State of New York
Court of Appeals

OPINION

No. 72
Carol Henry,
Appellant,
v.
Hamilton Equities, Inc., et al.,
Respondents.

Alan S. Friedman, for appellant.
Michael J. Tricarico, for respondents.

STEIN, J.:

In Putnam v Stout, this Court recognized a limited exception to the general rule that an out-of-possession landlord is not liable for injuries resulting from the condition of the demised premises where, among other things, the landlord "covenant[s] in the lease or

otherwise to keep the land in repair" (38 NY2d 607, 617 [1976] [citation omitted]). The issue presented on this appeal is whether that exception applies to a regulatory agreement between defendants, as owners of the property, and the United States Department of Housing and Urban Development (HUD), as guarantor of the mortgage on defendants' premises. We hold that the regulatory agreement at issue here is not such a covenant, and decline to expand the exception in Putnam to these facts.

I.

Plaintiff, a nurse, was injured when she allegedly slipped and fell on water that had leaked in through the roof and pooled on the top floor of a nursing home operated by her employer, Grand Manor Nursing and Rehabilitation Center. Defendants Hamilton Equities Company (Hamilton Company) and Suzan Chait-Grandt owned the property in which the nursing home operated, defendant Hamilton Equities Inc. (Hamilton Inc.) was the general partner of Hamilton Company, and defendant Chait-Hamilton Management Corporation (Chait-Hamilton) managed it.[1] In 1974, Hamilton Inc. entered into a lease agreement with Grand Manor's predecessor for the soon-to-be-constructed nursing home facility. The lease stated that the tenant would, at its "sole cost and expense, maintain and keep all parts of the leased premises . . . in a good state of repair and condition." Moreover, although Hamilton Inc. maintained the right to enter the facility to make repairs if the tenant failed to do so, the lease specified that it was not to be construed "as making it obligatory upon

[1] Hamilton Company, Hamilton Inc., and Suzan Chait-Grandt, collectively, will be referred to as the Hamilton defendants. Plaintiff's claims against Chait-Hamilton are not at issue in this appeal.

the part of [Hamilton Inc.] to make such repairs or perform such work." Rather, the lease provided that Hamilton Inc. "shall not be required to maintain, repair or replace any part of the leased premises or any of its fixtures, furniture, machines, equipment or appurtenances."

A 1978 amendment to the lease acknowledged that Hamilton Inc. would finance the project "through the Federal Housing Administration ('FHA')" and, in the event of inconsistencies between the lease and any regulatory agreements related to this financing, the "regulatory agreements [would] prevail and govern the rights of the parties." Hamilton Company thereafter secured a mortgage from Regdor Corporation in connection with the construction of the facility; the mortgage was insured by the FHA, which is part of HUD. Plaintiff's expert in the current action averred that the purpose of the regulatory agreement was to "protect both the physical asset, as well as the fiscal integrity of the property." The regulatory agreement between Hamilton Company and HUD provided that Hamilton Company, as the owner, was required to "maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition." Consequences of Hamilton Company breaching its duties under the regulatory agreement included HUD accelerating the indebtedness due, collecting rent from the nursing home, taking possession of the nursing home and applying for an injunction. The agreement stated that it was entered into "[i]n consideration of the endorsement for insurance by the Secretary" of HUD and that its requirements were "paramount and

controlling as to the rights and obligations set forth and supersede[d] any other requirements in conflict therewith."[2]

Notably, the regulatory agreement required Hamilton Company to establish a "reserve fund" to be used for, among other things, "effecting replacement of structural elements[] and mechanical equipment" at the facility. As the mortgagee, Regdor controlled the reserve fund; however, "disbursements from such fund" could be made only "after receiving the consent in writing" of the Secretary of HUD. The 1978 amendment to the lease also referenced the reserve fund. Although the "paramount and controlling" regulatory agreement required Hamilton Company to deposit approximately $4,100 per month into the reserve fund, the lease amendment provided that two-thirds of the required amount would be paid by the tenant and one-third would be paid by Hamilton Inc. The amendment to the lease also specified that "only Lessee" – i.e., Grand Manor – "may withdraw from such fund for the purposes for which such fund is established." Consistent with its obligations under the lease to maintain the facility in a state of good repair and the dictates of the lease amendment providing that only Grand Manor could make withdrawals from the reserve fund established as a source to pay for the repairs, Grand Manor applied for and received HUD's authorization for the release of money from this fund for the purpose of improving the facility's fire alarm and sprinkler system (see Grand Manor

[2] The lease amendment continued all terms from the 1974 lease that did not conflict with the regulatory agreement. Inasmuch as the regulatory agreement did not relieve Grand Manor of its obligation to maintain the mortgaged premises under the 1974 lease, that obligation remained "in full force and effect."

Health Related Facility, Inc. v Hamilton Equities, Inc., 941 F Supp 2d 406, 412 [SD NY 2013]).[3]

There is nothing in the record to suggest that, for the period of approximately 30 years following construction of the property until plaintiff's accident, the Hamilton defendants ever made repairs to, or even visited, the property. HUD periodically inspected the facility, including in 2007, 2008, and 2009, and provided either Chait-Hamilton or Hamilton Company with summary reports after each inspection. The reports revealed that the facility required maintenance and repair work each year, with the 2007 and 2008 reports indicating that repairs were necessary due to water and mold damage. However, the 2009 inspection report indicated that the facility's condition had significantly improved, resulting in the facility being excused from inspection for the next three years. Although none of the reports mentioned a roof leak, it is undisputed that Grand Manor hired

[3] The dissent, in recounting the parties' respective obligations under the lease, regulatory agreement and lease amendment, asserts that the Hamilton defendants could "request . . . access to the reserve fund to pay for . . . repair costs" (Dissenting op, at 17). That is unsupported by the record; the lease amendment provided that only Grand Manor could withdraw from this fund, and the HUD agreement – which is silent on the issue of who may request access to the Fund – does not indicate otherwise. If the dissent's reading of the various agreements were correct – i.e., if the lease amendment supplanted the provision of the original lease obligating Grand Manor to make repairs – only the Hamilton defendants, as lessors, would be permitted to make withdrawals from the reserve fund, rather than Grand Manor, as lessee. Contrary to the dissent's conclusion, our decision in He v Troon Mgt. Inc. (___ NY3d ___ [2019]) is not relevant to the issue presented in this case, which turns on the parties' respective contractual obligations in relation to common law principles; this case does not concern whether an owner may shift, to a tenant, liability in tort for injuries to third parties in the face of a statute (or regulation) expressly placing that liability on the property owner.

contractors to repair roof leaks, once in 2009 and, again, in 2011 – shortly before plaintiff's accident.

