

2000

James Dishinger and Nancy Dishinger d/b/a TCBY Yogurt v. Jana Potter d/b/a Silver Queen Hotel : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES DISHINGER and NANCY	:	
DISHINGER d/b/a TCBY YOGURT,	:	Court of Appeals No. 20000081-CA
	:	
Plaintiffs and	:	District Court No. 960600106PR
Appellants/Cross-Appellees,	:	
	:	
vs.	:	
	:	Priority No. 15
JANA POTTER d/b/a SILVER	:	
QUEEN HOTEL,	:	
	:	
Defendant and	:	
Appellee/Cross-Appellant.	:	
	:	

REPLY BRIEF OF APPELLANTS
BRIEF OF CROSS-APPELLEES

Appeal from the
Third Judicial District Court, Summit County
Honorable Pat B. Brian, Presiding over Trial
Honorable Robert K. Hilder, Presiding over Final Judgment

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COURT OF APPEALS

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	:	
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JANA POTTER d/b/a SILVER	:	
QUEEN HOTEL,	:	
	:	
Defendant and	:	
Appellee/Cross-Appellant.	:	
	:	

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INTRODUCTION

This brief first replies to defendant Jana Potter's arguments in response to the Dishingers' claims as appellants, and then responds to the arguments asserted by Ms. Potter on her cross-appeal. For the reasons that follow, this Court should reject Ms. Potter's challenges to the Dishingers' assignments of error and also her claims as cross-appellant.

REPLY POINTS

A. The record fails to support Ms. Potter's assertion that the jury's verdict concerning the elements of accord and satisfaction was only advisory.

Ms. Potter first argues that the Dishingers are not in a position to challenge the trial court's judgment that there was no accord and satisfaction on the ground that the court ignored the jury's undisputed findings concerning the elements of accord and satisfaction (as contained in the Special Verdict). Specifically, Ms. Potter contends that the jury's Special Verdict was advisory only and therefore not binding on the trial court. The record, however, fails to support that contention.

Most significant is that the judgment itself makes clear that the trial court entered judgment based on the findings made by the jury in its Special Verdict. In the very first paragraph of the judgment, the court states: "Based upon the evidence *and the special verdict*, the Court enters judgment as follows[.]" Br. of Appellants, Addendum B (emphasis added). And throughout the judgment, the trial court refers to specific findings made by the jury and simply applies the law to those findings

(see Addendum B to Brief of Appellants). The trial court made no independent findings of fact.

Moreover, nothing in the record even suggests that either the trial court or the parties believed the jury was sitting in an advisory capacity. The Dishingers made a proper and timely demand for a jury trial. (R. 35). The parties did not stipulate to a bench trial of any issues. Nor did they ever seek to limit the issues the jury would consider. Furthermore, the trial court did not “upon motion or its own initiative find[] that a right of trial by jury of some or all * * * issues d[id] not exist.” Utah R. Civ. P. 39(a)(2). The proceedings went forward as if the entire case were being tried to the jury as a matter of right, and the matter was consistently designated as a jury trial on the official court records (*e.g.*, the numerous minute entries regarding scheduling and conduct of the trial, and documents relating to the post-trial proceedings, including the judgment itself: “This matter came on before the Court for a jury trial * * *.”). (R. 234-40, 264, 300, 304, 341-42, 412-13, 605). Also, the jury was specifically instructed: “You are the exclusive judges of the facts and the evidence.” (R. 304).

Accordingly, this Court should reject Ms. Potter’s “advisory jury” argument for essentially the same reasons that it rejected a similar claim in *Goldberg v. Jay Timmons & Assocs.*, 896 P.2d 1241 (Utah Ct. App. 1995). In *Goldberg*, after receiving an unfavorable verdict from the jury, the plaintiffs argued for the first time in a post-trial memorandum that “because the case involved only equitable

issues, the jury had served in an advisory capacity.” 896 P.2d at 1241. Convinced by that argument, the trial judge ignored the jury’s verdict (considering it to be nonbinding), made its own findings of fact (which were contrary to the jury’s verdict), and entered judgment for the plaintiffs. *Id.* at 1242.

