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COURT OF APPEALS
STATE OF NEW YORK

CAROL HENRY,

Appellant,

-against-

HAMILTON EQUITIES, INC., et al.,

No. 72

Respondents.

20 Eagle Street
Albany, New York
September 10, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Good afternoon. The first
2 appeal on this afternoon's calendar is appeal number 72,
3 Henry v. Hamilton Equities.

4 Counsel?

5 MR. FRIEDMAN: Thank you, Your Honor. May it
6 please the court, Your Honor. My name is Alan Friedman. I
7 represent the appellant, Carol Henry, in this case. I
8 respectfully request three minutes' time for rebuttal.

9 CHIEF JUDGE DIFIORE: You may have three minutes,
10 sir.

11 MR. FRIEDMAN: Thank you, Your Honor.

12 CHIEF JUDGE DIFIORE: You're welcome.

13 MR. FRIEDMAN: Your Honors, there are two
14 separate grounds why the Appellate Division First
15 Department should be reversed. The first ground is that
16 the Appellate Division First Department incorrectly added
17 another prong to the second Restatement of Torts which this
18 court adopted in Putnam v. Stout in 1976.

19 The second reason this court should reverse the
20 First Department - - - Appellate Division First Department
21 is that the respondent was never truly an out-of-possession
22 landlord because they had a nondelegable duty to continue
23 to keep the property in good repair. In 1976, Your Honors,
24 this court adopted - - -

25 JUDGE FAHEY: What'd they add to the first prong?



1 MR. FRIEDMAN: Well, the first prong, Your Honors
2 is that - - - as this court knows, the second Restatement
3 of Torts, where a party contracts, by covenant in a lease
4 or otherwise, to keep the land in repair. It could be - -
5 -

6 JUDGE GARCIA: But doesn't that prong of the
7 restatement say "the lessor, as such, has contracted"? So
8 what does the "as such" mean?

9 MR. FRIEDMAN: Well, the "or otherwise" or - - -

10 JUDGE GARCIA: To me, it means the lessor, as a
11 lessor, has contracted. Or otherwise the lessor, I think
12 our cases can do it in orally; they don't have to do in a
13 contract. But they still have to be doing in the capacity
14 of a lessor. That's what "as such" means to me in that
15 provision.

16 MR. FRIEDMAN: I don't disagree, Your Honor, but
17 what - - - what happened in this case and - - -

18 JUDGE GARCIA: But then the one that you want to
19 incorporate is from a mortgage. They're not acting as a
20 lessor when they make that representation.

21 MR. FRIEDMAN: I'm not trying to incorporate from
22 a mortgage, Your Honor. This is a regular tort agreement
23 that was - - - that was entered into between the lessor and
24 the federal government. The less - - -

25 JUDGE GARCIA: But he's not acting as a lessor



1 there.

2 MR. FRIEDMAN: In a sense they are, Your Honor,
3 because what the purpose of HUD is - - - the core mission
4 of HUD is to promote sustainable housing for the express
5 purpose of building communities and improving the quality
6 of life.

7 JUDGE STEIN: Yes, but they do that by loaning
8 money or guaranteeing - - - guaranteeing mortgages and
9 providing buildings that can be kept up, right?

10 MR. FRIEDMAN: Well, yes, Your Honor, but the
11 whole - - -

12 JUDGE STEIN: But - - -

13 MR. FRIEDMAN: I'm sorry.

14 JUDGE STEIN: And their purpose is to make sure
15 that the - - - the property that's being mortgaged is kept
16 in - - - in a - - - in reasonable repair. And - - - and if
17 it's not, their agreement with the mortgagor says you're in
18 default of the mortgage, right?

19 MR. FRIEDMAN: No. No, the - - -

20 JUDGE STEIN: Or you're in default of our
21 agreement, but - - - but there - - - there are consequences
22 to that. But it doesn't say anything about third-party
23 liability.

24 MR. FRIEDMAN: Well, if I may, if I could
25 respond, the Restatement of Torts looks at it from the



1 landowner's responsibility to the public. It doesn't look
2 at it from the - - - the injured person that's injured;
3 from their perspective, do they have a benefit - - - do
4 they get a benefit to sue? The Restatement of Torts looks
5 at it from the landowner's responsibility to the public.
6 And as I just previously said, a review - - -

7 JUDGE FEINMAN: So you're not arguing then that
8 the plaintiff is a third-party beneficiary of this contract
9 between HUD and the landlord/lessor?