Following her accident, plaintiff commenced the instant action alleging, in pertinent part, that defendants, as the owners and managers of the property, were aware of leaks in the roof at the facility and failed to cure the defective condition for an unreasonable length of time. The Hamilton defendants moved for summary judgment dismissing the complaint and all cross claims as against them on the ground that plaintiff had not established an exception to the general rule that out-of-possession landlords are not liable for the condition of the subject premises. In opposition, plaintiff countered that the regulatory agreement with HUD imposed on the Hamilton defendants a non-delegable duty in tort, in favor of third parties, such as plaintiff, to maintain the facility, including the roof, and that defendants had actual notice of the facility's defective condition through the HUD inspection reports.

Supreme Court, as relevant here, granted the motion and dismissed the complaint and all cross claims asserted against the Hamilton defendants. The court held that the Hamilton defendants were out-of-possession landlords and were entitled to the protection of the general rule that such landlords will not be liable for injuries caused by dangerous conditions on the lease premises. While the court recognized that an exception to the general rule exists when an out-of-possession landlord "is contractually obligated to make repairs and/or maintain the premises," the court concluded that there was "no reasonable argument that the HUD regulatory agreement was designed to afford Grand Manor, as tenant, the benefits discussed in Putnam," and that plaintiff did "not allege[] that Grand

Manor, as tenant, was aware of the contractual obligation imposed by HUD or relied on it."

The Appellate Division unanimously affirmed Supreme Court's order insofar as appealed, concluding that inasmuch as "[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," the Hamilton defendants were not liable for the condition of the facility (161 AD3d 418, 419 [1st Dept 2018]). This Court granted plaintiff leave to appeal.

II.

Landowners generally owe a duty of care to maintain their property in a reasonably safe condition, and are liable for injuries caused by a breach of this duty (see Gronski v County of Monroe, 18 NY3d 374, 379 [2011]). The "duty is premised on the landowner's exercise of control over the property, [because] 'the person in possession and control of property is best able to identify and prevent any harm to others'" (id., quoting Butler v Rafferty, 100 NY2d 265, 270 [2003]). In contrast, a "landowner who has transferred possession and control [i.e., an out-of-possession landlord] is generally not liable for injuries caused by dangerous conditions on the property" (id.; see Chapman v Silber, 97 NY2d 9, 19 [2001]). There are, however, exceptions.

For example, out-of-possession landlords may be held liable "for dangerous conditions on the leased premises" if "a duty to repair the premises is imposed . . . by contract" in certain, limited instances (Rivera v Nelson Realty, LLC, 7 NY3d 530, 534 [2006]). Historically, this was not so: Even where there was a covenant to repair made by

the property owner directly with the tenant, "upon the landlord's breach of the covenant to repair, the tenant obtained only an action in contract for the breach" and, therefore, "third persons not parties to the contract had no right of action whatever against the landlord, and were relegated to recovery against the tenant" (Putnam, 38 NY2d at 614; see Cullings v Goetz, 256 NY 287, 290 [1931]). In other words, a "covenant to repair [did] not impose upon the lessor a liability in tort at the suit of the lessee or of others lawfully on the land in the right of the lessee" (Cullings, 256 NY at 290). The primary rationale underlying the old rule was that "the tenant, as occupier of the land, had control of its safety and if [the tenant] so desired, could [avoid liability] by excluding people from [the] property or by discriminating against those whom [the tenant] believed would not look out for their own safety whereas the landlord had neither control nor possession, and [the landlord's] covenant to repair did not reserve either" (Putnam, 38 NY2d at 614-615; see Chapman, 97 NY2d at 19).

In Putnam, "this Court relaxed the doctrine, imposing a duty to remedy dangerous conditions on a landlord who had contractually assumed the responsibility to make repairs," at least in cases where the property owner made the covenant to repair directly with the tenant (Chapman, 97 NY2d at 19). Specifically, the Court overruled Cullings to adopt the rule set forth in the Restatement (Second) of Torts § 357 that a landlord "may be liable for harm caused to others on [the] land with the permission of the [tenant], on the basis of [a] contract to keep the premises in good repair" (Putnam, 38 NY2d at 611) so long as three conditions are met: (1) the "'lessor, as such, has contracted by a covenant in the lease or otherwise 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'" (3) the "'lessor fails to exercise reasonable care to perform [the] contract'" (id. at 617, quoting Restatement [Second] Torts § 357).

In overruling Cullings, the Putnam Court opined that "[t]he Restatement rule . . . more accurately and realistically place[s] an increased burden on a lessor who contracts to keep the land in repair" (38 NY2d at 617). The Putnam Court explained that placing the burden on the landlord is justified because: (1) the "lessor has agreed, for a consideration, to keep the premises in repair"; (2) there is a "likelihood that the landlord's promise to make repairs will induce the tenant to [forgo] repair efforts which [the tenant] otherwise might have made"; and (3) the "lessor retains a reversionary interest in the land and by [the] contract may be regarded as retaining and assuming the responsibility of keeping [the] premises in safe condition" (id.). Moreover, the Court observed that certain "social policy" considerations weigh in favor of placing the burden of repair on the contracting landlord, specifically that: (1) "tenants may often be financially unable to make repairs"; (2) when a tenant's possession is for a limited term, "the incentive to make repairs is significantly less than that of a landlord"; and (3) "in return for [the] pecuniary benefit from the relationship, the landlord could properly be expected to assume certain obligations with respect to the safety of the others" (id. at 617-618).[4]

[4] To reiterate, Putnam sets forth three factors that must be considered in determining whether the Restatement Rule is applicable: the lessor, as such, has contracted in the lease or otherwise to keep the land in repair; the failure to meet that obligation creates an unreasonable risk to persons upon the land; and the lessor has failed to exercise reasonable care in meeting the obligation (38 NY2d at 617). That is the only analytical framework set forth in Putnam. Unlike the dissent, we read the remaining considerations discussed in

Here, while the lease provided Hamilton Inc. with a right to reenter the premises to make repairs, it unequivocally placed the duty to maintain and repair the facility on Grand Manor. Thus, plaintiff can recover against defendants only if the exception set forth in Putnam applies to the HUD regulatory agreement, as incorporated into the lease amendment, insofar as that agreement required Hamilton Company to "maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition." Plaintiff relies on the Court's statement in Putnam that the exception applies when the lessor "'as such, has contracted by a covenant in the lease or otherwise to keep the land in repair'" (id. at 617 [emphasis added], quoting Restatement (Second) of Torts § 357). She argues that this language signifies that the exception outlined in that case applies to any agreement made by the lessor, regardless of whether the agreement is directly with the tenant.[5] We disagree.

