NIXON PEABODY LLP
ATTORNEYS AT LAW

NIXONPEABODY.COM
@NIXONPEABODYLLP

Kevin M. Fitzgerald
Partner
T 603-628-4016
F 866-947-1074
kfitzgerald@nixonpeabody.com

900 Elm Street
Manchester, NH 03101-2031
603-628-4000

June 26, 2017

Eileen Fox
Clerk of Court
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Slania Enterprises, Inc. v. Appledore Medical Group, Inc.
Case No.: 2017-0159

Dear Clerk Fox:

Enclosed for filing with the Court, please find an original and eight (8) copies of the *Brief for the Appellee Appledore Medical Group, Inc.*, together with a CD containing an electronic version of the brief in pdf format. Two copies of the enclosed Brief have been served by first class mail on opposing counsel.

Sincerely,

Kevin M. Fitzgerald

KMF

Enclosures
cc: Lynne C. Christie, Esquire

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2017-0159

Slania Enterprises, Inc.

v.

Appledore Medical Group, Inc.

Appeal Pursuant to Rule 7

BRIEF FOR THE APPELLEE APPLEDORE MEDICAL GROUP, INC.

Respectfully submitted,

APPLEDORE MEDICAL GROUP, INC.

By its attorneys,

NIXON PEABODY LLP

Kevin M. Fitzgerald, Esquire
N.H. Bar No. 806
900 Elm Street
Manchester, NH 03101
Telephone: 603-628-4000
Fax: 603-628-4040
kfitzgerald@nixonpeabody.com

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STATEMENT OF THE CASE AND STATEMENT OF FACTS

Appellant's Slania Enterprises, Inc. ("Slania") filed suit beyond the three-year statute of limitations proscribed in RSA 508:4, I, alleging Appellee Appledore Medical Group, Inc. ("Appledore") owed Slania unpaid rent, utility payments, late fees, and attorney's fees and costs amounting to $82,572.87 for breach of a commercial real estate lease agreement ("Lease"). Compl., App. at 1-3; 17-39.[1] The Stafford County Superior Court (Howard, J.) allowed Appledore's motion to dismiss, finding that Slania's action fell outside the applicable statute of limitations because the Lease was not an installment contract under New Hampshire law. *See* Order on Defendant's Motion to Dismiss ("Order") at 8-9. The trial court further held that even if the Lease were an installment contract, Slania's claim would still fail. *Id.* at 11-12.

FACTS

On October 12, 2012, Appledore and Slania entered into the Lease for space located at 12 Jenkins Court, Durham, New Hampshire. Order at 1. Concurrently, the parties entered into a Leasehold Improvement Agreement ("LIA"), which provided that Slania would modify and improve the premises at 12 Jenkins Court to accommodate Appledore's medical practice. *Id.* at 1-2. Appledore bore the cost of these improvements. *Id.*

When Appledore later detailed the specific modifications to be made under the LIA, Slania notified Appledore it was significantly increasing the associated cost. *Id.* Pursuant to the LIA, Slania sought to have Appledore agree to the proposed cost increase. *Id.* When Appledore declined to approve the cost increase as unreasonable, Slania took the position that the Lease, commencement date and the obligation to pay rents nonetheless commenced on December 15,

[1] Citations to the Appendix (App.) refer to Appellant's Appendix, filed pursuant to New Hampshire Supreme Court Rule 17.

2012. *Id.* After Slania issued a demand for rent and notice of default, Appledore paid rent for December 15, 2012 through January 2012. *Id.* Appledore made no further rent payments. Appledore's Mot. to Dismiss at 2; App. at 5.

Next, on March 28, 2013, Appledore notified Slania it wished to terminate the Lease. Order at 2. "It is undisputed that Appledore was not in possession of the premises at the time and never took possession." *Id.* Shortly thereafter, on April 12, 2013, Slania issued a second notice of default and demand for rent amounting to $11,341.71. *Id.* Appledore did not tender payment and ten days later, on April 22, 2013, Slania purported to elect a remedy under Section 13 of the Lease "to keep this lease in effect and recover monthly rent from [Appledore] an amount equal to Base Rent and other charges due less the amount, if any, of any rentals." *Id.*

Over the next three-plus years, Slania took no action related to the Lease. Then, on April 29, 2016, Slania filed suit seeking $82,572.87 in the guise of back rent, late fees, and utility costs. *Id.* at 3.

