

STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2017-0159

SLANIA ENTERPRISES, INC.

V.

APPLEDORE MEDICAL GROUP, INC.

Appeal from Strafford Superior Court

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PLAINTIFF'S REPLY BRIEF

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NEW HAMPSHIRE  
SUPREME COURT

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2 Friedman on Leases, § 16.3.1 (5<sup>th</sup> Ed.): ----- 5

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### TEXT OF RELAVANT STATUTES

**Supreme Court Rule 16(3)(b):** The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. While the statement of a question need not be worded exactly as it was in the appeal document, the question presented shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in his brief any question of law not listed in his appeal document, but only if the supreme court has granted a motion to add such question, and he has presented a record that is sufficient for the supreme court to decide the questions presented. Motions to add a question may be filed only by a party who filed an appeal document (including a party who fled a cross-appeal), and shall be filed at least 20 days prior to the due date of the moving party's brief.

### STATEMENT OF THE CASE AND MATERIAL FACTS

The following are only the facts correcting the inaccuracies in the statement of Appledore's Brief:

After executing the Lease Agreement and the Leasehold Improvement Agreement ("LIA") for the premises located at 12 Jenkins Court, Durham, NH, Appledore Medical Group, Inc. ("Appledore") made changes to the Tenant Improvement Specifications, which would have significantly increased the cost of the improvements. *Complaint*, Appendix at 1. While Appledore would ultimately bear the cost of the improvements, the LIA required Slania Enterprises, Inc. ("Slania") to finance the improvement costs over the initial five year lease term. *Leasehold Improvement Agreement*, Appendix at 37. As required by the LIA, Slania sought Appledore's written approval of the changes and cost

increase. *Complaint*, Appendix at 1. Appledore did not provide written approval, nor any response, and therefore, Slania did not proceed with the fit out. *Id.* Contrary to Appledore's Brief, Appledore did not decline the cost increase, did not find the cost increase unreasonable, and did not authorize the fit out under the original specifications. *Appledore's Brief* at 1. Appledore simply made no reply. *Complaint*, Appendix at 1.

As a consequence of Appledore's delay, the Lease provided that lease began and rent began to accrue on December 15, 2012 *Id.* Slania issued a demand for rent and notice of default for the time period December 15, 2012 through January 31, 2013. *Id.* Appledore then paid the rent for that period, thereby acknowledging that the lease has commenced. *Id.*

## ARGUMENT

### **Possessory Interest Not Required For An Installment Contract**

While the Order and Appledore's Brief both claim that since a real estate lease does not convey a final possessory interest or unencumbered ownership interest in the property, then there is little need for the application of the installment contract rule, but neither the Order nor Appledore's Brief explains why. The trial court tries to justify a rule that an installment contract involves 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. *Order*, Slania's Brief at 22. The court cited *Metromedia Co. v. Hartz Mountain Associates*, as an example of a court that applied the installment contract rule to incremental payments for cleaning services. *Order*, Slania's Brief at 21. In *Metromedia*, the court found that the statute of limitations may begin to run against each installment as it falls due, and further found, "To hold otherwise

would allow a claimant to trigger the statute of limitations upon presentation of a claim rather than having the existence of a claim trigger the statute of limitations”. *Metromedia C. V. Hartz Mountain Associates*, 655 A.2d 1379, 1381 (N.J. 1995). The monthly cleaning installment became due each month as the cleaning was completed. *Id.* It is notable that there is no final possessory interest involved in cleaning services, thereby violating the trial court’s rule.

Consider this example, “A worker is employed by contract for one year at a salary of three thousand dollars per month. It is obvious that both the work and the wages are to be given in installments, the wages in twelve installments and the work divisible into, for example, weeks or days.” 8 Catherine M.A. McCauliff, *Corbin on Contracts* Sec 35.1. There is also no final possessory interest in this example of an installment contract.

The trial court also cited *Shrock v. Spognardi*, as distinguishing a lease from an installment contract. *Order*, Slania’s Brief at 6. In *Shrock*, the parties entered into two separate agreements, a residential real estate lease and a Purchase Real Estate Agreement. *Shrock v. Spognardi*, 46 N.E. 3d 1115, 1120 (Ohio Ct. App. 2015). The court did not find that a real estate lease is not an installment contract, rather it found that the Purchase Real Estate Agreement did not meet the minimum statutory requirements of a land installment contract. *Id.*

In its opening brief, Slania cited numerous jurisdictions that have found a real estate lease to be an installment contract. Florida, Texas, Illinois, New York, and the U.S. District Court for the District of New Hampshire have all found that the installment contract rule applies to real estate leases. *Slania’s Brief*, pp. 9-13. The trial court found that New Jersey, Hawaii, and California also apply the installment contract rule to real

estate leases. *Order*, Slania's Brief at 24. Despite the fact that the leases did not convey a final possessory or ownership in the property, numerous jurisdictions have applied the installment contract rule to real estate leases.

The trial court cited statutory remedies available for real estate leases. RSA 540 and RSA 540-A are primarily aimed at protecting residential tenants. These statutes do not address the breach of a commercial real estate lease, where the landlord is not seeking possession, as we have in the instant case.