In our decisions following Putnam, this Court has confirmed that the degree of control retained over the property by the landlord remains an important consideration (see e.g. Gronski, 18 NY3d at 379; Juarez by Juarez v Wavecrest Mgt. Team Ltd., 88 NY2d 628, 643 [1996]; Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 567 n 4 [1987]). Indeed, a primary concern underlying Putnam was that a landlord's promise to

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Putnam as providing an explanation for the Court's decision to depart from its prior precedent, rather than as establishing an additional test that must be applied in each case.

[5] The only case which plaintiff cites in support of her argument that the Putnam exception extends to regulatory agreements between landlords and HUD is Rojas v New York El. & Elec. Corp. (150 AD3d 537 [1st Dept 2017]). However, Rojas is clearly distinguishable inasmuch as the lease at issue was illegible, and there was evidence that the landlord had hired a third party to perform repairs.

make repairs and reservation of the right to enter to perform those repairs would induce the tenant to forgo repair efforts that otherwise would have been made (see Putnam, 38 NY2d at 614 n 4, 617). As noted above, Putnam adopted the rule set forth in the Restatement (Second) of Torts § 357; significantly, the Comments to that section emphasize the "special relation between the parties, and the peculiar likelihood that the lessee will rely upon the lessor to make the repairs, and so will be induced to [forgo] efforts which [the lessee] would otherwise make to remedy conditions dangerous to [the lessee] and to others who enter the land" (Restatement [Second] of Torts § 357, Comment b2). Thus, it is the relationship between those two parties – the landlord and the tenant – as reflected in their agreements regarding the maintenance of the property, that drives the analysis.

Critically, the HUD regulatory agreement, as incorporated into the 1978 amendment to the lease, did not alter the contractual relationship between the Hamilton defendants and Grand Manor regarding control of the premises or replace Grand Manor's contractual duty to perform maintenance and repairs at the facility. Although the terms of the HUD agreement were to supersede all other requirements in conflict therewith, the regulatory agreement did not conflict with, or absolve Grand Manor of, its responsibilities under the original lease. Indeed, as previously noted, the amendment continued all terms from the lease that did not conflict with the regulatory agreement. Given the absence of a conflict on the issue of Grand Manor's duties to make repairs, the HUD agreement, as incorporated into the lease amendment, was not a covenant that could be said to displace Grand Manor's duties or alter the relationship between landlord and tenant in the manner contemplated by Putnam.

In that regard, an analysis of the Court's rationale in Putnam for adopting the rule further indicates that the exception does not apply to (and should not be expanded to cover) the HUD regulatory agreement. In particular, the Putnam Court's emphasis on the likelihood that the landlord's promise to make repairs will induce the tenant to forgo repair efforts which it might otherwise have made clearly is not implicated by that agreement. The record reflects that Grand Manor regularly performed repairs (although perhaps negligently), including repairs to the alleged injury-causing roof condition in 2009, and retained a contractor to make further repairs to the roof two weeks before the accident. In addition, the regulatory agreement required monthly deposits into a reserve fund to be used for replacement of structural elements and mechanical equipment at the facility, and the 1978 amendment to the lease permitted only Grand Manor to withdraw money from the fund "for the purposes for which such fund is established." Significantly, Grand Manor successfully sought HUD's authorization for the release of money from this fund for the purpose of maintaining the facility's sprinkler system, whereas nothing in the record suggests that defendants ever performed any repairs.

Thus, the "exception to the general rule" set forth in Putnam is inapplicable to the regulatory agreement, and the general rule applies – that is, the "landlord is not liable for conditions upon the land after the transfer of possession" (38 NY2d at 617). Indeed, adoption of plaintiff's proposed rule – that would require us to extend the exception set forth in Putnam to any agreement made by the lessor to make repairs – would mean that lessees could assume the sole obligation in a lease to maintain premises in good repair but

avoid making repairs in reliance on a covenant later discovered between the land owner and a third party, a result not intended or supported by Putnam.

The parties' remaining arguments are either unpreserved, rendered academic or lacking in merit. Accordingly, the order of the Appellate Division should be affirmed, with costs.

Henry v Hamilton Equities, Inc.

No. 72

RIVERA, J. (dissenting):

When an out-of-possession property owner enters a federal regulatory agreement to fund a nursing home project that requires the owner to maintain the premises in good condition and repair, and when that agreement's conditions are incorporated as superseding

terms in the lease between the owner and the tenant, the owner should be subject to liability to persons lawfully on the premises for injuries proximately caused by negligent maintenance. That result flows naturally from Putnam v Stout (38 NY2d 607 [1976]), which held that a property owner "may be liable for injuries to persons coming onto [the owner's] land with the consent of [the] lessee solely on the basis of [the] owner's contract or covenant to keep the premises in repair" (id. at 617). The Putnam rule is based on the Restatement (Second) of Torts and applies to an out-of-possession landowner who has delegated the primary duty to maintain the premises to a lessee or tenant (id.), as is the case here.

The majority's conclusion that the regulatory agreement—the terms of which are incorporated into and supersede the lease—has no effect on the leasehold relationship or the owner's duty of care to the lessee and others on the property is contrary to property and contract law. It misunderstands basic elements of New York tort law, as evidenced by the majority's attempt to evade Putnam's defining rationale and the policy central to the holding in that case. It also undermines the Congressional purpose of funding nursing home projects like defendants'—namely, to address an urgent need to provide housing and treatment to vulnerable populations unserved by the private market through increased funding for construction and maintenance of safe and affordable facilities.

I.

Defendant corporate and individual property owners (the Hamilton defendants) entered a contract to build and run a nursing home facility on their land.[1] The contract required that they secure the capital necessary to realize this business venture. When they failed to get a mortgage through the private commercial mortgage market, they sought and obtained a federally insured, 5.6-million-dollar mortgage endorsed by the United States Department of Housing and Urban Development (HUD). In consideration for the endorsement, and in accordance with the applicable federal statutory and regulatory requirements, the Hamilton defendants signed a regulatory agreement with HUD (HUD agreement), by which they covenanted to repair and maintain the property throughout the life of the HUD agreement. The Hamilton defendants reasserted that promise in their amended lease with the nursing home facility lessee, Grand Manor.