Appledore moved to dismiss the complaint in its entirety, alleging that Slania failed to file within the required three-year statute of limitations on breach-of-contract actions in New Hampshire. Slania objected, arguing the Lease was an installment contract and, thus, their suit was timely. After briefing, the trial court agreed with Appledore and issued an Order dismissing Slania's complaint on November 30, 2016. *See* Order at 12. This appeal followed.

SUMMARY OF THE ARGUMENT

RSA 508:4, I requires that Slania's contract action be filed within three years of the breach. For the sake of argument, accepting as true Slania's allegation that Appledore breached, the breach occurred on or before April 12, 2013, upon Slania's notification that Appledore was in default. Accordingly, Slania's April 29, 2016 complaint falls beyond the statute of limitations.

In an attempt to save their late claim, Slania incorrectly asserts that the Lease is akin to a consumer-goods installment contract under New Hampshire law, *see General Theraphysical v. Dupuis*, 118 N.H. 277, 279 (1978), rendering each "missed" payment a new breach. Rather, for the reasons articulated below, the Lease is not an installment contract within the context of this Court's statute of limitations analysis.

As importantly, even if the Lease were subject to *General Theraphysical*, Slania's claim still fails because the Lease was fully breached no later than April 22, 2013, when Slania admits it invoked the remedy provision of the Lease, Section 13. Slania offers no developed argument countering the trial court's well-reasoned alternative basis for its ruling that the breach occurred no later than April 22, 2013, and accordingly, argument that the trial court erred on this basis has been waived.

ARGUMENT

A. Standard of Review

This Court "will uphold the trial court's findings of fact and rulings of law unless they lack evidentiary support or constitute a clear error of law[.]" *Ellis v. Candia Trailers and Snow Equipment, Inc.*, 164 N.H. 457, 466 (2012) (citation omitted). The application of law to facts engenders *de novo* review. *See Jesurum v. WBTSCC Ltd. P'shp.*, 169 N.H. 469, --- , 151 A.3d 949, 954 (2016).

B. RSA 508:4, I

The operative statute of limitations for Slania's complaint is RSA 508:4, I, which states,

> Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should

> have discovered, the injury and its causal relationship to the act or omission complained of.

Thus, "[t]o be timely, a contract claim must be brought within three years of when it arose." *Coyle v. Battles*, 147 N.H. 98, 100 (2001); RSA 508:4, I. When all necessary elements are met, "[a] cause of action arises, thereby triggering the running of the three-year statute" of limitations. *Therrien v. Sullivan*, 153 N.H. 211, 213 (2006). For contract actions, the cause of action arises "when the breach occurs." *Coyle*, 147 N.H. at 100 (citation omitted).

C. The Lease is not an Installment Contract

Before this Court, as below, Slania contends its failure to sue within three years is rescued because the Lease should be deemed an installment contract. Slania Br. at 8-14; Slania Obj. to Appledore's Mot. to Dismiss at 1-3; App. at 8-11. Slania's main font of support remains *General Theraphysical*, a case adopting the installment contract construct where a buyer takes possession of consumer goods purchased through a series of payments. 118 N.H. at 279. An installment contract is defined as "[a] contract requiring or authorizing the delivery of goods in separate lots, or payments in separate increments, to be separately accepted." *Black's Law Dictionary* (10th ed. 2014). The rule adopted by this Court, in turn, provides that "when an obligation is to be paid in installments the statute of limitations runs only against each installment as it becomes due even though the creditor has the option to declare the whole sum due on default of an installment, unless he exercises that option." *General Theraphysical*, 118 N.H. at 279.

The Lease between Slania and Appledore falls outside the bounds of this installment contract rationale. As an initial matter, leases—unlike consumer purchase agreements—do not contemplate the completed "delivery of goods" or any other final possessory interest. This differentiates the present case from those where courts have applied the installment rule to

contracts for the incremental payment for consumer goods and services. *See* Order at 5-6 (collecting cases). Unsurprisingly then, as noted by the trial court, this Court "has only applied the installment rule to contracts involving incremental payments for the purchase of goods." Order at 5 (citing *General Theraphysical*, 118 N.H. at 278; *Natasi v. Brown*, No. 2014-0671 (N.H. July 23, 2015) (3JX Order)). And the Court for good policy reasons should decline Slania's invitation to broaden its reach to the conveyancing of limited, temporary interests in real estate via leases.

