

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

Harvey Kent et al. v. Stephen Bernstein et al.

2026 NY Slip Op 01917 · No. Appeal No. 6235; Case No. 2025-05052 · Decided March 31, 2026

SUMMARY

The Appellate Division, First Department affirmed the denial of defendants' motion for summary judgment in a dispute arising from water damage to a cooperative apartment caused by a clogged roof drain. The court held that defendants had not established, as a matter of law, waiver of the proprietary lease's maintenance requirement and that factual issues remained regarding their common-law duty and response after becoming aware of the leak.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Moulton, J.P.; Kennedy, J.; Rodriguez, J.; Michael, J.; Chan, J.
JURISDICTION	New York Supreme Court, Appellate Division, First Department
DECIDED	March 31, 2026
DOCKET	Appeal No. 6235; Case No. 2025-05052
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their motion for summary judgment dismissing the complaint.
STANDARD OF REVIEW	On a motion for summary judgment, the movant must establish prima facie entitlement to judgment as a matter of law; issues of fact require denial of the motion.
PRECEDENTIAL VALUE	published
PARTIES	Stephen Bernstein et al. v. Harvey Kent et al.

TOPICS

- premises liability
- negligence
- duty of care
- standard of care
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether defendants established as a matter of law that the cooperative waived the proprietary lease requirement that defendants maintain the terrace drains.
2. Whether defendants could still owe a common-law duty to maintain the roof drain even if the cooperative waived a contractual duty.
3. Whether conflicting testimony created an issue of fact as to whether defendants timely addressed the leak after becoming aware of it.
4. Whether defendants were entitled to summary judgment based on their lack of prior notice of a drain blockage or deteriorated flashing.

HOLDINGS

1. Defendants failed to establish prima facie entitlement to summary judgment on the ground that the cooperative waived the proprietary lease requirement that defendants maintain the terrace drains, because their evidence did not establish a clear intent by the cooperative to relinquish a known right.
2. Even if the cooperative waived a contractual duty, defendants may still owe a common-law duty to maintain the roof drain as part of their general duty to protect against dangerous conditions on their property.
3. Conflicting testimony created an issue of fact as to whether defendants failed to timely address the leak after becoming aware of it by attempting to cure it or notifying building staff.
4. Defendants' lack of prior experience with a blocked drain or notice of deteriorated flashing before the storm did not resolve the negligence issue because the salient question was whether Stephen acted negligently after becoming aware of the leak.

KEY QUOTATIONS

*“Defendants' evidence is insufficient to establish prima facie entitlement to summary judgment as to waiver of the proprietary lease's requirement that they maintain the terrace drains because it does not establish, as a matter of law, a clear intent on the part of the cooperative to relinquish a known right” ([*1])*

*“Based on this evidence, there is an issue of fact as to whether defendants failed to timely address the leak after becoming aware of it by either attempting to cure it themselves or notifying building staff” ([*1])*

FACTUAL BACKGROUND

Plaintiffs' cooperative apartment was damaged by a water leak originating from a clogged roof drain on defendants' terrace during a September 2021 storm. Defendants contended that the cooperative's longstanding practice of maintaining the terrace roof drain waived any proprietary-lease requirement that defendants maintain the drain. The evidence conflicted regarding whether defendants promptly notified building staff or attempted to clear the drain after learning of the leak.

PROCEDURAL HISTORY

Plaintiffs sued defendants after a cooperative apartment was damaged by water from a clogged roof drain on defendants' terrace. Supreme Court, New York County, denied defendants' motion for summary judgment. The Appellate Division unanimously affirmed the order.

DISPOSITION

affirmed

CASES CITED

- Hadden v. Consolidated Edison Co. of N.Y., 45 NY2d 466, 469 (1978)
- Parlux Fragrances, LLC v. S. Carter Enters., LLC, 204 AD3d 72, 87 (1st Dept 2022)
- Tushaj v. Elm Mgt. Assoc., 293 AD2d 44, 47 (1st Dept 2002)
- Silverman v. Perl binder, 307 AD2d 230, 231 (1st Dept 2003)
- Andre v. Pomeroy, 35 NY2d 361, 364 (1974)

OPINION

Kent v. Bernstein 2026 NY Slip Op 01917

PER CURIAM.

Kent v Bernstein (2026 NY Slip Op 01917) Kent v Bernstein 2026 NY Slip Op 01917 Decided on March 31, 2026 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: March 31, 2026 Before: Moulton, J.P., Kennedy, Rodriguez, Michael, Chan, JJ. Index No. 152536/22 |Appeal No. 6235|Case No. 2025-05052| [*1]Harvey Kent et al., Plaintiffs-Respondents, v Stephen Bernstein et al., Defendants-Appellants. Cuomo LLC, Mineola (Matthew A. Cuomo of counsel), for appellants. Kane Kessler, P.C., New York (John Reklaitis of counsel), for respondents. Order, Supreme Court, New York County (Richard G. Latin, J.), entered July 25, 2025, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Plaintiffs' cooperative apartment was damaged from a water leak that originated from a clogged roof drain on defendants' terrace. The leak occurred during the course of a September 2021 storm. Defendants contend that the cooperative's course of conduct in maintaining the terrace roof drain for years waived, as a matter of law, any requirement in the proprietary lease that defendants maintain their roof drain. Both defendants submitted affirmations attesting that they understood the cooperative to be responsible for cleaning the terrace roof, including clearing any drains on the roof, and that they were never asked or instructed by the cooperative to maintain the roof since they began residing in the apartment in 2003. Defendants also submitted the testimony of the building's superintendent that he was directed by the cooperative's managing agent to inspect and

clear the terrace roof drain before the storm and that this was standard procedure in advance of a storm. Defendants' evidence is insufficient to establish prima facie entitlement to summary judgment as to waiver of the proprietary lease's requirement that they maintain the terrace drains because it does not establish, as a matter of law, a clear intent on the part of the cooperative to relinquish a known right (see *Hadden v Consolidated Edison Co. of N.Y.* , 45 NY2d 466, 469 [1978]; *Parlux Fragrances, LLC v S. Carter Enters., LLC* , 204 AD3d 72, 87 [1st Dept 2022]). Moreover, even if the cooperative waived a contractual duty, defendants may still have a common-law duty to maintain the roof drain as part of their general duty to protect against dangerous conditions on their property (see *Tushaj v Elm Mgt. Assoc.* , 293 AD2d 44, 47 [1st Dept 2002]). As to defendants' response to the incident, defendant Stephen Bernstein testified that he immediately called the building doorman for assistance upon becoming aware of the leak during the storm. However, the superintendent testified that he was not contacted by defendants but rather by the residents of another apartment regarding the leak. He testified that upon entering defendants' apartment, he immediately accessed the drain by lifting the paver cutout and clearing the drain with his hands, which allowed the accumulated water to immediately drain. Based on this evidence, there is an issue of fact as to whether defendants failed to timely address the leak after becoming aware of it by either attempting to cure it themselves or notifying building staff (see *Silverman v Perl binder* , 307 AD2d 230, 231 [1st Dept 2003]). Defendants argue that they did not experience a blockage of the drain before the September 2021 storm and did not have notice of the deteriorated flashing before the storm. Nonetheless, the salient issue is whether Stephen acted negligently after he did become aware of the leak (see *Andre v Pomeroy* , 35 NY2d 361, 364 [1974]). THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: March 31, 2026