STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2017-0159

SLANIA ENTERPRISES, INC.

V.

APPLEDORE MEDICAL GROUP, INC.

Appeal from Strafford Superior Court

PLAINTIFF'S OPENING BRIEF

Lynne C. Christie, Esq.
12 Jenkins Court
Durham, NH 03824
(603) 659-0128
N.H. Bar No. 10046

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2. If the lease agreement between Slania Enterprises, Inc. and Appledore Medical Group, Inc. is an installment contract, then is the application of the installment contract rule for statute of limitations barred by Appledore Medical Group, Inc. not being in possession of the leased premises when the rents became due? (*Motion for Reconsideration*, Appendix at 45).

3. If the lease agreement between Slania Enterprises, Inc. and Appledore Medical Group, Inc. is an installment contract, then does the statute of limitations run against each monthly rental installment as it becomes due, thereby entitling Slania Enterprises, Inc. to proceed with its claim? (*Objection to Motion to Dismiss* at 8, *Motion for Reconsideration* at 44).

TEXT OF RELEVANT STATUTES

RSA 508:4, I: Except as otherwise provided by law, all personal actions, except actions for slander and 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.

STATEMENT OF THE CASE AND MATERIAL FACTS

This action was filed on April 29, 2015, seeking unpaid rent for the time period of May 1, 2013 through April 30, 2015, late fees of $50 per month, utility payments, and attorney's fees and costs, totaling $82,572.87. (*Complaint*, Appendix at 3). Slania Enterprises, Inc. ("Slania") and Appledore Medical Group, Inc. ("Appledore") entered into a commercial real estate lease agreement (the "Lease") on October 12, 2012, for the premises located at 12 Jenkins Court, Durham, NH, for an initial term of five (5) years, with an option to extend. (*Appledore's Reply to Plaintiff's Objection to Motion to Dismiss* , Appendix at 12). The Lease also included a two (2) year escape clause that could be exercised after December 31, 2014, and upon 120 days notice (*Id.)*. Also on October 12, 2012, the parties entered into a Leasehold Improvement Agreement (the "LIA") through which Slania agreed to fit out the premises according to Appledore's Tenant Improvement Specifications, and Appledore agreed to pay for the fit out. The initial budget amount for the fit out was $183,764.12. (*Complaint*, Appendix at 1).

After October 12, 2012, Appledore made changes to the Tenant Improvement Specifications, that would have required significantly more money to complete than the original budget. (*Id.*) As required by the LIA, Slania sought Appledore's written approval of the changes and cost increase. (*Id.*) Appledore did not provide written approval, and therefore, Slania did not proceed with the fit out. (*Id.)* As a consequence, the terms of the Lease provided that because Appledore caused the delay in the fit out, the Lease

commenced and rent began to accrue on December 15, 2012. (*Id.*). Slania issued a demand for rent and notice of default to Appledore based on its failure to pay rent for the time period December 15, 2012 through January 31, 2013. *(Id.)*. Appledore then paid the rent for that period. *(Id.)*. Appledore has not made any further rental payments. (*Id.*)

On March 28, 2013, Appledore communicated to Slania that they wished to terminate the Lease. (*Id.* at 3.) On April 12, 2013, Slania notified Appledore that they were in default on rental payments in the amount of $11,341.71. *(Id.)* Appledore did not pay, and on April 22, 2013, which was the expiration of the 10-day cure period, Slania notified Appledore pursuant to section 13.1(b) of the Lease that it was electing as its remedy upon default "to keep this lease in effect and recover monthly rent from Tenant an amount equal to the Base Rent and other charges due less the amount, if any, of any rentals" may recover by reletting the premises. (*Id.*). Slania relet the premises for the time period from February 5, 2015 through April 30, 2015, for a lesser monthly rental amount. (*Id.*).

Appledore filed Motion to Dismiss on July 13, 2016, claiming that the contract breach had occurred on April 12, 2013, and the claim was therefore barred by the three year statute of limitations set forth in RSA 508:4, I. (*Appledore's Motion to Dismiss*, Appendix at 4). Slania filed its Objection to Motion to Dismiss on July 25, 2016, claiming that the New Hampshire Supreme Court recognizes the installment contract exception to the statute of limitations, and that the Lease is an installment contract. (*Plaintiff's Objection to Motion to Dismiss*, Appendix at 9). Appledore filed Reply to Plaintiff's Objection to Motion to Dismiss on August 3, 2016, and argued, in part, that the rental term never commenced and that the New Hampshire Supreme Court had never applied the

