

State of New Hampshire  
Supreme Court

NO. 2014-0371

2014 TERM

NOVEMBER SESSION

**ANN & RICHARD DALEY**

v.

**LINDA BABIGIAN**

RULE 7 APPEAL OF FINAL DECISION OF THE ROCKINGHAM COUNTY  
AND HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURTS

BRIEF OF ANN & RICHARD DALEY

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## QUESTIONS PRESENTED

- I. Did the superior court err in calculating the statute of limitations from the due date of the promissors' final payment, even though RSA 508:2, I provides that actions involving real estate "shall be brought after 20 years from the time the right to recover first accrued to the party claiming it."  
Preserved: MOTION FOR SUMMARY JUDGMENT (Apr. 4, 2013), *Appx.* at 22.



## STATEMENT OF THE FACTS

### I. Note and Private Real Estate Mortgage

In 1988, Ann and Richard Daley (the plaintiffs) bought a condominium in Manchester, New Hampshire from Mr. Vatche Manoukian for \$140,000. They arranged a standard bank mortgage for \$104,000. AFFIDAVIT OF ANN DALEY (Apr. 4, 2013), *Appx.* at 16. But because they did not have enough money for a down payment, Mr. Manoukian, who was the sole owner of the condo, lent the Daleys the remaining \$36,000 of the purchase price. *Id.* Ms. Linda Babigian (the defendant) was married to Mr. Manoukian at the time, but she was not an owner, and did not participate in the real estate transaction. RESPONDENT'S MEMORANDUM OF LAW (Mar. 20, 2014) at 6, *Appx.* at 125.

The Daleys gave Mr. Manoukian a note, in which they “promise[d] to pay to the order of Linda [Babigian] the principal sum of \$36,000 together with interest the rate of 10% per annum.” PROMISORRY NOTE (Exh. A to Motion for Summary Judgment) (Nov. 2, 1988), *Appx.* at 2 (duplicative words omitted). The note called for “[m]onthly payments of interest only in the amount of ... \$300” “to begin on the first day of December, 1988” and continue for five years, with a “balloon payment of all remaining principal and interest” by the expiration of the five-year term, *id.*, which would be November 2, 1993. ORDER (Sept. 16, 2013) at 3, *Appx.* at 59. The note allowed for a 10-day grace period for payments, after which “the principal balance due hereunder, together with interest, shall at the option of the holder hereof, be due and payable.” PROMISORRY NOTE. The note provided that if it were not paid off after five years, the holder “shall have the right to purchase the property” for \$135,000, and that it was “secured by a second mortgage” on the condominium. *Id.*

As security, the Daleys also gave Mr. Manoukian a mortgage, subordinate to the bank

loan, with Ms. Babigian named as mortgagee. MORTGAGE DEED (Exh B. to Motion for Summary Judgment) (Nov. 2, 1988), *Appx.* at 1.

The Daleys paid for four years, up to and including the interest payment due November 1, 1992. ORDER (Sept. 16, 2013) at 3, *Appx.* at 59; AFFIDAVIT OF ANN DALEY ¶9 (Apr. 4, 2013), *Appx.* at 16.

## **II. Babigian Goes Missing**

Unknown to the Daleys, however, Ms. Babigian got divorced, changed her name, and moved several times, probably to California and Massachusetts. *Compare* AFFIDAVIT OF LINDA K. BABIGIAN (attached to RESPONDENT'S OBJECTION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION TO SUMMARY JUDGMENT (May 2, 2013), *Appx.* at 44 (bankruptcy filed in California) *with* LETTER FROM DALEY TO BABIGIAN (Def. Exh. A, attached to Respondent's Memo of Law) (May 11, 2004) at 1, *Appx.* at 2 (addressee in Massachusetts).

In any event, the Daleys lost contact with Ms. Babigian and were thus precluded from performing their obligations under the note. LETTER FROM DALEY TO BABIGIAN (Def. Exh. A, attached to Respondent's Memo of Law) (May 11, 2004) at 1, *Appx.* at 44; LETTER FROM DALEY TO ATTY GREGORY MICHAEL (Def. Exh. B, attached to Respondent's Memo of Law) (Apr. 23, 2006) at 2, *Appx.* at 6.