On appeal, this Court, construing Rule 39 of the Utah Rules of Civil Procedure, held that the trial court had erred in designating the jury’s verdict as advisory and ruling contrary to that verdict. *Id.* at 1244. In so holding, the Court noted that both parties had demanded a jury trial without limiting their demand to particular claims, the trial court had not “‘upon motion or its own initiative f[ound] that a right of trial by jury of some or all * * * issues d[id] not exist,’ Utah R.Civ.P. 39(a)(2),” “the proceedings [had gone] forward as if the entire case were being tried by a jury as a matter of right,” on the official court forms the matter was consistently referred to as a jury trial, and neither the parties nor the trial court had sought to limit the issues to be decided by the jury. *Id.* at 1243. The *Goldberg* Court also noted that the jury had been “specifically instructed that it was the exclusive judge of the facts.” *Id.* All of the foregoing considerations apply with equal force to the instant case.

The *Goldberg* Court also observed that the trial court’s failure to notify the parties at the outset of trial that the jury’s verdict would be advisory prohibited it from treating the verdict in that fashion once a verdict had been returned. *Id.* at

1243-44. The absence of such notification in the instant case similarly precludes the “advisory jury” argument that Ms. Potter advances.

Goldberg and the instant case are distinguishable from *Peirce v. Peirce*, 2000 UT 7, 994 P.2d 193, which Ms. Potter relies on as support for her position. In *Peirce*, the sole claim before the trial court was an equitable claim, and it was clear on the face of the record that the trial court had treated the jury’s findings as advisory only. Indeed, the trial court actually entered separate findings of fact. 2000 UT 7, ¶¶ 14-15. In short, this Court’s conclusion in *Peirce* that the jury was sitting in an advisory capacity was based on factors not present in either *Goldberg* or the instant case.

In sum, contrary to Ms. Potter’s argument, the jury’s Special Verdict cannot be considered advisory only. The trial court was bound by the jury’s factual determinations concerning the elements of accord and satisfaction, as contained in the Special Verdict. *See Goldberg*, 896 P.2d at 1244 (“even if the trial court had been responsible for deciding equitable issues in this case, it would have been bound by the jury’s factual determination[s] [concerning those issues]”). The Dishingers therefore are in a position to challenge the trial court’s judgment on the ground that it is contrary to the jury’s findings concerning the elements of accord and satisfaction.

B. The Dishingers preserved their claim of accord and satisfaction, and that claim does not require them to satisfy the marshalling requirement.

Without analysis and in cursory fashion, Ms. Potter contends that this Court should not review the Dishingers' accord and satisfaction claim because (1) their brief fails to demonstrate that they preserved that claim in the trial court and (2) they have failed to meet the marshalling requirement for an insufficiency-of-evidence claim. Br. of Appellee 9-10. As explained below, in making that argument, Ms. Potter has overlooked the Dishingers' citations to the record and misconstrued the marshalling requirement.

Citing Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure, Ms. Potter asserts that "[t]he Dishingers' Brief fails to support that [the accord and satisfaction] issue[] w[as] preserved for review[.]" Br. of Appellee 9. To the contrary, the Dishingers' brief contains specific citations to the record where the accord and satisfaction issue was preserved. Br. of Appellants 1. Ms. Potter mounts no challenge to the sufficiency or accuracy of those citations. Accordingly, this Court should summarily reject her Rule 24(a)(5)(A) argument.

Ms. Potter's marshalling argument fares no better. The marshalling requirement applies only where an appellant challenges the sufficiency of the evidence to support findings of fact. *See, e.g., Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, ¶¶ 12-14, 993 P.2d 222 (to obtain appellate review of a challenge to the sufficiency of the evidence supporting a factual finding, the party making that challenge must marshal all of the record evidence in support of the

finding and then demonstrate that the evidence is insufficient to support the finding). The Dishingers are not making a sufficiency-of-evidence claim with respect to the accord and satisfaction issue. Rather, they simply are arguing that the trial court erred in entering judgment against them on the accord and satisfaction claim, given the jury's undisputed findings of fact in its Special Verdict. *See* Br. of Appellants 9-13. That is a pure question of law, which in no way raises a sufficiency-of-evidence issue. Thus, the marshalling requirement is inapplicable to the Dishingers. *See Peirce v. Peirce*, 2000 UT 7, n. 4, 994 P.2d 193 (“the marshaling requirement applies only to challenges of factual findings, not to conclusions of law”). Their accord and satisfaction issue is properly presented for review.