10 MR. FRIEDMAN: No, I'm not arguing they're a
11 third-party beneficiary.

12 JUDGE FEINMAN: Okay.

13 MR. FRIEDMAN: In fact, the Restatement of Torts
14 was - - - the modern trend, as of 1976, was to do away with
15 the necessity of privity. And they're not necessarily a
16 third-party beneficiary. But the restate - - -

17 JUDGE FAHEY: Let me just ask you about that
18 then. It seems to me that you're arguing that the contract
19 creates a duty on the landlord's part to keep the property
20 in good repair; am I right about that?

21 MR. FRIEDMAN: Absolutely, Your Honor.

22 JUDGE FAHEY: And that's where the tort
23 obligation arises - - -

24 MR. FRIEDMAN: Yes.

25 JUDGE FAHEY: - - - out of this contractual



1 relationship, and the contractual relationship is based in
2 a desire to keep a mortgageable asset in good repair,
3 right?

4 MR. FRIEDMAN: Absolutely, Your Honor.

5 JUDGE FAHEY: So how does it - - - to follow up
6 on - - - on Judge Feinman's question, how is that not then
7 creating, through a contract, like in Espinal, a third-
8 party beneficiary problem for us? Tell - - - tell me why
9 that - - - this isn't the creation of a third-party
10 beneficiary to that contract, how this tort duty is
11 different from the contractual duty. Explain that to me.

12 MR. FRIEDMAN: Well, if I may, Your Honor?

13 JUDGE FAHEY: Go ahead.

14 MR. FRIEDMAN: My understanding is, in the
15 Restatement of Torts, in Putnam v. Stout it did away with
16 the outdated modes of there had to be a contract between
17 parties to - - - for, in this case, Ms. Henry to bring a
18 lawsuit.

19 JUDGE FAHEY: Um-hum.

20 MR. FRIEDMAN: And that - - - that's - - - and
21 the court adopted the Restatement of Torts, a second
22 Restatement of Torts. So there is no necessity of a
23 contractual relationship where the - - - Ms. Henry would be
24 a third-party beneficiary of a contract. There's no need
25 for that contract anymore pursuant to Putnam v. Stout.



1 Now, just - - -

2 JUDGE STEIN: But when we overruled Cullings in
3 Putnam and essentially adopted the - - - the second
4 Restatement of Torts, we relied on certain policy reasons,
5 didn't we?

6 MR. FRIEDMAN: Yes, Your Honor.

7 JUDGE STEIN: Okay. So tell me how those policy
8 reasons are furthered here. How, in any way, we're - - -
9 we're worried about the - - - the tenant's ability,
10 financial ability to make repair, how there's any evidence
11 in the record that - - - that Grand Manor relied on
12 anything in any agreement between - - - between the owners
13 and HUD to refrain from making repairs when in fact there
14 was this escrow fund and they - - - they went into the fund
15 all the time, and they got permission of HUD, and they made
16 repairs, and everybody knew that's what was going on.
17 Nobody ever went to the owners and said, you make these
18 repairs, right?

19 MR. FRIEDMAN: Well, Your Honor, I believe they
20 went to the escrow fund one time to make the repairs; that
21 is correct.

22 JUDGE STEIN: One time?

23 MR. FRIEDMAN: I think - - - I think it was one
24 time, Your Honor that they went to - - - it wasn't - - - it
25 wasn't more than one time.



1 One thing about the - - - you know, legal
2 liability to a third party is a financial consideration,
3 which is a social policy issue in this case, as Putnam v.
4 Stout. Again, legal - - - this wasn't addressed by the
5 third - - - by the First Department. Legal liability to a
6 third party, in this case Ms. Henry, is a financial
7 consideration which was discussed in the - - - in the lower
8 court, in the First Department Appellate Division.

9 There's - - - this is forty-six years later also
10 then, Putnam - - - Putnam v. Stout. Social issues have
11 changed. And the purpose and mission of, like I said
12 before, of HUD, is to promote sustainable housing for the
13 express purpose of building communities and improving
14 quality of life. But there's also other vested interests -
15 - -

16 JUDGE FAHEY: The way I understood the issue was
17 is that I thought the First Department was saying that if
18 the contract had been between the owner and the tenant,
19 then the duty would have been created. But here the
20 contract was not between the owner and the tenant but - - -
21 but between the financier and the owner and therefore the
22 duty wasn't created.