Because they did not know where to send payments, the Daleys did not remit either the final year of interest, or the November 1993 balloon payment of principal. AFFIDAVIT OF ANN DALEY (Apr. 4, 2013), *Appx.* at 16. As of December 11, 1992, they were thus in default on the December 1, 1992 payment. PETITION TO QUIET TITLE, FOR DECLARATORY RELIEF AND OTHER EQUITABLE RELIEF ¶¶ 10-11 (Jan. 25, 2013), *Appx.* at 8.

There is no indication that Ms. Babigian ever attempted to apprise the Daleys of an address to forward payment, nor that she ever (until the counterclaims here) attempted to collect any installment or the balloon. MOTION TO ENJOIN FORECLOSURE AUCTION (Sept. 16, 2013), *Appx.* at 74; ORDER (Sept. 16, 2013) at 4, *Appx.* at 59.

In 1992, the Daleys got notice from one Mr. Trow of Newport Beach, California, claiming to be the new beneficiary of the note and instructing them to make payments to him. PETITIONERS' ANSWER TO RESPONDENT'S COUNTERCLAIM ¶33 (May 13, 2013), *Appx.* at 47. Since the Daleys had never been apprised by Ms. Babigian that she had assigned her rights, and were shown no proof of assignment, the Daleys were suspicious of a scam, and did not remit payment. RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR RECONSIDERATION ¶¶ 13-14 (Oct. 8, 2013), *Appx.* at 86 (rights not transferred); AFFIDAVITS OF RICHARD AND ANN DALEY IN SUPPORT OF SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT ¶11 (Mar. 14, 2014), *Appx.* at 99 (note never given to seller).

In 1993 or 1994, the Daleys got a notice from a California bankruptcy court informing them the note was part of Ms. Babigian's bankruptcy estate, and offering to sell the note to them for \$2,500 – an opportunity they later wished they had pursued. LETTER FROM DALEY TO BABIGIAN. The note was apparently abandoned by the bankruptcy estate, however, due to minimal equity in the Manchester condominium, and thus without her knowledge reverted to Ms. Babigian. RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR RECONSIDERATION ¶¶ 18-23 (Oct. 8, 2013), *Appx.* at 86; LETTER FROM DALEY TO ATTY GREGORY MICHAEL (Apr. 23, 2006) at 1, *Appx.* at 6.

### III. Daley's Attempts at Closure

In 2004, the Daleys decided they would like to sell their home, but discovered the note clouded its title. LETTER FROM DALEY TO BABIGIAN. Not knowing Ms. Babigian's whereabouts, the Daleys "paid a headhunter \$100 to find her," who reported that "she had many different addresses over an eight year span." LETTER FROM DALEY TO ATTY GREGORY MICHAEL.

Using that information, the Daleys then wrote Ms. Babigian a letter. They briefly recounted the genesis of the note, and reminded her that "monthly payments were made by us, according to the note, up until the time we lost contact with you and Vatche [Manoukian]." The Daleys asked Ms. Babigian to contact them, and requested she let them know whether she or the bankruptcy referee was in possession of the note. LETTER FROM DALEY TO BABIGIAN.

Although her response is not in the record, it is apparent she answered, leading the Daleys to understand that "she was unaware this note even existed." LETTER FROM DALEY TO ATTY GREGORY MICHAEL; OBJECTION FOR PETITION TO QUIET TITLE FOR DECLARATORY RELIEF AND OTHER EQUITABLE RELIEF ¶2B (Mar. 20, 2013), *Appx.* at 14 (referring to 2005 letter not otherwise in the record).

Later the Daleys learned Ms. Babigian had a lawyer, and in 2006, they wrote to him, "hop[ing] you or Linda [Babigian] doesn't expect to collect any interest for the missing years, as I did not know her whereabouts or name change." They inquired "how much Linda [Babigian] says we owe her to clear up this note between us." LETTER FROM DALEY TO ATTY GREGORY MICHAEL.