This appeal concerns plaintiff Carol Henry's tort claims against the Hamilton defendants as owners of the property where the nursing home is located. She alleges that while employed as a nurse for Grand Manor, she slipped and fell while assisting a resident, and due to the fall, she suffered injuries to her neck and hip that render her unable to return to work. According to plaintiff, she slipped on a puddle of water caused by a persistent roof leak. She further avers that the Hamilton defendants were on notice of the defect

[1] As identified by plaintiff, the Hamilton defendants are Hamilton Equities, Inc., Hamilton Equities Company, and Suzan Chait-Brandt as administrator of the estate of Joel J. Chait.

based on periodic inspections of the nursing home indicating exigent health and safety deficiencies, but that they failed to make proper repairs.

The Appellate Division affirmed Supreme Court's order granting the Hamilton defendants' summary judgment motion, thereby dismissing the complaint and all cross claims against them (Henry v Hamilton Equities, Inc., 161 AD3d 418, 418 [1st Dept 2018]). The court concluded that no exception applies here to the general rule that out-of-possession landowners are not liable for negligent maintenance of the premises. In so holding, the court rejected plaintiff's argument that the Hamilton defendants owed her a duty of care because they contractually agreed with HUD to make repairs or maintain the premises, and thus had to make the repairs if the lessee failed to do so (id. at 419).

This appeal turns on whether the Hamilton defendants owe plaintiff a duty of care based on their HUD agreement, as incorporated in the lease with Grand Manor. I would answer that question in the affirmative because the relevant terms of the lease and HUD agreement plainly establish that the Hamilton defendants covenanted with Grand Manor to abide by their promise to the federal government to maintain the premises in good repair and condition.

II.

A.

The literal terms of the Hamilton defendants' leasehold agreement are not in dispute. According to a 1974 contract, fashioned as a lease for the construction and operation of a

"240 bed Health Related Facility," Grand Manor[2] agreed to be solely responsible for maintaining the premises. The lease states,

> "Section 7.1. During the full term of this lease, the Lessee [Grand Manor] shall, at its sole cost and expense, maintain and keep all parts of the leased premises and all of its fixtures, furniture, machines, and equipment and appurtenances in a good state of repair and condition and whenever deemed necessary by the holder of any institutional first mortgage to which this lease is subject and subordinate, Lessee shall replace any of said property at its own cost and expense, free and clear of any liens or encumbrances . . . .
>
> "Section 7.3. Lessor [the Hamilton defendants] shall not be required to maintain, repair or replace any part of the leased premises or any of its fixtures, furniture, machines, equipment or appurtenances."

Once the Hamilton defendants determined it was necessary to secure financing for the project through the Federal Housing Administration (FHA), they amended the lease with Grand Manor to reflect applicable federal requirements to ensure approval of the funding. The amended lease provides, in relevant part,

> "Section 25.1. Lessor [the Hamilton defendants] 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. Consistent therewith the parties hereto agree that so long as an escrow fund is required after completion of said facility and turning possession thereof over to Lessee by Lessor, they will contribute to the fund on a monthly basis

[2] The lessees were Saul Liebman and Bert Liebman "d/b/a as Grand Manor Health Related Facility." I refer to the lessees, consistent with the parties' lease agreements, as Grand Manor.

. . . .

> "It is understood and agreed that only Lessee may withdraw from such fund for the purposes for which such fund is established. However, at the time Lessee shall withdraw any amount from such fund for those purposes, it shall pay over to Lessor within ten days from such withdrawal one-third of the amount withdrawn. . . .
>
> "Section 25.4. . . The parties agree that such fund shall remain in being so long as the FHA mortgage shall remain in effect and/or so long as such fund shall be a requirement of the FHA."

The parties incorporated all terms from the 1974 lease that did not otherwise conflict with the HUD agreements:

> "Section 27.3. Except as set forth herein the terms and conditions of [the] lease Dated July 30, 1974 shall be and remain in full force and effect."

Significantly, the parties also agreed that the amended lease terms were subordinate to the HUD agreement.

> "Section 27.1. In the event of any inconsistency with respect to the terms, provisions and conditions of this [amended lease] 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."

The HUD agreement entered thereafter confirms HUD and the Hamilton defendants' intent—as understood and accepted by Grand Manor—that its provisions and requirements supersede any other promise made by the Hamilton defendants as owners of the property. To that end, the agreement states, in relevant part,

> "Owners warrant that they have not, and will not, execute any other agreement with provisions contradictory of,

> or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith."

Those controlling terms accord with HUD's mandated regulation of the nursing home project. For example, the HUD agreement states that,

> "Owners shall not without prior written approval of the Secretary [of HUD] [c]onvey, transfer, or encumber any of the mortgaged property, or permit conveyance, transfer[,] or encumbrance of such property. . . .
>
> "The Owners or lessees shall at all times maintain in full force and effect from the state or other licensing authority such license as may be required to operate the project as a nursing home and shall not lease all or part of the project except on terms approved by the Secretary. . . .
>
> "Owners will comply with the provisions of any Federal, State, and local law prohibiting discrimination in housing on the grounds of race, color, creed, or national origin, including Title VI of the Civil Rights Act of 1964 (Public Law 88-352, 78 Stat. 241), all requirements imposed by or pursuant to the Regulations of the Department of Housing and Urban Development (24 CFR, Subtitle A, Part 1) issued pursuant to that title, and regulations issued pursuant to Executive Order 11063."

HUD's oversight extends to the fiscal and structural integrity of the nursing home project, and thus HUD imposed a duty of care on the Hamilton defendants:

> "Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition. . . ."

Plaintiff's expert in this matter, a former assistant to the Commissioner of the Federal Housing Administration during the time when the Hamilton defendants entered the

HUD agreement, and who was responsible for similar nursing home projects, confirmed that the HUD agreement imposed upon the Hamilton defendants a nondelegable duty and ultimate responsibility to maintain the property in good repair.

Further, as noted in the amended lease, the HUD agreement mandates the owners' establishment of a reserve fund,[3] under the control of the mortgagee, to ensure a readily available source to pay for repairs.

> "Owners shall establish or continue to maintain a reserve fund for replacements by the allocation to such reserve fund in a separate account with the mortgagee or in a safe and responsible depository designated by the mortgagee, concurrently with the beginning of payments towards amortization of the principal of the mortgage insured or held by the Secretary of an amount equal to $4,081.75 per month unless a different date or amount is approved in writing by the Secretary."

These terms, provisions, and conditions dictate, in accord with applicable federal statutes and regulations, how the Hamilton defendants must exercise their lessor responsibilities and obligations within the context of HUD's ongoing federal oversight of the nursing home project, eventually run as the Grand Manor Nursing and Rehabilitation Center.

B.