23 So the question for us then - - - and you can
24 correct me if you think I'm wrong because I don't know if I
25 know the answer to this question, but it was a duty created



1 in tort, or was a contractual obligation created as a
2 result of this contract that only extended between HUD and
3 the owner of the property, as opposed to once you - - -
4 you've made that contract, you had a duty to anyone who
5 uses the property that you own like you would in any other
6 situation as an owner. That's the nub of what I see is the
7 problem here.

8 MR. FRIEDMAN: Sure. Well, there's two points to
9 that, Your Honor.

10 JUDGE FAHEY: Um-hum.

11 MR. FRIEDMAN: Number one is the lower court
12 talked about the - - - well, first the Restatement of Torts
13 - - - again, I said this before - - - puts the duty on the
14 landlord, looks at a perspective from the landowner - - -

15 JUDGE FAHEY: That's clear.

16 MR. FRIEDMAN: - - - not as a - - -

17 JUDGE FAHEY: Right. No, you're right about
18 that. The only question is is: does that duty extend here
19 when the contract is not between the owner and the tenant?
20 And there's case law in the lower courts that seem to go
21 both ways.

22 MR. FRIEDMAN: Well, I will say this, Your Honor.
23 Number one, it does extend because this landowner knew - -
24 - was getting a benefit. They want all the benefits but
25 without any obligation to the public. They're getting



1 public money to build this - - -

2 JUDGE FAHEY: Well, what about the circumstance
3 were the landlord makes an agreement with the tenant to
4 clearly transfer all responsibility for repair and
5 maintenance to the tenant?

6 MR. FRIEDMAN: Well, would that - - - would that
7 - - - well, that's not the case here. This is a regulatory
8 agreement. We - - - may I finish my answer?

9 CHIEF JUDGE DIFIORE: Yes, please.

10 MR. FRIEDMAN: In the context of this case, Your
11 Honor, the regulatory agreement put the burden on the
12 landowner to continue to take care of the property. And
13 there are a lot of social issues that exist now such as
14 other vested interests, Medicare and Medicaid, in many
15 instances. This will have far-reaching implications
16 because Medicare and Medicaid now has clawback rights in
17 many cases to get their money back for when they pay for
18 health benefits for people that are injured by landowners.
19 So this will have far - - - far-reaching - - -

20 JUDGE GARCIA: May I ask - - -

21 MR. FRIEDMAN: - - - implications to the public
22 money.

23 CHIEF JUDGE DIFIORE: Yes.

24 JUDGE GARCIA: What would be the remedy that HUD
25 would have for violation of those terms? What's the remedy



1 under the agreement the landlord has with HUD?

2 MR. FRIEDMAN: Well, I - - - I think there are a
3 number of factors, if I - - - if I can - - - it's not a
4 direct answer, Your Honor. But I'll - - - I'll try to
5 answer it the best I can.

6 JUDGE GARCIA: How about a direct answer?

7 MR. FRIEDMAN: I'm sorry?

8 JUDGE GARCIA: How about a direct answer?

9 MR. FRIEDMAN: I will try to - - -

10 JUDGE GARCIA: Like, what are - - - under the
11 contract - - -

12 MR. FRIEDMAN: The point is - - -

13 JUDGE GARCIA: - - - what are the remedies that
14 HUD would have for a violation of this provision? Aside
15 from whatever liability they might have to a tenant, what
16 is HUD's enforcement ability of that provision? What can
17 they do?

18 MR. FRIEDMAN: Honestly, Your Honor, there was
19 nothing in the regulatory argument that I read where there
20 were any - - - there were any - - -

21 JUDGE GARCIA: Well, what are the consequences of
22 the landlord here, this party, violating the HUD agreement?
23 What are the consequences, generally, for violations of the
24 terms of that agreement?