1. The Lease Does Not Convey a Final Possessory Interest in Property

First, the Lease does not contemplate the sale of any goods (or real estate) and does not convey any final possessory interest in the real estate to Appledore. *See* App. at 17-39. That New Hampshire has not extended the installment contract construct beyond sale-of-goods contracts to real property makes sense: the protections afforded by the installment contract rule are unnecessary for the rental of a real estate. Unlike a consumer contract for the sale of goods, real estate leases are as "[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration." *Black's Law Dictionary* (10th ed. 2014). While the Lease bears some similarity to an installment contract, namely that it contemplates monthly payments, the Lease is different in every other material respect. As noted by the trial court, various provisions of the New Hampshire Revised Statutes Annotated are specifically drawn to regulate the landlord/tenant relationship and the remedies of lessors in the event of alleged breach by a lessee. *See, e.g.*, RSA 540:3, I (prior to eviction by nonresidential landlord for nonpayment of rent, landlord must first issue demand); RSA 540:5 (setting requirements for demand and eviction notice); RSA 540:7 (demand required for violation of written lease conditions "to constitute a forfeiture"); RSA 540:9 (noting that "[n]o tenancy shall

be terminated for nonpayment of rent . . . before the expiration of the notice); *see also Matte v. Shippee Auto Inc.*, 152 N.H. 216, 217-218 (2005) (holding that while RSA 540:26 "provides that nothing in [RSA 540] shall be construed to prevent a landlord from pursing his legal remedy at common law," this Court "can envision ways in which changing common law rights and remedies might disrupt the legislatively-created framework governing RSA chapter 540 actions. Thus, the [Court is] reluctant to make such changes without first giving the legislature an opportunity to address the issue.") (citations omitted). *See also* Order at 8. Thus, unlike a sale-of-goods contract, "a real estate lease typically does not result in the lessee obtaining a final possessory interest or unencumbered ownership interest in the property. As such, there is little need for the application of the installment contract rule to real estate leases." *Id.* at 6.

Moreover, to the extent Slania relies on *Lakeview Management, Inc. v. Care Realty, LLC*, 2010 WL 346811 (D.N.H. Jan. 22, 2010), the cases are easily distinguishable. *See* Slania Br. at 13. In *Lakeview*, although the United States district court ventured a guess that this Court would apply the installment rule to the real estate contract before it, there, unlike here, the analysis turned on an "unauthorized calculation" of rent by one party, and not a complete breach of the lease. *Id.* at *6. And, as discussed below, the lessee in *Lakeview* was in possession of the property. *Id.*, at *2-12.

2. Appledore was Never in Possession of the Property

Second, in the overwhelming majority of cases where courts apply the installment contract rule, the defendant has taken possession of the property at issue. This includes every instance where this Court has applied the installment contract rule in the installment sales context. *See, e.g.*, *General Theraphysical*, 118 N.H. at 278; *Natasi*, 2015 WL 11071587;

Lakeview;[2] *see also* Order at 5-6 (collecting cases). This is true even where foreign courts have applied the installment rationale to real estate leases. *See, e.g.*, *Pollard v. City of Bozeman*, 741 P.2d 776, 779 (Mont. 1987); Order at 8 (collecting cases).

Here, Appledore never took possession of the property nor sought a final possessory interest in the property. Order at 2. Quite the contrary, as indicated above, the purpose of the installment contract rationale is to protect sellers who do not retain possession of the goods at issue, not to create an unconditional judicial exception to the legislature's prescribed limitations period. Where, as here, possession of the property never transferred to the lessee, there is no cause for the added protection the installment contract rule contemplates. Thus, even if the Court were to conclude the installment rule generally applies to real estate leases where, like consumer sales transactions, the defendant takes possession, the facts of this case would render such a rule inapposite here.

3. Installment Rule Inapplicable Where Claim is Based on a "Single Event"

In *Gage v. State*, No. 2013-0362, 2014 WL 11656372 (N.H. Jan. 29, 2014) (3JX Order), a panel of this Court cited approvingly to the First Circuit's opinion in *McNamara v. City of Nashua*, 629 F.3d 92, 96 (1st Cir. 2011), noting that the "installment contract rule does not apply to claim[s] based on [a] single event with effects continuing over time." *Gage*, 2014 WL 11656372, at *5 (quotation marks omitted). *McNamara* dealt with a claim involving misreporting information to the New Hampshire Retirement System. 629 F.3d at 93-94. The First Circuit Court of Appeals noted no New Hampshire case existed on-point, but found an installment rationale inapplicable where "a claim [is] based on a *single distinct event* which has

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[2] The facts underpinning *Lakeview* can be found in the District Court's Mar. 30, 2009 Order, which indicates the lessee was in possession of the property during the dispute. *See Lakeview Mgmt., Inc. v. Care Realty, LLC*, 2009 WL 903818, at *2-12 (D.N.H. Mar. 30, 2009).

ill effects that continue to accumulate over time." *Id.* (*quoting Miele v. Pension Plan of N.Y. State Teamsters Conference Pension & Ret. Fund*, 72 F. Supp. 2d 88, 102 (E.D.N.Y. 1999) (emphasis added).