#### **Possession Not Needed For A Lease To Be An Installment Contract**

A real estate lease is both a contract and a conveyance of a leasehold estate in land. *Thompson on Real Property*, Third Thomas Ed. Sec. 39.01. The tenant holds a leasehold estate in the real property and has an exclusive right to possess and enjoy the property during the lease term. *Id.* The landlord retains the ownership of the property as a future non-possessory future interest in the form of a reversion. *Id.* Appledore and Slania entered into a lease agreement that commenced on December 15, 2012. Appledore in fact paid rent for December 15, 2012 through January 31, 2013. "So long as a lease is in existence rent accrues thereunder. This is true if the tenant fails without good cause to accept possession under the lease". 2 *Friedman on Leases*. Sec. 16.3.1 (5<sup>th</sup> Ed.). Appledore, without good cause, failed to take possession of the leased property beyond possessing a key and entering to measure and make plans with the architect. The lease is an enforceable contract against the tenant who fails to take possession.

The trial court and Appledore argue that the installment contract rule should not apply in this case even if it applies to real estate leases. *Order*, Slania's Brief at 23-25, *Appledore's Brief* at 6-7. They both distinguish those cases that do apply the installment

contract rule to real estate leases by citing the fact that that in the majority of the cases, the tenant was in possession of the leased premises. *Id.* Possession was noted in the factual recitation of the cases, but that fact was not mentioned in the analysis of the cases. Possession is not treated as a material fact. As noted above, possession does not affect the enforceability of a lease. In *Holiday Furniture Factory Outlet Corp. v. State of Florida, Dept. of Corrections*, 852 so 2d, 926, 928 (Fla.App 1 Dist. 2003), the court saw no reason to limit the general rule of applying the installment contract rule to real estate leases to lessees who had been in possession of the premises for some time, or at all.

#### **Installment Rule Is Not Based On A Single Event**

Appledore relies upon *McNamara v. City of Nashua*, 629 F3d. 92 (1<sup>st</sup> Cir. 2011). In *McNamara*, a firefighter sued the City of Nashua alleging that it miscalculated the amount of his pension. *Id.* at 94. The pension was actually paid monthly, not by the city, but by the NH Retirement System. *Id.* at 96. The court noted that McNamara did not sue the NH Retirement System for the individual underpayments. *Id.* He sued the city for the original, one time miscalculations that it gave to the NH Retirement System. *Id.*

Similarly in *Gage v. State*, No. 2013-0362, 2014 WL 11656372 (N.H. Jan. 29, 2014)(3JX Order), the petitioner did not sue the NH Judicial Retirement Plan for underpayments of the pension plan. She sued the State for improperly administering Judge Gage's employment. *Id.*

Both of the above cases are distinguishable, because the petitioners did not bring suit against the entity that was making the monthly installments that were alleged to be underpayments. Additionally, neither case is precedent for this court.



### **The Lease was Not Terminated**

In addition to the statutory remedies outlined above, real estate leases also have remedies found in the contracts. Section 13.1 of the Lease defines an act of tenant default as “Tenant defaults in payment of any installment of Rent or other sum payable by Tenant hereunder and fails to cure such default within ten (10) days after notice thereof.” *Lease*, Slania’s Appendix at 24. Appledore failed to pay the \$11,341.71 demanded by Slania on April 12, 2013, and was then in default on April 22, 2013 after the ten day cure period expired. Complaint, Slania’s Brief at 5. Upon the default by Tenant, the Lease in section 13.1(b) allows, upon thirty (30) days written notice, the landlord to terminate the lease. *Lease*, Slania’s Appendix at 24. Alternatively, section 13.1(b) allows that the “Landlord may elect to keep this Lease in effect and recover monthly from Tenant as 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.” *Id.* Slania chose the alternate remedy. *Slania’s Brief* at 5. Appledore has described its own default as a complete breach of the contract. *Appledore’s Brief* at 6. The lease does not define complete breach. “A total breach of contract is a non-performance of duty that is so material and important as to justify the **injured party** in regarding the whole transaction as at an end”(emphasis added). John E. Murray Jr., *Corbin on Contracts*. Sec. 53.4. Slania is the injured party, and it chose not to terminate the lease. Legal contract provisions should be enforced by the courts. Appledore should not be allowed to trigger the default and choose the only remedy available to the injured party, Slania.

As the lease was not terminated, rent accrued as it was due each month. As an installment contract, each month that the rent was not paid was a separate breach of the

lease triggering a new three year statute of limitations for each breach. Slania brought suit against Appledore for the rent, late fees, electricity, and natural gas for the period of May 1, 2013 through April 30, 2015, which is within the three year statute of limitations of RSA 508:4, I.

**Slania Did Not Waive The Argument That The Lease Continued After The Breach on April 22, 2013.**

Although the court found that Appledore fully and completely breached the lease on April 22, 2013, it did not find that the lease was terminated. *Order*, Slania's Brief at 26. The court found that the breach triggered the remedies available to Slania under the Lease, namely section 13.1(b) that Slania elected to continue the Lease. *Id.* Should this court find that the Lease is an installment contract, then each month for which rent was not paid would be considered a separate breach with a separate three year statute of limitations. Supreme Court Rule 16(3)(b) says, in part, "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." By asking whether the Lease between Slania and Appledore is an installment contract and asking as an installment contract whether the statute of limitations runs against each monthly rental installment as it becomes due, then Slania has thereby challenged the court's finding that the breach on April 22, 2013 triggered the entire claim.

CONCLUSION

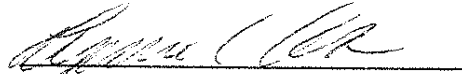
For the foregoing reasons, this Court should reverse and remand the trial court's Order.

Respectfully submitted,

SLANIA ENTERPRISES, INC.

By its counsel,

Dated: 7/17/17



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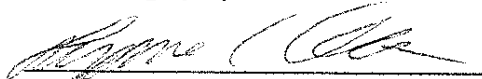
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CERTIFICATION OF SERVICE

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

Dated: 7/17/17



Lynne C. Christie, Esq.