25 MR. FRIEDMAN: Well, in this case, a third party



1 with a - - - if their property's not kept in repair - - -

2 JUDGE GARCIA: No, but there are other
3 provisions, other covenants, I'm assuming, in the HUD
4 agreement. What are the remedies, what enforcement
5 mechanism does HUD have if this party, the landlord here,
6 doesn't comply with - - -

7 JUDGE FEINMAN: So for example, sometimes a bank
8 and a mortgage says if you let the property go to waste
9 we're going to come in and we're going to make the repairs
10 and you're going to be responsible for that in addition to
11 whatever you borrowed.

12 MR. FRIEDMAN: Well, in this specific case, Your
13 Honor, what happened was - - - I could speak to the facts
14 of this case - - - HUD actually went in and issued reports,
15 issued - - - conducted inspections of the property. And
16 they issued reports. And those reports were not sent to
17 the tenant, they were sent to the landlord, in this case
18 the Hamilton companies. And my understanding is that there
19 would - - - there would be fines that would be imposed in
20 this - - - in this case. But that's just - - - that's just
21 one of the remedies.

22 And if we look at it, as I clearly stated in - -
23 - if I may finish my answer - - - the legal liability to
24 third parties is a financial - - - is a financial
25 consideration. And there are so many other, as I said,



1 social policy issues that exist today, where there's
2 clawbacks, we have Medicare and Medicaid and other
3 interests that have a lawsuit, not just Ms. Henry, through
4 Ms. Henry other entities want - - -

5 JUDGE RIVERA: Counsel, isn't it also a
6 consequence that if you breach the terms of these kinds of
7 agreements that you will not be able to get any more of
8 these federally-subsidized loans? You're basically going
9 to be put out of business.

10 MR. FRIEDMAN: I would agree with that, Your
11 Honor. I would agree with that. We - - -

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 MR. FRIEDMAN: Thank you.

14 CHIEF JUDGE DIFIORE: Thank you.

15 Counsel?

16 Counsel, what difference does it make if the
17 landlord makes the promise to keep the property in good
18 repair in an agreement with the tenant or with a third
19 party?

20 MR. TRICARICO: Well, first of all, may it please
21 the court. My name is Michael Tricarico, and I represent
22 some of the respondents here.

23 I just wanted to make one point clear before I
24 answer that question. The respondents that I represent are
25 Chait Hamilton Management Company, Hamilton Equities, Inc.,



1 Hamilton Equities Company, and Suzan Chait-Grandt, as
2 Administrator of the Estate of Joel Chait. And Chait
3 Hamilton Management Company is not a party to this appeal
4 because the plaintiff and appellant has agreed not to
5 pursue the claims against that entity.

6 Now, I'm sorry; what was your question?

7 CHIEF JUDGE DIFIORE: So my question is: what
8 difference does it make if the landlord makes the promise
9 to keep the property in good repair and that promise is in
10 an agreement with the tenant or with some third party?

11 MR. TRICARICO: Well, I think that creates a very
12 - - - a very significant problem. And I think that if - -
13 - if the court were to decide that the plaintiff has a - -
14 - has a cause of action based upon that, it would basically
15 undo significant precedent in the area of - - - of property
16 owner liability as well - - - as well - - -

17 JUDGE FAHEY: Tell me where it is in your
18 contract that the language is that limits this duty to a
19 relationship between HUD and the defendants? The duty to
20 keep it in good repair, once it's created, is it limited by
21 contract in any way?

22 MR. TRICARICO: Well, the duty to make - - - to
23 keep the premises in good repair, the consequence of that,
24 I think, to get back to the question that Judge Garcia
25 asked before, and I think that answers your question as

1 well, is that it's an acceleration of the mortgage. So
2 basically, HUD is guaranteed the mortgage.

3 JUDGE FAHEY: Well, that's the penalty for
4 failure to do it.

5 MR. TRICARICO: Yes.

6 JUDGE FAHEY: But my question is, as opposed to
7 the contractual relationship between the parties - - - I
8 understood the judge's question that way. What I'm
9 concerned about is does - - - does that contractual duty,
10 once that duty's created through a contract, is it limited
11 in any way to whom it extends to?