installment contract rule to a real estate lease. (*Appledore's Reply*, Appendix at 14). Slania filed its Reply on August 15, 2016, and argued that the rental term commencement was triggered under the Lease by Appledore's delay, which Appledore acknowledged by paying the rent for the time period of December 15, 2012 through January 31, 2013. (*Slania's Reply* , Appendix at 41). Slania also argued that under *Lakeview Management Inc. v. Care Realty LLC*, No. 07-CV-303-SM, 2010 WL 346811 (D.N.H. Jan 22, 2010), the court gave its best interpretation of how it thought that the New Hampshire Supreme Court would rule, and it found that the installment contract rule applied to real estate contracts. (*Id.* at 42). On December 27, 2016, the Strafford Superior Court granted Appledore's Motion to Dismiss. (*Order*, Brief at 17). The Superior Court decided that there were no New Hampshire cases that applied the installment contract rule to real estate leases, and in the court's view the Lease in this case was not the type of real estate lease contemplated in the statute of limitation context. (*Id.*). The installment contract rule had only been applied to incremental payments for the purchase of goods, and found no need for the installment contract rule when there was no final possessory interest or unencumbered ownership interest. (*Id.* at 21). The Superior Court considered *Lakeview,* but distinguished it because, despite having access and a key, Appledore had not moved into the leased premises, and that the claim was not for non-payment of rent but an accumulated overpayment of rent. (*Id.* at 22). In its Motion for Reconsideration, Slania cited *Holiday Furniture Factory Outlet Corp. v. State of Florida, Dept. of Corrections*, 852, So.2d. 926 (Fla. App. 1 Dist. 2003), which held that the real estate lease was an installment contract, even without ever having taken possession of the leased premises. (*Motion for Reconsideration*, Appendix at 45). Appledore filed its Objection to Motion

for Reconsideration on January 13, 2017. (*Objection to Motion for Reconsideration*, Appendix at 48). The Superior Court denied Slania's Motion for Reconsideration on February 17, 2017. (*Notice of Decision*, Brief at 29).

SUMMARY OF ARGUMENT

The New Hampshire Supreme Court has adopted the installment contract rule, in the case of a lease for consumer goods. *General Theraphysical v. Dupuis.* 118 N.H. 277(1978). The question is whether commercial real estate leases are also installment contracts. The New Hampshire Supreme Court has never ruled that a commercial real estate lease is or is not an installment contract. The court has never had the opportunity before now to rule on this issue. In making its decision, it can look to persuasive authority from the federal district court, as well as Florida, Texas, Illinois, and New York, that have found commercial real estate leases to be installment contracts, regardless of possession. .

ARGUMENT

In an appeal, the court reviews the trial court's application of the law to the facts *de novo*. *Coyle v. Battles*, 147 N.H. 98, 100(2001). The court will affirm the trial court's factual findings unless they are unsupported by the evidence. *Town of Newbury v. Landrigan*, 165 N.H. 236, 239 (2013).

RSA 508:4, I limits personal actions from being brought after the expiration of the three year statute of limitations from "the act or omission complained of". *West Gate Village Assoc. v. Dubois*, 145 N.H 293, 298 (citing RSA 508:4, I). A contract action is a personal action, and therefore, must be brought within three years of a claimed breach. *A & B Lumber, LLC v. Vrusho*, 151 N.H. 754, 756 (2005). A claim arises in contracts when

the breach occurs. *Coyle* at 100.. The question then, of course, is when does the breach occur?

In *General Theraphysical*, the New Hampshire Supreme Court adopted the installment contract rule, meaning that "when an obligation is to be paid in installments the statute of limitations runs only against each installment as it becomes due", even when "the creditor has the option to declare the whole sum due on default of an installment, unless he exercises that option." *General Theraphysical* at 279. *General Theraphysical* is analogous , because a consumer goods lease for exercise, massage, and sauna equipment, is very similar to a real estate lease. *Id.*

A consumer goods lease and a real estate lease have many commonalities. Black's Law Dictionary defines installment contract as "a contract requiring or authorizing the delivery of goods, **or payments in separate increments,** to be separately accepted." (emphasis added) *Installment Contract*, Black's Law Dictionary (10th ed. 2014). A commercial real estate lease requires monthly payments, or payments in separate increments, that are separately accepted. "An installment contract is one in which the agreed performance of at least one of the parties is to be rendered, not as a whole at one time and place, but piecemeal at different times or different places." 8 Catherine M.A. McCauliffe, *Corbin on Contracts*, sec. 35.1 (rev. ed. 1999). In a commercial real estate lease with monthly rental payment, the agreed performance of the tenant is to pay monthly, or piecemeal at different times. As in a consumer goods lease, a commercial real estate lease has a fixed "whole sum due", and it equals the total months of the lease term multiplied by the amount of the monthly rent amount. Therefore, in commercial real estate leases and leases for consumer goods, the lessee has full access to the leased space

or goods, a known amount is due at each interval or month, and a known total amount is due to the lessor under the terms of the lease agreement. In the commercial real estate lease between Slania and Appledore, the rent was due monthly for the term of December 15, 2012 through April 30, 2015, for a total of $99, 212.50.