The construction and interpretation of a lease is subject to basic principles of contract law (South Rd. Assoc., LLC v International Bus. Machs. Corp., 4 NY3d 272, 277

[3] The amended lease refers to an FHA "replacement fund" or "escrow fund." It is undisputed this is the "reserve fund" described in the HUD agreement. For clarity purposes, I adopt HUD's designation.

[2005]; Farrell Lines v City of New York, 30 NY2d 76, 82 [1972]; Arkin Kaplan Rice LLP v Kaplan, 120 AD3d 422, 426 [1st Dept 2014]). Under those established rules, "'when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms'" (South Rd. Assoc., LLC, 4 NY3d at 277, quoting Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004]). Moreover, as with any other contract, "the parties to a lease may, by mutual consent, alter, change, cancel, or modify its terms" (74 NYJur2d Landlord and Tenant § 60). The effect of an agreement modification is the creation of a new contract (see Walker v Millard, 29 NY 375, 378 [1864]; 350 E. 30th Parking v Board of Mgrs. of 350 Condominium, 280 AD2d 284, 287 [1st Dept 2001]). In other words, the modification supplants provisions of the original agreement to the extent they are affected by the amendment, while the balance remain binding (Cortesi v R & D Constr. Corp., 73 NY2d 836, 838 [1988]; see also Fane v Chemung Canal Trust Co., 151 AD3d 1526, 1528 [3d Dept 2017]; OneBeacon Ins. Co. v Uniland Partnership of Delaware, L.P., 121 AD3d 1548, 1548-1549 [4th Dept 2014]).

Applying these principles here, it is clear that in accordance with the amended lease, the Hamilton defendants are liable to persons lawfully on the nursing home property for injuries proximately caused by negligent maintenance of the premises. Here, the amended lease incorporated by reference the original lease terms and conditions and became the new controlling leasehold document between the Hamilton defendants and Grand Manor. The amendment also states that in the event of an inconsistency, the federal regulatory agreement "will prevail and govern the rights of the parties." The original lease term that

Grand Manor was solely responsible for maintenance and repairs, now part of the amended lease, is thus superseded by the conflicting term in the HUD agreement that the Hamilton defendants were responsible for maintaining the property in good repair and condition.

The Hamilton defendants' view, shared by the majority, that there is no conflict in terms between the two agreements is belied by the plain language of the HUD agreement and the amended lease. The Hamilton defendants' argument is twofold: (1) the original lease provision placed the sole duty to maintain the property in good condition and repair on Grand Manor, and (2) the HUD agreement, by contrast, merely creates a contractual relationship between the landowners and HUD, which cannot serve as a basis for a tort obligation to third parties. The Hamilton defendants cannot have it both ways. Either the terms of the amended lease along with the original lease mean what they say or there is no leasehold promise at all. The latter is an untenable reading of the arrangement between the Hamilton defendants and Grand Manor.

The majority concludes there is no conflict among the documents because the HUD agreement did not relieve Grand Manor of its duty to maintain the premises under the 1974 lease (majority op at 4 n 2). The majority's point is unclear. Under established legal doctrine, HUD, as a nonsignatory, could not terminate Grand Manor's obligations because only a party to a contract may relieve another of their bargained-for promises. What HUD could and did do is mandate, as a condition of its endorsement of the mortgage, that any other agreements entered into by the owners would not contradict or oppose the HUD agreement, and that in all cases the HUD agreement would control. The owners complied

by incorporating the lease terms into the amended lease except to the extent those prior obligations conflicted with the HUD agreement. As I have discussed, an inescapable conflict arises between the owners' federal covenant to maintain the mortgaged premises and the lease provision that placed the sole duty to maintain the property in good condition and repair on Grand Manor.

III.

A.

The Hamilton defendants are not entitled to summary judgment because they assumed ultimate responsibility in the amended lease for maintaining the premises in good condition, which provides a basis for potential liability to plaintiff. As the Court held in Putnam, an out-of-possession landowner who covenants to make repairs "in the lease or otherwise" is liable in tort to persons lawfully on the premises who are not in privity of contract with the owner (38 NY2d at 617, quoting Restatement [Second] of Torts § 357). The Hamilton defendants thus are "subject to liability for physical harm caused to" plaintiff—a person "upon the land with the consent of the lessee" (id.).

That ends the analysis and there is no need to proceed as the majority does to consider whether, under Putnam, the HUD agreement contains a freestanding covenant to repair that subjects these out-of-possession owners to tort liability. Nevertheless, even under the majority's approach, the outcome is the same because the Hamilton defendants' promise to the federal government, solemnized in the HUD agreement, is the type of

covenant to repair that subjects these out-of-possession owners to liability in accordance with Putnam.

As the majority acknowledges, the rule adopted in Putnam was a break from precedent (majority op at 8). This change was not unforeseeable, given that our earlier cases suggested and at times led the evolution in tort law, expanding the foundation for liability beyond traditional notions of party privity (see Putnam, 38 NY2d at 615-616, discussing MacPherson v Buick Motor Co., 217 NY 382 [1916]; Cullings v Goetz, 256 NY 287 [1931]; Ultramares Corp. v Touche, 255 NY 170 [1931]; Greenberg v Lorenz, 9 NY2d 195 [1961]; Randy Knitwear v American Cyanamid Co., 11 NY2d 5 [1962]; Guarino v Mine Safety Appliance Co., 25 NY2d 460 [1969]; Codling v Paglia, 32 NY2d 330 [1973]).

Finally, in Putnam, this Court recognized that prior legal doctrines dependent on privity of contract between the landowner and tenant "no longer retain the vitality they may once have had" because "the precept of privity is sterile and no longer serves the interests of justice" (38 NY2d at 615-616). The Court additionally observed that "it is likewise inconsistent with reality to suggest that the parties do not accept their mutual engagements with a full awareness that if the necessary repairs are not made, the safety of such persons will be endangered" (id. at 616 [citation omitted]).

Against this analytic backdrop, the Court embraced "the modern trend" and expanded an out-of-possession landowner's tort liability,[4] adopting the rule of the Restatement (Second) of Torts. That rule states, in relevant part,

> "A lessor of land is subject to liability for physical harm caused to [a] lessee and others upon the land with the consent of the lessee or [the lessee's] sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
>
> (c) the lessor fails to exercise reasonable care to perform [the lessor's] contract" (Restatement [Second] of Torts § 357).

[4] Decades after Putnam, in Espinal v Melville Snow Contrs. (98 NY2d 136, 140 [2002]), our Court summarized three other exceptions to the general no-tort-liability rule for out-of-possession landowners (id. at 140). As explained in that case, such owner is potentially liable to third persons in tort:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of [their] duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (id. [internal citations and quotation marks omitted]).