## STATEMENT OF THE CASE

Despite the Daley's attempts to bring closure, nothing more happened. Twenty years having passed, in 2013 they commenced the current lawsuit, seeking to quiet title, discharge the debt, and declare the mortgage void. PETITION TO QUIET TITLE, FOR DECLARATORY RELIEF AND OTHER EQUITABLE RELIEF (Jan. 25, 2013), *Appx.* at 8.

Ms. Babigian admitted that some of the missed payments are older than the statute of limitations, but alleged that despite statutory language, the statute of limitations applies to each installment individually thus making some of the missed payments and the balloon within the limitations period. Consequently she counterclaimed to recover the monthly payments and the balloon, claiming a total of \$241,765.23, and to exercise her option to buy the condominium at the 1988 price. RESPONDENT'S ANSWER AND COUNTERCLAIM, (Apr. 15, 2013), *Appx.* at 27.

Both parties filed motions for summary judgment. MOTION FOR SUMMARY JUDGMENT (Apr. 4, 2013), *Appx.* at 22; RESPONDENT'S OBJECTION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION TO SUMMARY JUDGMENT (May 2, 2013), *Appx.* at 34; RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF HER OBJECTION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION TO SUMMARY JUDGMENT (May 2, 2013), *Appx.* at 36; PETITIONERS' OBJECTION TO RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT (May 13, 2013), *Appx.* at 52.

The court held that five of the missed payments were older than the statute of limitations and granted the Daleys summary judgment with regard to them; but that the remaining seven, including the balloon, were within 20 years of the date Ms. Babigian filed her counterclaim, and granted Ms. Babigian summary judgment with regard to those.

The court granted a stay of foreclosure pending summary judgment on additional issues

not presented here, which was later lifted. ORDER (Oct. 18, 2013), *Appx.* at 95; ORDER ON SUPPLEMENTAL CROSS-MOTIONS FOR SUMMARY JUDGMENT (May 9, 2014), *Appx.* at 135.

This appeal followed.

## **SUMMARY OF ARGUMENT**

The Daleys argue that the lower court employed a rule of law developed in connection with commercial negotiable instruments – that the statute of limitations runs from each installment in an installment contract – but erroneously applied it here in the context of real estate mortgages where the legislature has specified that the limitations period runs from the date when the “right to recover first accrue[s].”<sup>1</sup>

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<sup>1</sup>The issue presented in question I of the Daley’s Notice of Appeal is not argued.

## ARGUMENT

### I. **The Court Erred by Using a Limitations Period Applicable to Commercial Contracts While Ignoring the Limitations Period the Legislature Specified for Collections on Mortgages**

Borrowing from the context of commercial contracts for installment sales of personalty, the court below held that the statute of limitations applies to each installment individually. Consequently, it calculated 20 years from the various missed payments, finding that some were older and thus time-barred, but others were newer and therefore actionable.

[W]hen 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.

ORDER (Sept. 16, 2013) at 5, *Appx.* at 59 (quoting *General Theraphysical, Inc. v. Dupuis*, 118 N.H. 277, 279 (1978)).

*General Theraphysical* involved an installment contract for the rental of “certain exercise, massage, and sauna equipment.” 118 N.H. at 278. Although no statute was cited in the decision, *General Theraphysical* used a 6-year statute of limitations, presumably derived from either RSA 508:4 (statute of limitations for “personal actions” now using a 3-year but then a 6-year limitations period) or RSA 382-A:3-118 (6-year statute of limitations for negotiable instruments). In any event, it is clear that *General Theraphysical* did not involve real estate nor a real estate mortgage.

The New Hampshire legislature has set forth differing limitations periods for personal actions and negotiable instruments on the one hand, and real estate mortgages on the other. The law applicable to real estate specifies:



No action for the recovery of real estate shall be brought after 20 years from the time the right to recover *first accrued* to the party claiming it or to some persons under whom the party claims.