The Florida Court of Appeals draws no distinctions between different types of leases, nor does it require possession, and it focused on the periodic nature of rental payments, and their separate due dates, defining real estate lease payments as installments. *Holiday Furniture Factory Outlet Corp. v. State of Florida, Dept. of Corrections*, 852 So 2d. 926, 928 (Fla.App 1 Dist. 2003). In *Holiday Furniture*, Plaintiff leased property to the Department of Corrections for a five year term between February 1, 1995 through January 31, 2000. *Id.* at 927. The Department of Corrections terminated the lease agreement, never moved in, and contended that Plaintiff did not complete the necessary renovations. *Id.* Holiday Furniture brought suit on December 28, 2001. *Id.* The trial court dismissed, finding that Holiday Furniture had alleged that it had either completed renovations, or was prevented from performing by March 1, 1995, and therefore was barred from its breach of contract suit after February 29, 2000. *Id.* The appellate court reversed and remanded. *Id.* at 928. The court said, "Lease agreements require installment payments, and each failure to pay an installment constitutes an individual breach." *Id.* In Florida, the general rule is :

"...when there has been a breach, abandonment, or renunciation of a lease before the expiration of the term, the lessor has three options. The lessor may (1) treat the lease as terminated and retake possession for the lessor's purposes; (2) hold possession for the lessee's account, in which case the lessee is responsible for any difference between the rent obligation and amounts the lessor recovers by reletting the premises; or (3) stand by and do nothing and sue the lessee as each installment of rent matures, or sue for all the rents due when the lease expires." *Id.*

The court saw no reason to limit the general rule to lessees who had been in possession of the premises for some time, or at all. *Id.* The court held that Holiday Furniture could sue the Department of Corrections for each separate monthly rent installment not barred by the five year statute of limitations. *Id.*

Holiday Furniture is on point with the present case in every respect. Slania and Appledore entered into a lease agreement for a five year term, Slania was to perform the fit out of the leased premises, Appledore delayed and caused the fit out not to be completed, although it had full access to the leased premises, and finally tried to terminate the lease prior to physically moving into the leased premises. After default on the rental payments, Slania notified Appledore that it was electing under the section 13.1(b) of the Lease "to keep the Lease in effect and recover monthly from Tenant an amount equal to the Base Rent and other charges due less the amount, if any, of any rentals which Landlord may receive by reletting the premises." *Appledore's Repy to Plaintiff's Object to Motion to Dismiss*, Appendix at 24.

The Florida general rule is a persuasive one, especially when one considers the practical application of the breached real estate lease. In its Order, the Superior Court found that the claim was ripe "no later than April 22, 2013. *Order*, Brief at 22. But as a practical matter, on April 22, 2013, the Plaintiff did not know if it would find a replacement tenant in one day, one month, one year, or ever. Additionally, other costs for which Appledore was responsible under the Lease were unknown at that time, such as heating and electric charges for the leased premises that ultimately accumulated for almost two years before the premises was relet. *Slania's Motion for Reconsideration*, Appendix at 46. The Consumer Price Index and Real Estate Taxes were also uncertain on April 22,

2013. *Id.* at 47. If the claim was ripe on April 22, 2013, and Slania had brought suit for the entire rent due for two years, and then found a tenant a year later, then Slania could have been inequitably compensated twice for the same time period. To avoid this type of "double dipping", the installment contract rule would allow the claim to fully ripen and allow all charges or mitigation to arise. The claim, for example, includes electric and heating bills ending February 15, 2015. So the amount that damage was not known until just fifteen and one half months before the claim was filed, well within the three year statute of limitations. Similarly, the rent for April 2015 accrued just one year before the claim was filed. Without adopting the installment contract rule for real estate leases, Slania would effectively be entitled to a statute of limitations roughly one half as long as prescribed in RSA 508:4, I.

Texas also recognizes the installment contract rule. "For a breach of a contract requiring fixed, periodic payments, Texas law is clear that a separate cause of action arises for each missed payment," *Discovery Group Inc. v. Kammen*, (Tex. App.Nov. 19, 2015). *Discovery Group* involved a residential real estate lease where the tenant left three months before the termination of the lease. *Id.* Due to the periodic nature of monthly rental payments, the court found that the residential lease was an installment contract, and that each missed payment created a separate cause of action. *Id.* "Thus, Texas law is settled that in any circumstance where a contract requires fixed, periodic payments, the statute of limitations for a breach-of-contract claim will only bar those payments due more than four years ago." *F.D Stella Products Co. v. Scott,* 875 S.W.2d 462, 465 (1994). *F.D Stella Products*, involved an equipment lease, but offers:

"Although we have found no Texas cases specifically addressing the applicability of installment-contract principles to lease with respect to the issue of limitations, logic dictates that they should be treated in the same fashion. Leases are similar to installment contracts. The essential feature of a divisible contract is that a portion of the price is set off against a portion of the performance; therefore, when a part of the performance has been rendered, a debt for that part immediately arises, 6 Williston on Contracts, sec. 861 (Walter H.E. Jaeger ed., 3rd ed. 1962). An installment contract under which monthly payment is for a portion of the goods received is a classic divisible contract. So too is a lease, in which a month's use of the lessor's property is set off by a month's worth of rent. Under such a lease, for each month's use there is a new debt apportioned as monthly rent." *Id.* at 466.