So too, here. As discussed below, an unmistakably complete breach of the contract occurred no later than April 22, 2013. On that date, Slania suffered – and fully appreciated – the complete harm alleged in this case. Where, as here, Slania retained possession of the property, the continuation over time of that *status quo ante* did not, without resorted to artificial device, constitute a series of new and successive breaches. Rather, Slania simply continued to suffer fully realized "ill effects that continue[d] to accumulate over time." *Id.* Thus the installment construct is inapplicable to Slania's Lease for this reason as well.

4. The Cases Slania Relies Upon Offer Scant Support

With two exceptions, the cases Slania relies upon are factually distinct from the case here: in each the lessee was in possession of the property. Unable to identify New Hampshire law that extends the installment rubric to contracts where the lessee never takes possession, and counter to the majority of cases cited by the trial court, Slania suggests heavy reliance on two out-of-state appellate cases: *Holiday Furniture Factory Outlet Corp. v. State of Florida Dep't of Correction*, 852 So. 2d 926, 928 (Fla. App. 1 Dist. 2003) and *Discovery Group, Inc. v. Kammen*, No. 01-15-00243-CV, 2015 WL 7300690 (Tx. Ct. App. 1 Dist. 2015) (unpublished). Neither case, however, offers a meaningful analysis of the effect possession has on the purpose of the installment contract rule.

D. The Lease Terminated On April 22, 2013

Ultimately, this Court need not reach whether the Lease—or any real estate lease—should come under an extension of the installment rationale because, in addition to finding that

the Lease was not an installment contract, the trial court alternatively concluded "[i]n this case, the breach occurred no later than April 22, 2013, the date upon which Appledore's right to cure the claimed default expired." Order at 7. This finding of fact is amply supported by the record. As found by the trial court, "Appledore did not take possession of the property and clearly indicated its intent not to honor the lease in its communication on March 28, 2013." *Id.* at 8. This material breach—regardless of whether the Lease is an installment contract—unequivocally triggered the statute of limitations on Slania's claim. Accordingly, an independent ground exists to affirm the judgment of the trial court.

"A breach of contract occurs when there is a failure, without legal excuse to perform any promise which forms the whole or part of a contract." *Lassonde v. Stanton,* 157 N.H. 582, 588 (2008) (quotation marks omitted). This Court "will uphold a trial court's ruling in an action for breach of contract unless the decision was made without evidentiary support or was an unsustainable exercise of discretion." *Id.* The findings of fact in such an action "are binding" in this Court "unless they are unsupported by the evidence or erroneous as a matter of law." *Id.*

"The interpretation of the language of a lease, like any contract language, is ultimately an issue for the court to decide." *One Beacon Ins. LLC v. M & M Pizza, Inc.*, 160 N.H. 638, 641 (2010). In undertaking its review, "absent ambiguity," this Court will "determine the parties' intent from the plain meaning of the language used in the contract." *Id.* The Court "assign[s] the words and phrases used by the parties their common meaning, and ascertain[s] the intended purpose of the contract based upon the meaning that a reasonable person would give to it." *Sabinson v. Trustees of Dartmouth College*, 160 N.H. 452, 458 (2010).[3]

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[3] Consideration of the Lease is appropriate given its centrality to Slania's claims. *See* Order at 9 n.2.; *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010).

The trial court's determination that Appledore fully breached on April 22, 2016 is amply supported by the record. On March 28, 2013, Appledore notified Slania that they wished to terminate the lease. Slania Br. at 5. Slania promptly issued a notice of default on April 12, 2013. *Id.* Ten days later, on April 22, 2013, pursuant to Section 13 of the Lease, the period to cure expired. *Id.*; App. at 23. At that point, Slania was fully aware that Appledore had repudiated and ostensibly terminated the Lease, breaching the contract. Appledore plainly communicated its intent to do so, and failed to cure the default after notice. Order at 8-9.