RSA 508:2, I (emphasis added); *see also* RSA 508:6 (“Actions upon notes secured by a mortgage of real estate may be brought so long as the plaintiff is entitled to bring an action upon the mortgage.”).

The legislature has thus explicitly provided that the limitations period *for real estate mortgages* begins to run from when the “right to recover first accrue[s],” and not from the time each installment payment is due.

No statute or common law rule restricts the statute of limitations for commercial contracts to when the right to recover first accrues. Instead, as *General Theraphysical* recognized, the limitations period in that context runs separately from each installment.

Here, however the court used the rule of law drawn in the context of commercial instruments, but erroneously applied it to real estate mortgages.

The differing counting methods specified by the legislature make sense. Commercial contracts are generally for relatively short periods and have a correspondingly short 3- or 6-year limitations period. Real estate mortgages, however, often run for 20 or 30 years, and consequently have a much longer 20-year limitations period. Allowing the statute of limitations to run from each installment in the commercial context gives commercial creditors a reasonably short 6-year window from each installment in which to begin collection. But in the real estate context, this is untenable. It would conceivably allow a mortgagee to tack an additional 20 years to a claim of a mortgage default that occurs toward the end of a 30-year mortgage, thereby resulting in a 50-year limitations period.

By providing a longer limitations period for real estate actions, coupled with the

requirement that counting begins from when the “right to recover first accrue[s],” the legislature ensured that the 20-year limitations window could not be extended to a half-century.

Words and phrases in a statute are construed according to the common and approved usage of the language unless from the statute it appears that a different meaning was intended. . . . We seek to effectuate the overall legislative purpose and to avoid an absurd or unjust result. We can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.

*Bovaird v. New Hampshire Dep’t of Admin. Servs.*, slip op. 2013-0760, \_\_ N.H. \_\_ (decided Sept. 30, 2014) (quotations and citations omitted).

Here the superior court applied a rule of law intended for commercial paper, but ignored the plain meaning of an explicit statute. It thus erred in its calculation of the limitations period.

Because the Daleys first defaulted on December 11, 1992, more than 20 years before Ms. Babigian commenced her counterclaim, she is time-barred from collecting. Accordingly, the lower court’s finding that some of the Daleys payments were within the limitations period is in error, and this Court should reverse.

## **CONCLUSION**

This Court should reverse the judgment below, release the Daleys from the lower court’s finding of damages, and quash any pending foreclosure. In addition, the Daleys request, as they did below, that Ms. Babigian be barred from enforcing the note and mortgage, that title be quieted in the names of Ann and Richard Daley subject only to the first bank mortgage, and that the Babigian mortgage be declared void and discharged.

Respectfully submitted,

Ann and Richard Daley  
By their Attorney,

Law Office of Joshua L. Gordon

*Joshua L. Gordon*

Dated: November 14, 2014

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**REQUEST FOR ORAL ARGUMENT AND CERTIFICATION**

Counsel for Ann and Richard Daley request that Attorney Joshua L. Gordon be allowed oral argument because the portion of the statute cited herein has not been construed, and because the court below erred to the significant detriment of the Daleys.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on November 14, 2014, copies of the foregoing will be forwarded to Benjamin R. Roberge, Esq.

*Joshua L. Gordon*

Dated: November 14, 2014

Joshua L. Gordon, Esq.

**ADDENDUM**

ORDER (Sept. 16, 2013)..... 37

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

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**NOTICE OF DECISION**

**Daniel J. Kalinski, ESQ  
Law Office of Daniel J Kalinski  
16 Salmon Street  
Manchester NH 03104-3019**

Case Name: **Richard H Daley, et al v Linda K Babigian**  
Case Number: **216-2013-CV-00079**

Enclosed please find a copy of the court's order of September 16, 2013 relative to:

Motions for Summary Judgment

September 20, 2013

Raymond W. Taylor  
Clerk of Court

(504)

C: Benjamin R. Roberge, ESQ

**The State of New Hampshire  
Superior Court**

**Rockingham, SS.**

Richard H. Daley & Ann S. Daley

v.