Illinois also recognizes the installment contract rule for commercial real estate leases. *Akhtert v. D'Avis*, 2013 IL App (1st) 113556-U. *Akhtert* involved an oral contract for the use of a medical facility. *Id.* Defendant was to pay monthly 40 -50 % of his income to landlord. *Id.* All claims timely filed within the five years of the filing date were allowed, while all claims filed outside of that time period were not allowed. *Id.* "When a money obligation is payable in installments, the limitations period begins to run against each installment on the date the installment becomes due. *Id.* (citing *Thread & Gage Co. v. Kucinski*, 116 Ill. App 3d 178, 184 (1983)).

New York also follows the installment contract rule. *J.C.Penney Corp. v. Carousel Ctr. Co.*, 635 F.Supp 2d 126 (N.D.N.Y 2008). J.C.Penney Corp., involved a commercial real estate lease. *Id.* "Where a lease requires the payment of rent in installments the statute of limitations begins anew with each separate installment." *Id.* at 133. New York has also applied the installment contract rule to real estate leases in numerous cases. *Id.* at 131; see also *Harlington Realty Co. LLC. v. Rojas*, 2014 NY Slip Op 30827(U) March 28, 2014. "Since the lease provided for monthly payments, [I]t is obvious that it was the intention of the parties that the landlord would have a separate cause of action for each month's rent as it became due". *A I Realty Corp. v. Kent Dry*

Cleaners Inc, 307 N.Y.S2d 99, 102 (N.Y. Dist. Ct. 1969). For timeliness purposes, a continuous wrong will give rise to successive causes of action. *J.C.Penney Corp.* at 132.

Finally, the U.S.District Court for the District of New Hampshire in *Lakeview* found that the installment contract rule applied to the commercial real estate lease. *Lakeview* at 2. In *Lakeview*, Landlord brought suit for accrued Additional Rent under the commercial lease agreement. *Id.* The court found that the three year statute of limitations period begins to run as to each Additional Rent payment as it becomes due, so the Landlord could bring suit for all the Additional Rent payments accrued looking back three years from the filing date. *Id.*.

In contracts, the rights and obligations of the parties under the terms of a lease agreement do not change or disappear because the Tenant refuses to take possession when Tenant had full access to the leased premises. *Holiday Furniture* at 928. Under the terms of the Lease, Slania had the sole option to choose its remedy following Appledore's default. Slania chose to continue the lease and attempt to mitigate Appledore's losses by acquiring a new tenant. It is not equitable for Appledore to cause the delay, default on the Lease, and then be able to unilaterally terminate the Lease.

Statutes of limitation are part of balancing plaintiff's right to have his claim heard on the merits with Defendant's competing right to timely defend the lawsuit. In this case, Appledore was on notice since April 22, 2013, that Slania was electing to continue the lease, and therefore knew that it would need to safeguard witnesses and documents, so applying the installment contract rule should not cause any prejudice.

CONCLUSION

The Lease is a contract requiring periodic payments. Consumer goods leases and real estate leases sufficiently analogous. As a portion of the price is set off against a portion of the performance in a consumer goods lease, as is a month's use of the lessor's property is set by a month's worth of rent. The installment contract rule adopted in General *Theraphysical* should be extended and clarified to apply to real estate leases. The Superior Court erred in finding that the Lease was not an installment contract, The Superior Court further erred in finding that even if real estate leases were installment contracts, the installment contract rule would still not apply in this case because Appledore chose not to possess the leased premises that it had full access to. Slania, therefore requests that the Court reverse and remand the Superior Court order for a hearing on merits.

CERTIFICATION

I hereby certify that the decision appealed from is in writing, and is appended to this brief.

Respectfully submitted,

SLANIA ENTERPRISES, INC.
By its counsel,

Dated: 5/26/17

Lynne C. Christie, Esq.
12 Jenkins Court
Durham, NH 03824
(603) 659-0128
N.H. Bar No.: 10046

ORAL ARGUMENT

Plaintiff hereby requests oral argument of 15 minutes before the full court, to be presented by Lynne C. Christie, Esq.

CERTIFICATION OF SERVICE

I, Lynne C. Christie, hereby certify that I have this day forwarded two copies of the foregoing brief and appendix to Kevin M. Fitzgerald, Esq., 900 Elm Street, Manchester, NH 03101, counsel for defendant, via first class mail, postage prepaid.

Dated: 5/26/17

Lynne C. Christie, Esq.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Slania Enterprises, Inc. v Appledore Medical Group, Inc.**
Case Number: **219-2016-CV-00165**

Enclosed please find a copy of the court's order of November 30, 2016 relative to:

Order on Defendant's Motion to Dismiss

December 27, 2016

Kimberly T. Myers
Clerk of Court

(277)

C: Lynne C. Christie, ESQ; Kevin M. Fitzgerald, ESQ

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Slania Enterprises, Inc.

v.

Appledore Medical Group, Inc.