12 MR. TRICARICO: Yeah, I think it's limited - - -
13 actually, there's federal case law on this. And actually
14 there's a case that I've cited in my brief that is actually
15 between Grand Manor and Hamilton, and that's a federal
16 court case at 94 F. Supp. 2d 406. And in that case it
17 deals with the issue, and it talks about who is the
18 intended beneficiary of these HUD agreements. And what the
19 court concluded there, and basically all of these cases
20 with HUD involving regulatory - - -

21 JUDGE FAHEY: Is this a Second Circuit case?

22 MR. TRICARICO: That is a - - - I apologize if I
23 said Second Circuit; I meant Southern District.

24 JUDGE FAHEY: No, that's okay.

25 MR. TRICARICO: But it is a trial court case in



1 the Southern District. What I'm - - - what I'm - - - what
2 you find is these HUD cases tend to appear in federal court
3 because HUD can move the cases to federal court.

4 But in any event, they were dealt - - - they
5 dealt with not only HUD agreements in general but the HUD
6 agreements that were at issue in this very proceeding. In
7 fact, as - - - as the court knows from the requests that
8 I've made that it take judicial notice of certain
9 information in that case, there are actually two - - - two
10 HUD agreements. There was one with Grand Manor, and there
11 was one with - - - with Hamilton, and the Hamilton one is
12 an exhibit that's been marked in this case. But in any
13 event - - -

14 JUDGE WILSON: But isn't it a fair way to look at
15 those that each of them represents an independent
16 obligation that HUD saw from both Grand Manor and Hamilton?

17 MR. TRICARICO: Right, and what's interesting
18 about that and the federal case that involves the two
19 parties is basically it involves Hamilton and Grand Manor.
20 Basically what they said is that those regulatory
21 agreements exist solely for the benefit of HUD. And the -
22 - -

23 JUDGE WILSON: That's in terms of who can enforce
24 them; is that right?

25 MR. TRICARICO: That's in terms of who can



1 enforce them and who has rights under them because - - -

2 JUDGE WILSON: Well, are those the same
3 questions? And that goes back to Judge Fahey's question.
4 That is, if someone is a third-party beneficiary to a
5 contract, that person has standing then to enforce the
6 contract himself or herself. But somebody might be the
7 beneficiary of a duty, not have any ability to sue to
8 enforce the contract - - - so for example, the plaintiff
9 here couldn't have sued saying the conditions are unfit,
10 but if injured by the - - - by the duty that's created,
11 that person might be - - - I'm not saying is but might be
12 covered by the duty.

13 MR. TRICARICO: Well, no, I don't think so
14 because I think the courts below, and the court in the
15 Southern District dealing with this issue, and other
16 federal cases that dealt with it, basically say - - - and
17 the court expressly said this in - - - in the federal case
18 that I'm talking about. It said that neither party has a
19 right - - - has any rights to enforcement of the other
20 party's contract. So neither party is an intended third-
21 party beneficiary to that contract. The only beneficiary
22 of it is - - - is HUD, so - - -

23 JUDGE RIVERA: No, but that doesn't go, I think,
24 to the point that's being made here as to whether or not
25 someone who's injured who's not a party to that contract



1 can seek to get some kind of civil relief - - -

2 MR. TRICARICO: Well, I think then - - -

3 JUDGE RIVERA: - - - monetary relief or
4 otherwise.

5 MR. TRICARICO: I think then you would be
6 extending third-party beneficiary law in the State of New
7 York well beyond whatever - - -

8 JUDGE RIVERA: Well, but I think that it - - -

9 MR. TRICARICO: - - - it is or - - -

10 JUDGE RIVERA: That's really what we're arguing
11 about.

12 But let me ask you a different question. I want
13 you to explain to me what your client's view and your - - -
14 your advocacy on this is of the state of the relationship
15 between the lessor and the lessee post the amendment to the
16 lease, that is, after the regulatory agreements - - -
17 excuse me, after the agreements with HUD are entered into,
18 now you're now subject to these provisions, what - - - what
19 effect did this amendment to the lease have?

20 MR. TRICARICO: In all honestly, to tell you the
21 truth, Your Honor - - -

22 JUDGE RIVERA: That would be a good thing, yeah.

23 MR. TRICARICO: - - - as a practical matter, it
24 didn't have much of an effect because - - -

25 JUDGE RIVERA: Well, doesn't it, at a minimum,



1 put the lessee on notice that the federal agreement
2 supersedes the lease - - -

3 MR. TRICARICO: I think - - -

4 JUDGE RIVERA: - - - if there's a conflict?

5 MR. TRICARICO: Well, I don't think it's a
6 conflict, and I don't think it's an inconsistency, which is
7 the term that's used in the amendment. I think that
8 clearly the parties didn't treat it as an inconsistency.
9 And it has - - -

10 JUDGE RIVERA: Well, if the lessee says that - -
11 - or excuse me, if the lessor is saying I have no duty
12 under the lease, and the argument here is that the federal
13 agreement imposes a duty, don't you then have a conflict?