Linda K. Babigian & JP Morgan Chase Bank, N.A.

No. 216-2013-CV-079

**ORDER**

Petitioners, Richard and Ann Daley ("Petitioners"), initially brought suit against the Respondents Linda Babigian ("Babigian") and JP Morgan Chase Bank ("Chase"), seeking to quiet title to condominium property located at 684 South Porter Street, Unit 35 in Manchester and for declaratory relief. Petitioners moved to voluntarily nonsuit their action against Chase, which the Court (Abramson, J.) granted on April 4, 2013. Petitioners have since moved for summary judgment and Babigian objects and has cross moved for summary judgment, to which Petitioners have objected. For the reasons discussed herein, Petitioners' Motion for Summary Judgment is GRANTED in part and DENIED in part, and Respondent Babigian's Motion for Summary Judgment is GRANTED.<sup>1</sup>

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to

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<sup>1</sup> For clarity, Babigian's Motion for Summary Judgment can best be construed as a motion for partial summary judgment because she seemingly acknowledges that some portion of the debt Petitioners owed to her falls outside the twenty-year statute of limitations period that RSA 508:2, I, establishes.



judgment as a matter of law.” RSA 491:8-a, III. In order to defeat summary judgment, the non-moving party “must put forth contradictory evidence under oath, ‘sufficient . . . to indicate that a genuine issue of fact exists so that the party should have the opportunity to prove the fact at trial . . . .’” Phillips v. Verax, 138 N.H. 240, 243 (1994) (quoting Dolan v. Maple Leaf Health Care Ctr., Inc., 119 N.H. 424, 425 (1979)). A fact is *material* if it affects the outcome of the litigation under the applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). The evidence must be considered in the light most favorable to the non-moving party, together with all reasonable inferences therefrom. Sintros v. Hamon, 148 N.H. 478, 480 (2002). In reviewing cross motions for summary judgment, courts view the evidence in the light most favorable to each party in its capacity as the nonmoving party. City of Concord v. State, 164 N.H. 130, 133 (2012).

The parties do not dispute the operative facts nor do they largely dispute which statute of limitations applies. Mot. Summ. J. ¶¶ 10–11; Resp’t’s Mem. Support Obj. Petrs.’ Mot. Summ. J. 3. Rather, the central dispute in this case is when the statute of limitations began running on a debt Petitioners owe Babigian.

Petitioners acquired ownership of the disputed property by Warranty Deed dated October 24, 1988, recorded at the Hillsborough County Registry of Deeds, Book 5016, Page 93. Mot. Summ. J. ¶ 3. Petitioners granted a mortgage interest in this property to Dime Real Estate Services, by a mortgage dated October 24, 1988. Mot. Summ. J. ¶ 4. The mortgage secures a note with the same date, in the amount of \$104,000. Petitioners then granted another mortgage interest (“Babigian Mortgage”) in the Manchester condominium property to Linda K. Manoukian (now Babigian) and secured it with a

note, dated November 21, 1988 in the amount of \$36,000 ("Babigian Note"). Mot. Summ. J. ¶ 5.

The Babigian Note required Petitioners to make monthly installment payments of \$300, the accrued interest, beginning in December 1988 and ending on November 2, 1993. Mot. Summ. J. ¶ 8. On that date, the monthly interest amount would have been due along with a balloon payment of the balance of the Note. Petitioners never made this payment, however. They themselves admit that the last payment they made was on November 1, 1992. Mot. Summ. J. ¶ 9; Richard Daley Aff. ¶ 9.

The statute of limitations constitutes an affirmative defense, and the defendant bears the burden of proving that it applies in a given case. Lamprey v. Britton Const., Inc., 163 N.H. 252, 258 (2012). "Actions upon notes secured by a mortgage of real estate may be brought so long as the plaintiff is entitled to bring an action upon the mortgage." RSA 508:6. "No action for the recovery of real estate shall be brought after 20 years from the time the right to recover first accrued to the party claiming it or to some persons under whom the party claims." RSA 508:2, I. Together, these statutes provide a twenty-year limitations period for actions on notes that are secured by mortgages on real property. Cadle Co. v. Dejadon, 153 N.H. 376, 378 (2006).