Docket No.: 219-2016-CV-00165

ORDER ON DEFENDANT'S MOTION TO DISMISS

The plaintiff, Slania Enterprises, Inc. ("Slania"), filed this breach of contract action against the defendant, Appledore Medical Group, Inc. ("Appledore"), seeking unpaid rent, late fees, costs of utilities, and attorney's fees and costs stemming from Appledore's alleged breach of a commercial lease. (Court Index #1). Appledore moves to dismiss Slania's complaint, asserting that Slania's claim is barred by the statute of limitations under RSA 508:4, I. (Court Index #6). Slania objects. (Court Index #7). In response to Slania's objection, Appledore submitted a reply with the lease agreement attached, and Slania submitted a sur-reply. Based on the parties' arguments by pleading, the relevant facts, and the applicable law, Appledore's motion to dismiss is GRANTED.

FACTS

The following facts are asserted in the complaint or are otherwise supported by the record. The instant action was filed on April 29, 2016. Approximately three years and five months earlier, on October 12, 2012, Slania entered into a commercial lease agreement ("the Lease") with Appledore to rent the premises located at 12 Jenkins Court in Durham, New Hampshire, for an initial fixed term with an option to extend. Slania alleges that the term began on December 15, 2012 and was to run through April 30, 2015. (Compl. ¶ 3). Also on October 12, 2012, the parties entered into a Leasehold Improvement Agreement (LIA) by which Slania agreed to improve the leasehold to suit Appledore's

medical practice and Appledore agreed to pay for the improvements. The improvements were to be made in accordance with the Tenant Improvement Specifications. Initially, the budgeted amount was $183,764.12. (Id. ¶ 4).

At some point after October 12, 2012, Appledore changed the Tenant Improvement Specifications; alterations that would have required significantly more money to complete than the original budget. (Id. ¶ 5). As required by the LIA, Slania sought Appledore's written approval of the changes and cost increase. (Compl. at continuation ¶ 1). Appledore did not provide the required approval and, therefore, Slania did not proceed with the improvements. (Id.) As a consequence, the Lease provided that rents commenced on December 15, 2012, because Appledore caused the delay in making the improvements. (Id. ¶ 2). Shortly thereafter, Slania provided a demand for rent and notice of default to Appledore based on its failure to pay rent for the time period of December 15, 2012 through January 31, 2013. (Id.). Appledore paid the rent for that period. (Id.).

On March 28, 2013, Appledore communicated to Slania that it wished to terminate the Lease. (Id. ¶ 3). It is undisputed that Appledore was not in possession of the premises at the time and never took possession. On April 12, 2013, Slania notified Appledore that it was in default on rental payments in the amount of $11,341.71. (Id.) Appledore did not pay and, on April 22, 2013, which was the expiration of the 10-day cure period, Slania notified Appledore pursuant to Section 13 of the Lease that it was electing as its remedy upon default "to keep this lease in effect and recover monthly rent from Tenant an amount equal to the Base Rent and other charges due less the amount, if any, of any rentals" it may recover by reletting the premises.. (Id.); Lease, § 13.1(b). Slania relet the premises nearly two years later, from February 5, 2015 through April 30, 2015, for a lesser monthly rental amount. (Id.) Aside from the rent paid by Appledore for the period of December 15, 2012 through January 31, 2013, Appledore has made no other rental payments to Slania. (Id. ¶ 2).

As noted above, Slania filed this action for breach of contract on April 29, 2016, and seeks unpaid rent for the period of May 1, 2013 through April 30, 2015, late fees of $50 per month, and the cost of electricity and gas, all totaling $82,572.87. (Id. ¶ 4). Slania also seeks its attorney's fees and costs pursuant to the Lease.

LEGAL STANDARD

Generally, when ruling on a motion to dismiss, the court must discern whether the allegations stated in the plaintiff's complaint "are reasonably susceptible of a construction that would permit recovery." Plourde Sand & Gravel Co. v. JGI E., Inc., 154 N.H. 791, 793 (2007) (quotation omitted). In most instances, the court must "assume all facts pled in the plaintiff's writ are true, and . . . construe all reasonable inferences drawn from those facts in the plaintiff's favor." Id. (*quoting* Berry v. Watchtower Bible & Tract Soc'y of N.Y. Inc., 152 N.H. 407, 410 (2005)). "However, when the motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief." Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010) (quotation omitted). The statute of limitations is such a defense. Cf. Birch Broad., Inc. v. Capitol Broad. Corp., 161 N.H. 192, 199 (2010) (applying rule in assessing plaintiff's standing); Kibby v. Anthony Indus., Inc., 123 N.H. 272, 274 (1983) (applying rule in assessing court's personal jurisdiction).

ANALYSIS

Under RSA 508:4, I, personal actions "may be brought only within three years of the act or omission complained of." West Gate Village Ass'n v. Dubois, 145N.H. 293, 298 (citing RSA 508:4, I). A contract action is a personal action and must be brought within three years of the claimed breach. A & B Lumber Co., LLC, v. Vrusho, 151 N.H. 754, 756 (2005). A claim arises in a contract case when the

breach occurs. Coyle v. Battles, 147 N.H. 98, 100 (2001). Appledore argues that Slania's complaint was filed over three years after it notified Appledore of its default on April 12, 2013, and therefore is time-barred. (Def.'s Mot. Dismiss at 1, 3). Slania contends that its claim is not barred because it is based not on Appledore's April 2013 default, but on the unpaid monthly rent and associated charges which accrued every month under the Lease, beginning on May 1, 2013, and ending on April 30, 2015, the date the Lease ended. (Pl.'s Obj. Def.'s Mot. Dismiss at 2). Citing General Theraphysical v. Dupuis, 118 N.H. 277, 279 (1978), Slania asserts that the Lease constitutes an installment contract and, as such, the statute of limitations resets for each missed installment payment, that is, the monthly rent obligation. Slania seeks recovery for only those rents and other costs that became due within the three years of filing. (Id.).