These exceptions are not at issue in this appeal but exemplify our Court's continued recognition of the broadening scope of tort liability founded on a landowner's conduct as regards the maintenance of the property.

The Court in Putnam explained that the "Restatement rule rests on a combination of factors," which justify imposing liability, notwithstanding the general rule insulating such owners from tort claims.

> "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 [the tenant] otherwise might have made; thirdly, the lessor retains a reversionary interest in the land and by [the lessor's] contract may be regarded as retaining and assuming the responsibility of keeping [the lessor's] premises in safe condition" (38 NY2d at 617).

Finally, Putnam also instructs that the following "social policy factors must be considered":

> "(a) [T]enants 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 [the landlord's] pecuniary benefit from the relationship, the landlord could properly be expected to assume certain obligations with respect to the safety of the others" (id. at 617-618, citing Restatement [Second] at Torts § 357, Comment b).

B.

The Putnam exception applies here. Under the analytic framework set forth above, the first and third factors unequivocally weigh in favor of the Hamilton defendants' exposure to potential tort liability for plaintiff's injuries. As to the first, the Hamilton defendants undeniably agreed for consideration to adequately maintain the premises. The HUD agreement states that "in consideration of the endorsement for insurance by the

Secretary [of HUD] to the [] note . . . Owners agree . . . so long as the contact of mortgage insurance continues in effect . . . Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition." The third factor is similarly straightforward, as the contractual language of the amended lease incorporates the parties' agreement that "Lessor . . . shall . . . have the right to enter the leased premises [to] (a) Exhibit for sale; (b) Inspect[ ] . . . ; (c) Mak[e] repairs or additions to the leased premises and perform[] any other work therein resulting from Lessee's failure to perform its covenants herein contained . . . ." Thus, in this context, the right to reenter is probative of the Hamilton defendants' reversionary interest in the land and their concurrent obligation to keep the premises in good repair.

Unlike the majority, I conclude that the second factor—the likelihood that the Hamilton defendants' promise to make repairs would induce Grand Manor to forego repair efforts—also favors plaintiff. The amended lease refers to the HUD agreement and subjects both Grand Manor and the Hamilton defendants to all superseding federal terms, provisions, and conditions. Thus, Grand Manor, as lessee, was on notice that the Hamilton defendants were required under the HUD agreement to maintain the premises in good condition. Moreover, the amended lease describes the reserve fund, setting forth the Hamilton defendants' required one-third monthly payment into the account, and mandating that Grand Manor reimburse the Hamilton defendants their one-third contribution within 10 days of Grand Manor accessing the funds for repair purposes. Notably, any failure to maintain the premises placed the Hamilton defendants at risk of penalties and debarment

from federal programs for, as relevant here, "willful failure to perform in accordance with the terms of one or more public agreements or transactions" (2 CFR 2424.1110 [b] [1]). Under these circumstances, the second factor supports recognition of the Hamilton defendants' potential tort liability.

The fact that Grand Manor made repairs and the Hamilton defendants did not, while true, is not determinative of the landowners' duty, as suggested by the Putnam Court's limiting phrase focusing on a "*likelihood* that the landlord's promise to make repairs [would] induce the tenant to forego repair efforts" (Putnam, 38 NY2d at 617 [emphasis added]). Grand Manor understood the powerful incentive on the Hamilton defendants to maintain the premises in good condition should Grand Manor fail to do so. Put another way, Grand Manor always knew that the Hamilton defendants could be counted upon to make the repairs to avoid the consequences of breaching their promise to the federal government. To that end, the Hamilton defendants were entitled to reimbursement of their proportional share from the reserve fund from Grand Manor and they could seek access to additional funds in the reserve from the Secretary of HUD.

The social policies identified in Putnam overall favor subjecting the Hamilton defendants to liability for negligent maintenance of the premises based on the HUD agreement. The first policy is grounded on the premise that a tenant may lack funds to make repairs. Here, there are significant costs associated with maintenance of this large nursing home facility and its surrounding premises. Given the potential expenses, HUD required defendant Hamilton Equities Company to make continuing contributions to a

reserve fund for repairs. The Hamilton defendants also committed to contributing one-third of the monthly required payments to the reserve fund. In the event Grand Manor did not make repairs, the Hamilton defendants could request from HUD's Secretary access to the reserve fund to pay for the repair costs. Nothing in the record suggests Grand Manor had the financial resources, absent the reserve fund, to pay for repairs without experiencing financial distress.

The majority's conclusion that the parties understood that Grand Manor was responsible for the repairs because it alone could make withdrawals from the reserve fund (majority op at 5 n 3) misconstrues the HUD agreement as incorporated into the amended lease. The HUD agreement mandates the Hamilton defendants establish and contribute to the fund. Nothing in that language suggests that if Grand Manor failed to make repairs, for whatever reason, the Hamilton defendants could ignore their federal regulatory obligation to maintain the premises in good condition and repair. Moreover, nothing prevented the Hamilton defendants from seeking permission from the Secretary of HUD to access the reserve fund to make the repairs. Indeed, the HUD agreement provides as much: "Disbursements from such fund . . . may be made only after receiving the consent in writing of the Secretary." If, as the majority believes, the amended lease was intended to prevent the Hamilton defendants from requesting this consent, such prohibition would conflict with the superseding HUD agreement, negating this amended lease term.

In support of its mistaken conclusion that only Grand Manor can withdraw from the escrow account, the majority cites federal litigation between Grand Manor and Hamilton

Equities, Inc., but in that case, HUD initially informed the mortgagee who controlled the reserve account that the owners had agreed to release the funds and HUD requested that the mortgagee issue two checks for partial repair costs, neither one to go to Grand Manor. In fact, the mortgagee issued one check made out to the owners (Grand Manor Health Related Facility, Inc. v Hamilton Equities Inc., 941 F Supp 2d 406, 412 [SD NY 2013]). Significantly, the majority ignores the applicable federal regulations governing this facility and imposing responsibility for repairs on the owners (see 24 CFR 207.19 [f] [2] [1978] ["The mortgagor shall maintain its project, the grounds, buildings, and equipment appurtenant thereto, in good repair and will promptly complete necessary repairs and maintenance . . ."]).