14 MR. TRICARICO: No, because I don't think the
15 federal agreement imposes a duty. I think, ultimately, we
16 do have a duty to - - -

17 JUDGE RIVERA: If we disagree with you, do you
18 lose?

19 MR. TRICARICO: I don't think so. I don't think
20 so. If there's a conflict, like I said, I don't - - - if
21 you find that these two things are in conflict, I don't
22 think that - - - that we lose because I think that - - -

23 JUDGE STEIN: Well, does it make a difference
24 whether HUD recognized that the defendants could delegate
25 their duty to a third party as long as the property was



1 kept in good repair?

2 MR. TRICARICO: Yeah, and I think that's the key
3 question here. Actually, HUD, as we know from the federal
4 case that I was talking about between Grand Manor and
5 Hamilton, HUD actually entered into a separate regulatory
6 agreement, which I've asked the court to take judicial
7 notice of, which is in the record of the case that I cited,
8 and it's in the docket at 12 Civil 04916.

9 JUDGE RIVERA: Yeah, but that doesn't in any way
10 state that it relieves the lessor of their promise and
11 covenant to HUD.

12 MR. TRICARICO: Right. Well, I think to answer
13 your question simply, what happens here is I don't think
14 that the - - - and it's clear from the two regulatory
15 agreements that we have the ability to delegate someone to
16 perform the repairs. However, if they don't perform the
17 repairs properly, we bear the consequences of what the
18 agreement with HUD tells us, and that is a foreclosure or
19 acceleration of the mortgage, not third - - - not liability
20 to some third party that gets injured because, as I said
21 before, the tenant is not a third-party beneficiary - - -

22 JUDGE FEINMAN: And basically a breach of a
23 contractual duty is not the same as a breach of a duty in
24 tort.

25 MR. TRICARICO: I think that's correct. And I



1 think that - - -

2 JUDGE FEINMAN: I mean, at a very basic level.

3 MR. TRICARICO: Right, and I think - - -

4 JUDGE FEINMAN: All right.

5 MR. TRICARICO: Well, and I think - - -

6 JUDGE FEINMAN: So can we decide this case
7 without actually getting into consideration of the purpose
8 of the HUD agreement?

9 MR. TRICARICO: Well, I think it's all relevant
10 based upon the arguments that have been raised by the
11 appellant here. But clearly the - - - the stated purpose
12 of the HUD agreement, by their own expert and by the lower
13 courts, is to protect the physical property and its fiscal
14 integrity. But yes, I think - - - I think you can - - -

15 JUDGE RIVERA: But the way it does that is by
16 requiring something of the landlord, which is this duty to
17 maintain - - - to maintain the premises in good condition.

18 MR. TRICARICO: Right, and the consequence of
19 that is, like I said, if it does not, is an acceleration of
20 the mortgage, not - - -

21 JUDGE FEINMAN: Yes, but we've adopted the
22 restatement, and the restatement says if you agree - - -
23 the landlord agrees to be responsible for repairs, that
24 they're responsible to someone who's injured, as a
25 consequence.



1 MR. TRICARICO: Well, I think that the way the
2 restatement is written, and I think that - - - that Judge
3 Garcia touched on it before, talking about responsibilities
4 as a lessor - - -

5 JUDGE RIVERA: Yes, but that goes to the first
6 provision. It actually adds nothing because it says: "The
7 lessor, such as contracted by a covenant in the lease", but
8 that is how the lessor would contract pursuant to a lease -
9 - -

10 MR. TRICARICO: Well - - -

11 JUDGE RIVERA: - - - in the position as a lessor.
12 The question that's raised is what the rest of it means "or
13 otherwise".