Appledore counters that the New Hampshire Supreme Court has never applied the installment contract rule to real estate leases and this court should not do so in this case. Appledore advances other arguments in support of dismissal, including that the Lease never commenced, and if it did, Appledore validly terminated it on March 28, 2013. As such, Appledore argues, it was under no obligation to pay rent for the period between May 1, 2013, and April 30, 2015. (Def.'s Reply Pl.'s Obj. at 2–3). The court will address these arguments in turn.

I. The Installment Contract Rule

In General Theraphysical, a case involving the lease of consumer goods of which the lessee had possession, the New Hampshire Supreme Court adopted the installment contract rule: "when an obligation is to be paid in installments the statute of limitations runs only against each installment as it becomes due," even when "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. Appledore correctly notes that General Theraphysical does not involve a real estate lease but rather consumer goods

and further that, unlike General Theraphysical, there is no "whole sum due" on the cost of the Lease. In addition, Appledore argues that due to "the lack of analogous landlord/tenant cases" in New Hampshire, the installment contract rule should not be applied here. (Def.'s Reply to Pltf's Obj. to Mot. Dismiss at 3 (*quoting* Lakeview Mgmt. v. Care Realty, LLC, No. 07-cv-303-SM, 2010 WL 346811, at *5 (D.N.H. Jan. 22, 2010) (see below for detailed discussion of Lakeview).

In this court's view, a real estate lease of the type involved here is not an installment contract as that term is contemplated in the statute of limitations context. Further, even if the Lease is deemed an installment contract, the rule does not save the plaintiff's claim in this case. Black's Law Dictionary defines an installment contract as "[a] contract requiring or authorizing the delivery of goods in separate lots, or payments in separate increments, to be separately accepted." *Installment Contract*, Black's Law Dictionary (10th ed. 2014); see also 8 Catherine M.A. McCauliffe, Corbin on Contracts, § 35.1 (rev. ed. 1999) ("An installment contract is one in which the agreed performance of at least one of the parties is to be rendered, not as a whole at one time and place, but piece meal at different times or different places."). Our Supreme Court has only applied the installment rule to contracts involving incremental payments for the purchase of goods. *See* Natasi v. Brown, No. 2014-0671 (N.H. July 23, 2015) (3JX Order) (monthly rental payments for construction equipment); General Theraphysical, 118 N.H. at 278 (monthly payments for exercise, massage and sauna equipment). Other courts have similarly applied the installment contract rule to incremental payments for goods and services. See, e.g., Perez v. Rent-A-Center, Inc., 892 A.2d 1255, 1267 (N.J. 2006) (rent-to-own contracts for household items); Metromedia Co. v. Hartz Mountain Associates, 655 A.2d 1379, 1381 (N.J. 1995) (cleaning services). Some courts have also applied the installment contract rule to monthly benefits payments. See, e.g., Pierce v. Metropolitan Life Ins. Co., 307 F. Supp. 2d 325, 333 (D.N.H. 2004) (in diversity case, applied rule to monthly disability payments after analyzing New Hampshire law); Jackson v. Am. Can Co., 485 F.

Supp. 370, 374 (W.D. Much. 1980) (underpayment of regular disbursements from a pension fund). Still other courts have recognized contracts for the purchase of land as installment contracts. See, e.g., Lewis v. Premium Inv. Corp., 568 S.E. 2d 361, 363 (S.C. 2002) ("Real property is often sold under contracts that provide for the payment of the purchase price in a series of installments."); Mackiewicz v. J.J. & Associates, 514 N.W. 2d 613, 618 (Neb. 1994) ("[O]ne selling under an installment contract agrees to accept payments from the buyer . . . until the purchase price as established by the contract has been paid."); Shrock v. Spognardi, 46 N.E. 3d 1115, 1120 (Ohio Ct. App. 2015) (distinguishing a lease and option to purchase contract from an installment contract). A real estate lease, in contrast to the contracts in the foregoing cases, is defined as "[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration." *Lease*, Black's Law Dictionary (10th ed. 2010).

While a lease for real estate is a contract typically paid in intervals, with it comes a variety of remedies available under the purview of the laws governing landlords and tenants. See, e.g., RSA 540:3, I (eviction); RSA 540:7 (demand of rent for a violation of the condition of a written lease). In the commercial lease context, as in this case, the procedures upon default or breach, and the available remedies, are commonly negotiated between the parties. In addition, 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.