The second policy concerns the length of the leasehold and presumes that a tenant with a long-term lease is more likely to have an incentive to make repairs than a tenant with a short-term lease, so that the existence of a long-term lease cuts against liability of an out-of-possession landowner. Here, although the lease provides for a 25-year term, with two ten-year renewal options, the Hamilton defendants' incentive to make repairs is at least as great as that of Grand Manor. Both parties' investments in the nursing home project depend on compliance with the HUD agreement, as well as the regulatory and licensure requirements imposed on nursing home facilities, all of which seek to ensure the structural integrity and safety of the premises.

The third policy focuses squarely on society's expectation that a landowner should be liable for promises to maintain a safe premises made in exchange for a pecuniary benefit.

This requires a court to identify the existence and value of the benefit. Here, the Hamilton defendants greatly benefitted from the HUD agreement because without it, they could not have secured the millions of dollars in financing necessary to construct the nursing home facility. After years of unsuccessfully seeking to fund the project with private funding, the Hamilton defendants turned to the federal government for assistance because, as they represented in the amended lease, they were "unable to obtain conventional financing."

This combination of factors, and consideration of the social policy concerns, warrant "plac[ing] an increased burden on [the Hamilton defendants] who contract[ed] to keep the land in repair" (Putnam, 38 NY2d at 617). That burden manifests as a duty of care that gives rise to potential liability in tort for injuries proximately caused to plaintiff due to negligent maintenance of the premises.[5]

C.

The majority's contrary analysis and conclusion are at odds with Putnam's rationale. To begin, plaintiff's appeal does not require further expansion of our existing precedent; it only requires the proper application of Putnam to the facts of this case. The majority fails

[5] The majority misconstrues my analysis as establishing "an additional test to be applied in each case" (majority op at 9 n 4). The only test I employ is the one adopted by the Court in Putnam which imposes tort liability on a landowner who agrees "to keep the land in repair" for on-site injuries incurred by third parties lawfully on the premises (38 NY2d 616-617). The operative elements of that tort are what the majority now erroneously identifies as "factors." Applying those elements here, the Hamilton defendants are not entitled to summary judgment merely by asserting they are out-of-possession owners. This is because if plaintiff establishes, as she has, that they contracted by a covenant with HUD to keep the land in repair—which creates the duty of care to plaintiff—she may prevail on her tort claims against the Hamilton defendants if she also proves the other elements of the tort, i.e. breach of the duty, causation, and injury (id. at 617).

to do so, incorrectly holding that what matters in determining a landowner's tort liability to third parties is the agreement between the landowner and tenant as to which party must maintain the premises. Instead, what drives the analysis is the landowner's covenant to repair as set forth in "the lease or otherwise." That is the rule adopted by the Court in Putnam. Nowhere in the opinion does the Court state—and it surely would have done so as it was pronouncing a new divergent rule—that the owner's covenant must be with the tenant. Instead, the Court focused on the landowner's conduct as a basis to impose an "increased burden" exposing the owner to liability in tort.

The majority implies that the factors and social policy considerations are irrelevant because once Putnam adopted the rule, there is no basis to revisit the Court's underlying rationale (majority op at 9 n 4). That assertion ignores fundamental rules of legal analysis. Courts regularly consider the reasoning of a decision to determine whether the rule applies to the facts before it. Just so here, as the Appellate Division erroneously concluded that the social policy considerations cited in Putnam are promoted only when the landowner's promise is to the tenant. The parties also discuss the factors in support of their respective positions. In any case, the majority retreats from its unsupportable position and in fact analyzes the second factor in an attempt to bolster its conclusion: "an analysis of the Putnam Court's rationale for adopting the rule further indicates that the exception does not apply to (and should not be expanded to cover) the HUD regulatory agreement" (majority op at 12). Still, the majority fails to discuss the first and third Putnam factors—perhaps because both factors plainly support application of the Putnam rule to the Hamilton

defendants. Nevertheless, the focus on the second factor solely does not assist the majority because the Putnam Court did not hold or even suggest that the second factor is outcome determinative. In fact, the opinion expressly states the rule adopted "rests on a combination of factors" and further notes the various social policies that "must be considered" in determining whether to impose tort liability on an out-of-possession landowner (Putnam, 38 NY2d at 617). The analysis is thus multifaceted.[6]

To the extent the majority rejects the notion that the Hamilton defendants and Grand Manor could both carry responsibility for maintenance of the premises but the Hamilton defendants bear tort liability for negligent maintenance, we have recognized just the opposite: "While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210 [of the Administrative Code of the City of New York]" (He v Troon Mgt., Inc., slip op at 9 [decided today]). It would be illogical and unsound policy to hold that a duty of care and tort liability imposed by a local government's statutory fiat gives rise to an action against a landowner for negligent maintenance of a publicly-owned sidewalk, but no such duty or liability arises when a landowner freely covenants with the federal government to repair the owner's property in exchange for millions of dollars of taxpayer-insured financing for construction of a socially beneficial

[6] I have no occasion to address whether each factor and relevant social policy must weigh in favor of a plaintiff in order to subject an out-of-possession landowner to liability, because for the reasons I have discussed, all those considerations support application of the Restatement Second rule as adopted in Putnam.

nursing home facility. Contrary to the majority's position, as I have discussed, this appeal concerns liability for the owner's breach of a nondelegable duty imposed by the HUD agreement and federal regulation (surely no less potent than the New York City ordinance to which we gave effect in He).

The obvious policy served by the majority holding is the one rejected by the Court in Putnam—the insulation of landowners from liability even when they assume responsibility for maintaining their property. A retrograde rule is reason enough to reject the majority approach, but the rule has the added disadvantage of undermining governmental efforts to improve residential and quality-of-care services for society's senior members. I now turn to the policies animating the HUD agreement.

IV.

Contrary to the majority's suggestion that the HUD agreement has no impact on the leasehold tenancy or landlord/tenant relationship (majority op at 11), and the Appellate Division's narrow view of HUD's goals here, the purpose of the federal regulatory agreement between HUD and the Hamilton defendants was not solely to "benefit HUD and the bank" (Henry, 161 AD3d at 419), but to assist in the provision of housing to vulnerable populations. To fully appreciate the interlocking aspects of the Hamilton defendants' arrangement with HUD and Grand Manor, it is important to understand the overarching federal interests served by HUD's endorsement of the nursing home project.

Justification for this investment of federal taxpayer funds is grounded in long-standing federal housing policy. Congress has determined that the "general welfare and

security of the Nation and the health and living standards of its people require housing production and related community development sufficient to . . . eliminat[e] substandard and other inadequate housing . . . , thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation" (42 USC § 1441). "One of the specific purposes of the [federal housing statutes] is to provide a decent home and a suitable living environment for every American family that lacks the financial means of providing such a home without governmental aid" (Thorpe v Housing Auth. of City of Durham, 393 US 268, 281 [1969] [internal quotation marks and citation omitted]).