C. There was an accord and satisfaction between the parties, which set the rental rate at \$19 per square foot, and Ms. Potter's subjective intent regarding the accord and satisfaction is irrelevant.

In responding to the merits of the Dishingers' accord and satisfaction argument, Ms. Potter does not dispute their assertion that all of the elements of an accord and satisfaction were established by the evidence and found by the jury: (1) the applicable rental rate was not a liquidated or set dollar amount, and there was a bona fide dispute or uncertainty regarding the applicable rental rate; (2) the Dishingers tendered payment to Ms. Potter in full satisfaction of the disputed monthly rental amount; and (3) Ms. Potter was on notice of the tendered payment by the Dishingers and accepted it. Rather, she contends that there could be no

accord and satisfaction because she did not subjectively intend for that to occur.

That contention, however, is defeated by this Court's holding in *Cove View Excavating & Construction Co. v. Flynn*, 758 P.2d 474 (Utah Ct. App. 1988), a case cited by Ms. Potter.

In *Cove View*, the parties had a dispute regarding the amount owed for the purchase of construction materials and the rental of a pump and a backhoe. The debtor submitted a check to the creditor with "pmt in full to date labor & materials" written on the front, and "payment in full for all labor and materials to 6/26/84" written on the back. 758 P.2d at 476. On the advice of counsel, the creditor crossed out the restrictive language on the back of the check and negotiated it. *Id.* As does Ms. Potter in the instant case, the creditor claimed that it had not subjectively consented to accept an amount less than the full amount demanded as payment in full. In rejecting the creditor's argument, and ruling that an accord and satisfaction had indeed occurred, this Court explained:

In light of the express condition on the check, the fact that [the creditor] did not subjectively intend to accept the check as full payment of [the debtor's] obligation is legally irrelevant. A creditor may not disregard the condition attached to a check tendered in full payment of an unliquidated or disputed claim. His negotiation of [the debtor's] check was an acceptance of [the debtor's] offer of full payment, notwithstanding his lack of any actual intent to accept it as such.

"The fact that the creditor scratches out the words 'in full payment,' or other similar words indicating that the payment is tendered in full satisfaction, does not prevent his retention of the money from operating as an assent to the discharge It may, indeed, be clear that he does not in fact assent to the offer made by the debtor, so that there is no actual 'meeting of the

minds.’ But this is merely another illustration of the fact that the making of a contract frequently does not require such an actual meeting.”

* * * *

[The creditor’s] negotiation of this check resulted in an accord and satisfaction as a matter of law regardless of his subjective intent.

Id. at 478 (quoting 6 A. Corbin, Corbin on Contracts § 1279 (1962)) (citations omitted).

The Utah Supreme Court has similarly ruled that a party’s subjective intent is irrelevant in light of the party’s actual conduct with respect to an accord and satisfaction:

As adopted in this jurisdiction, the doctrine [of accord and satisfaction] does not require subjective intent to discharge an obligation, provided the parties’ actions give rise to a reasonable inference that they accepted the altered performance of their contract. Where, as here, the check is tendered under the condition that negotiation will constitute full settlement, mere negotiation of the check constitutes the accord, regardless of the payee’s efforts or intent to negate the condition.

Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Telephone & Telegraph Co., 844 P.2d 322, 330 (Utah 1992).

In *Estate Landscape*, the Utah Supreme Court concluded that the creditor’s negotiation of the check tendered as payment in full satisfied the debtor’s obligation, regardless of the creditor’s subjective intent that the check be considered only a partial payment and the creditor’s efforts to recover the full amount through litigation:

While it is true that, as with any contract, the parties must consent to an accord and satisfaction, a party’s conduct may be conclusive proof of

acceptance. Here, [the creditor's] negotiation of the check constituted acceptance of the accord and satisfaction as a matter of law.

Id.

In contrast, in *Tates, Inc. v. Little America Refining Co.*, 535 P.2d 1228 (Utah 1975), relied upon by Ms. Potter for the proposition that no accord and satisfaction occurred, the amount at issue was a fixed amount, and although some discussions had occurred with respect to possible offsets to the amount due, the creditor was not on notice that the subject payment was tendered as payment in full of the obligation. *Id.* at 1230-31. No such facts are present in the instant case.