While the installment contract rule has been applied in numerous different scenarios, the commonality among the installment contract cases is that they involve incremental payments paid to the provider of goods, services or benefits by the party seeking a final possessory interest in those goods, services or benefits, or an unencumbered ownership interest. A lease of real estate, on the other hand, is

an owner's temporary release of its possessory interest to another party for a limited period of time in exchange for rent, provided the rent is paid at agreed-upon intervals. See 31 Williston on Contracts § 78:44 (4th ed. 2015). The difference in possessory interests between installment contracts and real estate leases, and the wide range of remedies available to lessors and lessees under established landlord/tenant laws and commercial leases, compels this court to find that installment contracts and real estate leases are two distinct types of contracts. In this court's view, it makes good sense to apply the installment contracts rule to the purchase of goods on installment because the purchaser has the full benefit of the goods, a known amount is due at each installment, and a known total amount is due to the seller. Real estate leases, however, typically do not involve a fixed total amount. Further, the lessee is not attempting to acquire a final possessory or ownership in the property. In addition, the lessor may recover possession of the property upon a breach through legal process or the terms of the lease itself. The court concludes, therefore, that the installment contract rule does not apply to real estate leases under New Hampshire law.

In this case, the breach occurred no later than April 22, 2013, the date upon which Appledore's right to cure the claimed default expired. As such, Slania's suit for breach of contract is barred because it was filed more than three years after the cause of action of arose.

Even if our Supreme Court were to apply the installment contract rule to real estate leases, this court would nevertheless conclude that the action is barred under the circumstances of this case. Some jurisdictions have applied the installment contract rule to real estate leases where the lessee has possession of the property and is otherwise carrying out the lease, but either fails to pay rent or pays the wrong amount of rent. For example, in Lakeview Mgmt. v. Care Realty, LLC, No. 07-cv-303-SM, 2010 WL 346811 (D.N.H. Jan. 22, 2010), the U.S. District Court for the District of New Hampshire was called upon to predict whether the New Hampshire Supreme Court would adopt the installment contract

rule and apply it to the commercial lease in that case.[1] In Lakeview, the District Court held that the installment contract rule applied to the plaintiff's claim for breach of a lease agreement, and thus the plaintiff could recover for each installment that was within the three-year statute of limitations. Lakeview, No. 07-cv-303-SM, 2010 WL 346811 at *2-3. Recognizing that New Hampshire has adopted the installment contract rule in other contexts, and had not expressly carved out any exceptions to the rule, the District Court assumed that the installment contract rule would apply to the commercial lease in that case. However, unlike the instant case, the breach of each installment in Lakeview was not the nonpayment of each month's rent. Id. at *6. Instead, the breach was the payment of rent based on an "unauthorized calculation" which resulted in a lower amount of rent, which the defendant allegedly concealed from the plaintiff and was contrary to the lease agreement. Id.

Other courts have applied the installment contract rule to real estate leases. *See, e.g.*, Shan v. U.S. Carpet & Furniture, Inc., 2014 WL 3749157, at *4 (N.J. Super. Ct. App. Div. April 8, 2014) (unpublished) (applying installment contract rule to lease, but finding statute of limitations had run on plaintiff's claim nevertheless); Lindner v. Meadow Gold Dairies, Inc., 515 F. Supp. 2d 1141, 1150 (D. Haw. 2007) (applying installment contract rule to lease where lessee was in possession and paying at least base rent during period of rent negotiations); and Davenport v. Stratton, 149 P.2d 4 (Cal. 1944). The common thread among these cases is that the lessee had possession of the property at the time the rents became due.

In short, 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. Further, after Slania gave notice of the breach on April 12, 2013, Appledore did not cure the default within the 10-day period. Unequivocally, this

[1] This court respects the difficult position of a federal court attempting to engage in judicial soothsaying and predict with some certainty how a State court would rule. Although this court disagrees with the Lakeview court, the disagreement is not material because the outcome in this case is the same even applying Lakeview.

contract action arose no later than April 22, 2013, and needed to be filed within three years of that date. Since it was not, the claim is time-barred.

II. The Lease Agreement

Appledore advances three alternative arguments to support its assertion that the lease agreement was not in effect prior to April 29, 2016, and therefore the installment contract rule, even if it applies here, does not preserve Slania's claim.[2] (Def.'s Reply Pl.'s Obj. at 1–3). First, Appledore argues that the lease term on which it was obligated to pay never commenced because a final Certificate of Occupancy never issued, which the Lease required. (Id. at 1–2). Second, Appledore argues that the Lease was not in effect because the LIA states that the Lease would commence once Slania completed the improvements, which Appledore claims Slania failed to do. (Id. at 2–3). Third, Appledore argues that it expressly terminated the Lease on March 28, 2016, and therefore rent could not accrue after that date. (Id. at 3).