To achieve its goal of ensuring the construction and proper maintenance of safe and affordable living accommodations, Congress provided in the National Housing Act for publicly financed loan and mortgage insurance. Section 220 provides:

> "The purpose of this section is to aid in the elimination of slums and blighted conditions and the prevention of the deterioration of residential property . . . with a system of loan and mortgage insurance designed to assist the financing required for the rehabilitation of existing dwelling accommodations and the construction of new dwelling accommodations . . . ." (12 USC § 1715k [a]).

Congress also sought specifically to relieve "the shortage of housing for elderly persons and to increase the supply of rental housing for elderly persons" (12 USC § 1715v). Section 232 thus states that the Act "assists in the provision of facilities for any of the following purposes" or combinations thereof:

> "(1) The development of nursing homes for the care and treatment of convalescents and other persons who are not

> acutely ill and do not need hospital care but who require skilled nursing care and related medical services, including additional facilities for the nonresident care of elderly individuals and others who are able to live independently but who require care during the day.
>
> "(2) The development of intermediate care facilities and board and care homes for the care of persons who, while not in need of nursing home care and treatment, nevertheless are unable to live fully independently and who are in need of minimum but continuous care provided by licensed or trained personnel, including additional facilities for the nonresident care of elderly individuals and others who are able to live independently but who require care during the day.
>
> "(3) The development of assisted living facilities for the care of frail elderly persons" (12 USC § 1715w).

To give effect to the statutory purpose, HUD has issued detailed regulations pursuant to its delegated authority that require the borrower maintain the premises in a safe condition (see 24 CFR 5.703, made applicable to HUD-financed nursing homes under 24 CFR 200.853 and 200.855). Accordingly, "[o]wners . . . must maintain [a nursing home] in a manner that is decent, safe, sanitary and in good repair" (24 CFR 5.703). Also, HUD may provide financial support for nursing home construction or rehabilitation only when the appropriate state agency certifies:

> "(i) there is a need for such home or facility or combined home and facility, and (ii) there are in force in such State or in the municipality or other political subdivision of the State in which the proposed home or facility or combined home and facility is to be located reasonable minimum standards of licensure and methods of operation governing it" (12 U.S.C. § 1715w [d] [4] [A]).

In furtherance of the intended statutory purpose and specific goal of increasing the development of well-established and adequately maintained facilities for the elderly, HUD entered into the HUD agreement with the Hamilton defendants which insured the mortgage and made possible the construction of the nursing home run by Grand Manor. The Hamilton defendants thereby became subject to the statutory and regulatory framework applicable to nursing homes.

It is abundantly clear that the Hamilton defendants, Grand Manor, and HUD representatives were on notice of, and understood, several key aspects of this HUD arrangement: the owners could not proceed with the nursing home project absent federal backing that allowed them to secure the mortgage to build the nursing home; to secure this financing, the Hamilton defendants were required to enter an agreement with HUD, which subjected them to federal regulation and required that they make repairs and maintain the premises in good condition; the federal requirements and covenants set forth in the HUD agreement superseded prior and future conflicting terms and agreements; and the Hamilton defendants were ultimately responsible for negligent maintenance of the property by any person or entity charged with the actual physical repair work.

These promises operated to ensure that the nursing home facility and surrounding premises were properly maintained in good condition and that funds were readily available to make such repairs, whether as a matter of course or upon approval by the Secretary of HUD. The arrangement worked as follows: the owners received federal assistance to secure an unconventional mortgage and in return agreed, amongst many other promises, to

maintain the property. The Hamilton defendants and Grand Manor agreed to the establishment of the reserve fund escrow account, and to their proportional contributions. They also agreed that Grand Manor could make the repairs and access the account to pay for the repair costs. Thus, the HUD arrangement maximized the likelihood that the property would be adequately maintained, protecting the federal government's financial investment and achieving its goal to promote "housing production and [ ] community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing . . . , and the realization . . . of a decent home and a suitable living environment" for every family in the United States, "thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation" (42 USC § 1441). In other words, since both the Hamilton defendants and Grand Manor could make necessary repairs to maintain the property, and the Hamilton defendants were ultimately liable if they failed to ensure the repairs were adequately made, including civil liability to third parties lawfully on the property, the Hamilton defendants were unlikely to avoid their promise to HUD.

By permitting a landowner to avoid liability to those injured on the premises, the majority's decision undermines the Congressional intent that federal taxpayer money be used to establish well-maintained and safe nursing homes for the most vulnerable members of our society who reside and receive services at these facilities. It is wholly rational for society to hold a landowner to its promise that its facility will be kept in good condition, and if the landowner fails to do so, to subject such landowner to tort-based liability for

third-party injuries proximately caused by the failure to maintain the premises. It is even more rational under the circumstances here, where the federal government imposed a duty upon the landowner to maintain and repair a nursing home as a condition of the federally insured funding project and the landowner's continued oversight of the nursing facility. Given HUD's mission to "reliev[e] the shortage of housing for elderly persons and to increase the supply of rental housing for elderly persons" (12 USC § 1715v), the Hamilton defendants "could properly be expected to assume certain obligations with respect to the safety of others" (Putnam, 38 NY2d at 618, citing Restatement [Second] of Torts § 357, Comment b; Gallagher v St. Raymond's R.C. Church, 21 NY2d 554, 557 [1968]; Prosser & Keeton, Torts § 63 at 410 [4th ed]).

V.

This appeal is controlled by established rules of property and contract, which reflect the policy justifications for owner tort liability to third parties recognized by this Court in Putnam. As explained, in order to secure federally insured financing for the establishment of a nursing home facility on the Hamilton defendants' property, the landowners entered an agreement with HUD that required them to maintain the property in good repair and condition. The Hamilton defendants and Grand Manor incorporated the HUD agreement by reference into their amended lease, and further acknowledged that in the case of any inconsistencies, the HUD agreement controlled. These promises serve as the basis for the Hamilton defendants' duty of care and potential civil liability to plaintiff, an employee of Grand Manor, who alleges her injuries were proximately caused by the negligent

maintenance of the nursing home's roof. Thus, the Hamilton defendants are not entitled to summary judgment and the Appellate Division order should be reversed. I dissent.

* * * * * * * * * * * * * * * * *

Order affirmed, with costs. Opinion by Judge Stein. Chief Judge DiFiore and Judges Fahey, Garcia and Feinman concur. Judge Rivera dissents in an opinion in which Judge Wilson concurs.

Decided October 24, 2019