Petitioners argue that the Babigian Note became due ten days after December 1, 1992, when the next installment payment would have been due, accounting for the ten day grace period for late payment. Because Babigian could have enforced her right to accelerate the debt at this time, Petitioners assert that the Note required her accelerate the debt and that the statute of limitations began to run on December 11, 1992. On the other hand, Babigian argues:



The five (5) unpaid monthly payments due between December 1, 1992 and April 1, 1993 each came due more than twenty (20) years prior to Babigian's Counterclaim. The remaining seven (7) monthly payments, along with the balloon payment due on November 2, 1993, each came due within the 20 years preceding Babigian's filing of her counterclaim.

Resp't's Mem. Support Obj. Petrs.' Mot. Summ. J. 3. Babigian is correct.

The terms of the note allow but do not require Babigian to call the entire balance of the note upon one late payment:

The maker may anticipate payment at any time without penalty. PROVIDED, however, that if any default shall be made in the payment of any installment or final payment and such default continues for a period of ten (10) days, the principal balance due hereunder, together with interest, shall at the option of the holder hereof, be due and payable.

Ann Daley Aff., Ex. A (emphasis added). Babigian did not exercise her option to call the Note. Every month after November 1992, Petitioners failed to pay the \$300 interest payment, and every month Babigian did nothing. Then, on November 2, 1993, the entire balance of the Note was due. At that time, the terms of the Note again permitted but did not require Babigian to demand Petitioners pay the entire balance of the Note, including the delinquent interest payments:

In the event his Note is not paid in full on or before ten (10) days after the sixtieth (60th) anniversary month of this Note, the holder hereof shall have the right to purchase the property which this Note is secured by a second mortgage upon . . . . This right shall take effect on or after the sixtieth (60th) anniversary month of this Note. This right shall be an addition to all other rights of the holder hereof and the rights granted to the holder in a Mortgage of even date securing this Note.

Id. Again, Babigian did nothing.

Twenty years from November 2, 1993 is November 2, 2013, so the statute of limitations permitting Babigian to bring an action enforcing the Note has not yet run. In fact, the statute of limitations has been tolled since Babigian filed her answer and coun-



terclaim on April 15, 2013. Desaulnier v. Manchester School Dist., 140 N.H. 336, 338 (1995). As such, Babigian's argument accurately describes the legal status of Petitioners' quiet title action.


Babigian cites Gen. Theraphysical, Inc. v. Dupuis, 118 N.H. 277, 279 (1978), for the proposition that an action against a debt, where the debt is due in installments, accrues installment-by-installment. This proposition is accurate; "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." Id. The terms of the Babigian Note are consistent with this understanding. The Note does not require Babigian to enforce her right to accelerate the debt because none of the language is mandatory. Therefore, any installment payment that came due before the statute of limitations ran is now barred, but several payments came due after that time. The balance of the Note, for example, was due within ten days of November 2, 1993, which is within the limitations period.

Each installment payment was due on the first of the month. Babigian filed her counterclaim on April 15, 2013, tolling the statute of limitations. Thus, any installment that would have come due after April 15, 1993 is not barred by the statute of limitations. Put another way, the May 1993 through November 1993 installment payments in addition to the November 2, 1993 balloon payments are outstanding debts Petitioners owe that are not barred by the statute of limitations. Babigian's cross Motion for Summary Judgment is thereby GRANTED as to these payments. However, any actions arising based on the installment payments that came due prior to May 1993 are barred by the

statute of limitations, and Petitioners' Motion for Summary Judgment is GRANTED as to those payments. Petitioners' Motion for Summary Judgment is DENIED in all other respects, and Babigian's Motion for Summary Judgment is DENIED as to the April 1993 payment.

So ORDERED.

Date: 9/16/2013

  
\_\_\_\_\_  
N. William Delker  
Presiding Justice