In order to assess these arguments, the court looks to the contractual language of the Lease. (See Def.'s Ex. A.) "[T]he interpretation of the language of a lease, like any contract language, is ultimately an issue for the court to decide." One Beacon Ins. v. M&M Pizza, 160 N.H. 638, 641 (2010) (citation omitted). "When interpreting a written agreement," the court "give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." Id. "In the absence of ambiguity, the parties' intent will be determined from the plain meaning of the language used." Found. For Seacoast Health v. HCA Health Servs. of N.H., 167 N.H. 487, 492 (2008). The court assigns "common meaning" to the "words

[2] Appledore attached the Lease to its reply to Slania's objection to its motion to dismiss. (See Def.'s Reply Pl.'s Mot. Dismiss, Ex. A). Because the court may consider "documents sufficiently referred to in the complaint," Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010) (quotation omitted), the court considers the contents of the Lease in its findings.

and phrases used by the parties" and "ascertain[s] the intended purpose of the contract based upon the meaning that would be given to it by a reasonable person." Id.

In response to Appledore's first and second arguments, Slania refers to § 1.1 of the LIA, which states "No rent shall accrue prior to the Commencement Date except to the extent specified under Section F(3)." (Pl.'s Reply at 1; Def.'s Ex. A § 1.1.) Section F(3) states, "Changes to the Plan or Tenant Improvement Specifications made by Tenant, which causes delays, shall cause the Commencement Date of the Lease to be December 15, 2012, and Tenant shall begin rental payments." (Def.'s Ex. A § F(3).) Based on Slania's complaint, which asserts that Appledore caused the delay in making the improvements to the property by not providing the required approval for the change in plans and costs, (see Compl. at continuation ¶ 3), the court finds that Appledore cannot prevail on their motion to dismiss on either of these two grounds.

In response to Appledore's third alternative argument, Slania cites to Natasi v. Brown, asserting that the New Hampshire Supreme Court upheld the trial court's finding that the plaintiff's demand letter did not terminate the contract. No. 2014-0671 (N.H. July 23, 2015) (3JX Order). Furthermore, Slania argues that there is no support in the case law or the Lease that allows Appledore to terminate the contract unilaterally. (Pl.'s Reply at 3). While this may be true,[3] it is not dispositive here. Appledore's default, which occurred on or before April 22, 2013,[4] was clearly a full and complete breach of the Lease, regardless of whether the March 28, 2013 letter effectively terminated the Lease. The default triggered the remedies available to Slania in Section 13 of the Lease. These remedies allowed Slania to elect either to (1) terminate the Lease with thirty days prior written notice and recover all "reasonable

[3] Section 1.2 of the Lease states that any notice of termination provided by Appledore must be "delivered on or after December 31, 2014," suggesting that the Lease Agreement permits Appledore to terminate after it takes possession only on or after December 31, 2014. (Def.'s Ex. A. § 1.2).

[4] The Lease provides Appledore with a ten-day period to cure the default after receiving notice from Slania. (See Def.'s Ex. A § 13.1(a)). Because Slania sent Appledore a notice of default on April 12, 2013, Appledore's ten-day cure period lapsed on April 22, 2013.

damages" Slania incurred as a result of the default, or (2) keep the Lease "in effect and recover monthly from [Appledore]" rent and other charges less the amount Slania may receive from reletting the premises. (Def.'s Ex. A. § 13.1(b)). The remedies under the lease agreement were only that, remedies. The do not serve to toll, extend, or displace the statute of limitations. *See* West Gate Village Ass'n v. Dubois, 145 N.H. at 298-99 (while statute of limitations can be waived or tolled by agreement, it cannot be waived or tolled before any cause of action arose).

The statute of limitations is triggered when "[a] cause of action arises," which is when "all the elements necessary for such a claim are present." Singer Asset Fin. Co., LLC v. Wynder, 156 N.H. 468, 477–78 (2007). In contract cases, our State Supreme Court has been clear that the statute of limitations begins to run at the time the defendant breached the contract. See, e.g., Metropolitan Property, 136 N.H. at 597-98 (statute of limitations began to run when insurer breached its contract with its insured motorist, rather than when the underlying motor vehicle accident occurred). The Lease here certainly provided Slania with the choice to continue the Lease and calculate damages in a certain manner as a remedy to Appledore's breach of the contract. Yet, Slania's unilateral choice of remedies cannot serve to extend the time in which Appledore's initial breach occurred. Furthermore, and perhaps more importantly, Appledore's notification to Slania in March of its intent to terminate the Lease Agreement, regardless of whether it had the unilateral authority to do so, and its subsequent failure to pay rent in April, clearly placed Slania on notice that it would not continue to pay rent or honor the terms of the Lease. When Appledore subsequently failed to cure the default by April 22, 2013, the cause of action had arisen for purposes of the statute of limitations.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss is GRANTED.

So Ordered.

November 30, 2016

Mark E. Howard
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **Slania Enterprises, Inc. v Appledore Medical Group, Inc.**
Case Number: **219-2016-CV-00165**

Please be advised that on January 31, 2017 Judge Howard made the following order relative to:

Plaintiff's Motion for Reconsideration; "Upon review, motion to reconsider denied. The court has not overlooked any points of law or fact meriting reconsideration."

February 17, 2017

Kimberly T. Myers
Clerk of Court

(277)

C: Lynne C. Christie, ESQ; Kevin M. Fitzgerald, ESQ