14 MR. TRICARICO: Right, "or otherwise", I would
15 submit that the lower court got that correct, and it has to
16 be - - -

17 JUDGE RIVERA: But what's the point of "or
18 otherwise"?

19 MR. TRICARICO: Because it can be outside of the
20 scope of the lease. For example, there are cases in the
21 lower courts that illustrate that. The - - - the landlord
22 says to the tenant, don't worry, I will shovel the snow off
23 of your steps, you know, during the winter, you know, I
24 will be responsible for repairing the driveway. It's not
25 in the lease but it's a communication outside of the lease



1 where you've - - - where you've - - - where you have
2 assumed that responsibility. It's really all about a
3 manifestation of intent.

4 JUDGE FEINMAN: And a conduct, without saying
5 anything.

6 MR. TRICARICO: Yeah, a con - - - in - - - in
7 some ways I guess conduct could be, but I think that
8 conduct is evident of - - - of what your intent or what
9 your communication was to - - - - - to the - - - to the
10 lessee. For example, you know, if you're - - - if you're a
11 lessor and you're going to agree to, you know, repave the
12 parking lot in a - - - in a shopping mall, like is
13 discussed in Putnam, you're not going to just show up one
14 day and - - - and start repaving, in all likelihood, you're
15 going to tell - - - you're going to tell the tenant, look,
16 the property - - - the parking lot's in bad shape, I'm
17 going to take on the responsibility of - - - of performing
18 that, and I'm going to fix it.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.
20 Counsel?

21 MR. TRICARICO: Thank you.

22 CHIEF JUDGE DIFIORE: You're welcome.

23 MR. TRICARICO: Sorry. One second.

24 MR. FRIEDMAN: No, take your time.

25 JUDGE STEIN: Counselor, can you point to any



1 cases in which we have applied the Putnam rule to - - - to
2 an agreement between the owner and someone other than the
3 tenant?

4 MR. FRIEDMAN: Well, Your Honor, that's - - - the
5 trial court actually mentioned that, that this is a case of
6 first impression. In this case we have a regular tort
7 agreement which is - - -

8 JUDGE STEIN: So we would be creating new law. I
9 mean, you're not basing this on - - - on Putnam or - - - or
10 any precedent of ours?

11 MR. FRIEDMAN: Well, that can be answered in two
12 - - - I have two responses to that, Your Honor. You're not
13 creating a new law because what the court has already done,
14 it's already - - - it's already adopted the second
15 Restatement of Torts that puts a duty on the landowner to
16 keep the - - - when they enter into a contract to - - -

17 JUDGE STEIN: But we've never said what that "or
18 otherwise" means, right?

19 MR. FRIEDMAN: That's fair, Your Honor.

20 JUDGE STEIN: And if we were to say what you say
21 it means, it would - - - we would be creating new law in
22 the State of New York because we have never applied that
23 language in that way - - -

24 MR. FRIEDMAN: Well, I think - - -

25 JUDGE STEIN: - - - so far.



1 MR. FRIEDMAN: I think the court, yes, would be
2 defining what "or otherwise" means. But as - - - as well,
3 Your Honor, in this specific - - - in the specific facts of
4 this case, one, there's a regulatory agreement. In this
5 case the landowner had a nondelegable duty to continue to
6 take care of the property, so they're not even really an
7 out-of-possession landlord.

8 JUDGE STEIN: That's the conclusion that you want
9 us to reach is that it's nondelegable.

10 MR. FRIEDMAN: No, it is.

11 JUDGE STEIN: That's the question that we're here
12 to answer. That - - - that's not - - - that's not
13 specified or explicitly stated anywhere.

14 MR. FRIEDMAN: Well, actually, there's an
15 expert's report, Mr. - - - I think his name is - - - first
16 name was Mark, Mr. Klion, K-L-I-O-N, where he had - - - he
17 was a commissioner for the Department of Housing and Urban
18 Development. And that's - - - that's part of the record
19 where he said that these regulatory agreements mandate a
20 nondelegable duty upon - - -

21 JUDGE STEIN: Right, that's his opinion, and as -
22 - - and that - - - that coincides with your opinion.

23 JUDGE GARCIA: And that's in terms of HUD's
24 perspective of this agreement. What I have a problem with
25 in all this third-party duty talk is it disassociates this



1 from Putnam because this isn't a general contract issue.
2 In Putnam we changed the law where you could have an
3 agreement between the landlord and the tenant, and then
4 somebody was injured, and we were saying even that didn't
5 create a third-party obligation to the person who was
6 injured. And we changed that rule. It wasn't a contract
7 rule; it was an out-of-possession landlord rule, and we
8 changed that rule.

