condition for the issuance of a mortgage. In fact, there are many publicly available examples. *See, e.g., Mortgage, Security Agreement and Assignment of Leases and Rents*, NEW YORK CITY BAR ASSOCIATION, http://www.nycbar.org/RealEstate/Forms/Mortgage_pdf.pdf (last visited June 9, 2018; Forms from Steinman's Bergerman and Roth, *Subordinate*

Mortgage of Commercial Property, LexisNexis Form 140-106.22; *Sample Mortgage Document*, TRANSLEGAL, https://www.translegal.com/wp-content/uploads/real_property_appendix_1.pdf (last visited June 9, 2018); Forms from Steinman's Bergerman and Roth, *Mortgagor Obligated to Maintain Mortgaged Premises in Good Repair*, LexisNexis Form 140-108.44; LexisNexis Real Property Law Forms, *Commercial Building Note and Mortgage—Building Equipment Included as Collateral—Parties Rights Regarding Rent Defined—No Recourse Against Borrower—New York*, LexisNexis Form 285-B.18.[12]

Were the Court to accept Appellant Henry's argument, virtually every lease in which an out-of-possession landlord had no duty to repair would be re-written to include such an obligation where the premises were subject to a mortgage. Clearly, this was not the intent of the *Putnam* Court, or the Restatement 2nd, as the exception would swallow the rule.

POINT II

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

As previously discussed, the Hamilton Respondents were out-of-possession landlords. As such, even if true, Appellant Henry's unsupported allegation that the Hamilton Respondents had notice of a defective condition at the Grand Manor

[12] The Hamilton Respondents respectfully request that this Court take judicial notice of the referenced documents.

Facility, plays no role in determining the liability of an out-of-possession landlord with only a limited right of re-entry. Rather, as stated above, regardless of notice, the out-of-possession landlord's duty to repair exists only with respect to significant structural or design defects that violate a specific statutory safety provision. Moreover, as the Appellate Division, and the trial court before it, correctly recognized, the HUD agreement was for the benefit of HUD and the lender, and did not create a duty to third-parties injured at the Grand Manor Facility.

However, even if this were not the case, and as Appellant Henry alleges, the Hamilton Respondents could not properly divest themselves of control of the premises – this is of course untrue – the Hamilton Respondents were still entitled to summary judgment, as it cannot be disputed that they had no notice of the alleged roof leak.

In an effort to establish such notice, Appellant Henry has relied upon a January 30, 2007 HUD inspection report (A-1313), and a June 18, 2008 affidavit of Robert Nova (principal and shareholder of defendant Hamilton Equities Inc., and sole limited partner of defendant Hamilton Equities Company) that was filed in another action. (*See* Friedman Aff. at pp. 14-15) (A. 1320-27). Both the referenced report and the affidavit significantly pre-date Appellant Henry's accident, and neither have any bearing on the claimed condition of the accident site

at the time of her fall. Moreover, neither identifies the roof condition or the alleged leak that Appellant Henry identified as having caused her accident. As this Court has expressly held in *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 (1994) (citations omitted):

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

While HUD found certain violations as referenced in the January 30, 2007 and January 16, 2008 reports, neither report identified a roof leak, or for that matter, referenced the area of the building in which Appellate Henry's accident is alleged to have occurred. Additionally, the Hamilton Respondents had not visited the Grand Manor facility for a period of almost thirty years. (A-705-706, 760). Moreover, while Appellant Henry argues that for a period of time far prior to her accident, the Grand Manor Facility was in a general state of disrepair, and that the Hamilton Respondents were aware of this general state of disrepair, she has not identified a single shred of evidence to suggest that the Hamilton Respondents were specifically aware of the alleged roof leak as required by *Piacquadio*. Thus, even if Appellant Henry's arguments are correct regarding the HUD Agreement – they are not – contrary to her assertions, the existing record fails to establish that

the Hamilton Respondents had notice of the condition that is alleged to have caused her injuries.

For final proof of this, one need look no further than the HUD inspection that took place on December 4, 2009, which was the final inspection pre-dating Appellant Henry's accident (a fact that Appellant Henry conveniently ignored in her briefing below.) As discussed above, that inspection found the Grand Manor Facility to be clear of any of the alleged issues identified in the January 30, 2007 and January 16, 2008 inspection reports (*See* A1483 – A1491), and identified absolutely no deficiencies with respect to the roof. In fact, most tellingly, the December 4, 2009 HUD inspection report gave the premises an overall score of 90, which was so exemplary that it excused the premises from further inspections for another three years. (A-1483, A-1493).

Thus, even if this Court were to accept Appellant Henry's argument that the HUD Agreement in essence altered the terms of the Grand Manor Lease – it clearly should not – given that they had no notice of the alleged roof leak, the Hamilton Respondents were still properly entitled to summary judgment and dismissal of Appellant Henry's complaint against them.

CONCLUSION

For all the foregoing reasons, and those identified in the Hamilton Respondents' briefings below, it is respectfully submitted that Appellate Henry's motion seeking leave to appeal should be denied in its entirety.

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