In their brief, Slania effectively acknowledges the breach occurred no later than April 22, 2013. Slania Br. at 13. Invoking Section 13.1(b) of the Lease, Slania notes that it was "electing as its *remedy* to keep this lease in effect and recover monthly rent from [Appledore] an amount equal to the Base Rent and other charges due less the amount, if any, of the rentals [Slania] may recover by reletting the premises." *Id.*; App. at 24 (emphasis added). Slania's invocation of this remedy provision is an acknowledgement that Appledore breached the lease no later than April 22, 2013.

As relevant to the instant analysis, "[t]he principal purpose of statutes of limitations is to eliminate stale or fraudulent claims." *West Gate Village Ass'n v. Dubois*, 145 N.H. 293, 298 (2000). While this Court has "recognize[d] that statutes of limitations may be waived[,]" a party to a contract is not free to "circumvent the legislature's declaration of public policy in RSA 508:4, I[.]" *Id.* A look to the Lease makes plain Slania possesses various remedies in the event of Appledore's breach. As the trial court expressly decided, however, Slania's election of a remedy, is just that: a *remedy*. Order at 11. It cannot serve to artificially extend the statute of limitations for Appledore's breach.

The operative question in the statute of limitations analysis under a breach of contract claim is when the breach occurred. At the very latest, Slania was aware of Appledore's full and complete breach – including renunciation of any possessory interest in the property – no later than April 22, 2013, upon the expiration of the ten-day cure period. This logical conclusion is supported by the evidence in the record, and the trial court's determination that the statute of limitations began to run on April 22, 2013, is not an "unsustainable exercise of discretion." *Lassonde,* 157 N.H. at 588.

E. Slania Waived Any Argument to the Trial Court's Holding that the Lease Terminated On or Before April 22, 2013

Finally, for these reasons this Court has a sufficient alternative ground to affirm the trial court's ruling. Slania devotes the entirety of its brief to argue the Lease ought to be subject to an extension of the installment contract rationale. Slania fails to offer any argument—developed or otherwise—that the trial court erred in determining that the breach occurred on April 22, 2013, thus triggering the three-year statute of limitations under RSA 508:4, I. Accordingly, this Court should find any such argument waived and affirm the trial court's ruling on this basis.

"[I]n the realm of appellate review, a mere laundry list of complaints regarding adverse rulings by the trial court, without developed legal argument, is insufficient to warrant judicial review." *Douglas v. Douglas*, 143 N.H. 419, 429 (1999). Where, as here, Slania offers no basis to set aside the trial court's determination that the breach occurred on or before April 22, 2013, the argument "is not sufficiently developed to warrant appellate review." *Wyle v. Lees*, 162 N.H. 406, 414 (2011).

The trial court plainly found that a "full and complete breach" of the Lease "occurred on or before April 22, 2013[.]" Order at 10. Yet, on appeal, Slania does not devote a single sentence of their brief to this independent ground for the dismissal of Slania's complaint. Each

of the three questions Slania presents for review turn on the trial court's treatment of the installment contract issue. Slania Br. at 3. Fatally absent is any argument the trial court erred in its analysis and determination that Appledore materially breached the Lease no later than April 22, 2013, starting the clock on the three-year statute of limitations. Accordingly, argument opposing the trial court's breach analysis is waived.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's November 30, 2016 Order.

REQUEST FOR ORAL ARGUMENT

Appledore requests oral argument in furtherance of this appeal. Kevin M. Fitzgerald will argue the case for Appledore.

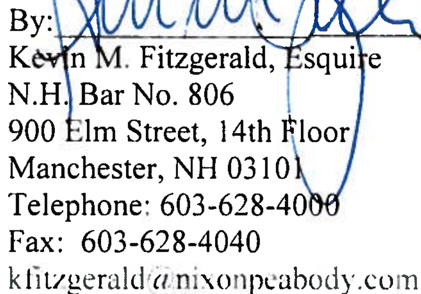
Dated: June 26, 2017

Respectfully Submitted,

APPLEDORE MEDICAL GROUP, INC.

By its attorneys,

NIXON PEABODY LLP



By: ______________________
Kevin M. Fitzgerald, Esquire
N.H. Bar No. 806
900 Elm Street, 14th Floor
Manchester, NH 03101
Telephone: 603-628-4000
Fax: 603-628-4040
kfitzgerald@nixonpeabody.com

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief have been forwarded via first class mail, postage prepaid, to Lynne C. Christie, Esquire, Attorney at Law, 12 Jenkins Court, Durham, NH 03824.

Dated: June 26, 2017

____
Kevin M. Fitzgerald