9 So now I think you have to look at what are we
10 making this change to. It's not, well, we're going to
11 examine this as is this a third-party beneficiary of a HUD
12 agreement. This is: are we going to extend that Putnam
13 ruling to encompass agreements between an out-of-possession
14 landlord and someone else besides the tenant. And that, as
15 I think Judge Stein is alluding to, is a big step, and I
16 don't see any other state that's done that.

17 MR. FRIEDMAN: Your Honor, this is not just any
18 other party that - - - that the landowner agreed to. This
19 was a federal government.

20 JUDGE GARCIA: So it would be a rule that where
21 you make a third-party agreement with a federal regulatory
22 agency?

23 MR. FRIEDMAN: Well, I think that's a factor to
24 consider. I mean, what has got - - -

25 JUDGE GARCIA: So what would the rule be?



1 MR. FRIEDMAN: I'm sorry?

2 JUDGE GARCIA: What would the third-party rule
3 be?

4 MR. FRIEDMAN: Well, I think the third-party rule
5 would be is I don't - - - I think we're just - - - the
6 court would just be, not necessarily expanding on the
7 Restatement of Torts, it's just reinforcing the Restatement
8 of Torts, the first prong where, you know, a party - - -
9 where a landlord contracts to continue to take care of the
10 property. You're just - - - you're just reinforcing it.

11 JUDGE FAHEY: Well, let's take a step back here.
12 In New York, third-party beneficiaries can receive a
13 benefit that they have not contracted for in a tort
14 situation under the Espinal - - - I forget the full name of
15 the site, and there are a specific series of - - -

16 JUDGE FEINMAN: Espinal - - -

17 JUDGE FAHEY: I'm not sure of the rest of the
18 cite, Judge, but there are three rules they set out, and
19 those three rules I don't think you're arguing would apply
20 here. So the Espinal third-party beneficiary rules, you're
21 not saying they apply in this circumstance, are you?

22 MR. FRIEDMAN: Absolutely, not. I'm not saying
23 Espinal - - -

24 JUDGE FAHEY: Okay. So but, in point of fact,
25 third-party beneficiaries who are not parties to contracts



1 can benefit in a tort-like situation to a contract. A
2 classic example is a snow plowing contract, you know, those
3 kind of situations. You're familiar with that, right?

4 MR. FRIEDMAN: Yes.

5 JUDGE FAHEY: Okay. So - - - so the question for
6 us, though, is - - - is a little bit different. Here we're
7 talking about an out-of-possession landlord who has a
8 contract that's unrelated to the beneficiary of the
9 contract and whether or not on the duty that arises between
10 those two or the - - - or as Judge Feinman put it, the
11 contractual obligation that arises between those two
12 extends to the - - - the third party, the plaintiff in this
13 action. So the question still goes back to: is a tort
14 being created here, or is it simply a matter of - - - of
15 contract law?

16 MR. FRIEDMAN: Well, it's not a matter of
17 contract law because contract law - - - may I? I noticed
18 my time expired.

19 CHIEF JUDGE DIFIIORE: You may.

20 MR. FRIEDMAN: Thank you, Your Honor.

21 CHIEF JUDGE DIFIIORE: Please.

22 MR. FRIEDMAN: As this court knows, in Putnam v.
23 Stout, you did - - - you did away with the necessarily of
24 privity. So - - -

25 JUDGE FAHEY: No, I'm not saying there has to be



1 privity. I think the third-party beneficiaries can - - -
2 can recover. I think you're totally right about that. The
3 question is: under this contract, can they recover?

4 MR. FRIEDMAN: Absolutely, Your Honor. Even
5 under - - - there was a case decided in the First
6 Department by the name of Rojas v. - - -

7 JUDGE FAHEY: And if they could recover - - - let
8 me ask this. I accept that. Let's say they could under
9 contract, they could only recover under tort law, right,
10 not under contract law?

11 MR. FRIEDMAN: Under tort, yes.

12 JUDGE FAHEY: Okay. Thank you.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. FRIEDMAN: Thank you, Your Honors.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Carol Henry v. Hamilton Equities, Inc., et al., No. 72 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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