Allen-Howe Specialties v. U.S. Construction, Inc., 611 P.2d 705 (Utah 1980), another case relied upon by Ms. Potter, also is distinguishable from the instant case. In *Allen-Howe*, partial progress payments of a fixed sum were paid pursuant to a written contract, all of which contained a restrictive endorsement to the effect that negotiation of the check constituted payment in full for all labor, materials and equipment provided to date. 610 P.2d at 710. The creditor refused acceptance of the last check, and pursued the debtor for collection of the full debt. Although the Utah Supreme Court did not discuss each and every element of an accord and satisfaction, it did rule that the partial payment of a fixed sum, and the rejection of the attempted final payment of the fixed sum, did not constitute an accord and satisfaction. *Id.* Unlike in *Allen-Howe*, in the instant case rather than a fixed sum being due and owing, there was a bona fide dispute over the actual amount of rent

the Dishingers owed to Ms. Potter. Additionally, unlike in *Allen-Howe*, Ms. Potter never refused a single payment made by the Dishingers.

Finally, Ms. Potter's assertion that "the lease provides that acceptance of partial rent could not constitute an accord and satisfaction," Br. of Appellee 12, is based on a misreading of the lease. The language from the lease that Ms. Potter quotes and relies on, Br. of Appellee 12, provides that the landlord's acceptance of rent "shall not be deemed to be a waiver of any preceding default by tenant or any term, covenant or condition of the lease, other than the failure of Tenant to pay particular rent also accepted[.]" Br. of Appellant, Addendum C (page 19 of Lease). That language, although not entirely clear, cannot reasonably be read to preclude an accord and satisfaction, which, of course, presumes a bona fide dispute over an unliquidated amount (here, the "then prevailing rental rate"), a payment tendered in full settlement of the entire dispute, and an acceptance of the payment. *Estate "Landscape"*, 844 P.2d at 325 (setting forth the elements of accord and satisfaction).

In sum, nothing in the law or the facts of this case supports Ms. Potter's contention that an accord and satisfaction did not, or could not, occur. Indeed, the only fair reading of the Special Verdict – viewed in the light of established case law – is that the jury found an accord and satisfaction between the parties with respect to the rental rate for the option period provided for in the lease. And the trial court simply was not in a position to ignore that finding in entering judgment.

D. Ms. Potter fails to show that the lease between her and the Dishingers was forfeited for purposes of the unlawful detainer statute.

In response to the Dishingers' argument that the trial court erred in entering a judgment against them for unlawful detainer and treble damages, Ms. Potter contends that, contrary to the Dishingers' principal point, the lease between the parties was forfeited – *i.e.*, terminated – under the terms of the lease. Although she never expressly makes the point, she apparently is of the view that termination of the lease under the “Remedies In Default” section of the lease (Br. of Appellants, Addendum C, page 13 of Lease) enabled her to obtain a judgment for unlawful detainer and treble damages, even though she accepted rent from the Dishingers after serving a notice to pay or quit. As further explained below, however, that view is incorrect, because it fails to consider controlling authority from the Utah Supreme Court concerning the effect of post-notice-to-quit acceptance of rent, payments on a landlord's ability to obtain relief – including treble damages – under Utah's unlawful detainer law (UTAH CODE ANN. §§ 78-36-3 through -11 (1996)).

Ms. Potter spends considerable time in her brief discussing the non-waiver and remedies-for-default provisions of the lease. Br. of Appellee 12-14. That discussion, however, is irrelevant to the Dishingers' assignment of error, which is that the trial court erred in entering a judgment for unlawful detainer and treble damages pursuant to statute, even though Ms. Potter accepted rent from the Dishingers after serving them with a notice to quit. That the lease provides that Ms. Potter, as landlord, does not waive any tenant default by accepting rent after the

default and thus does not waive the right to seek whatever contractual remedies she may have for the default – an interpretation of the lease with which the Dishingers do not disagree – is unimportant insofar as the unlawful detainer statute is concerned. What controls for purposes of applying the statutory law is the clear principle set forth in *Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.*, 560 P.2d 700, 701-02 (Utah 1977), that in order to pursue the *statutory* remedies of unlawful detainer and treble damages, a landlord may not accept rent – even partial rent – after serving a notice to quit on a tenant. Interestingly, Ms. Potter neither challenges the Dishingers’ statement of the *Woodland Theatres* rule nor explains why it does not apply in this case to defeat the judgment against the Dishingers for unlawful detainer and treble damages.

At bottom, as fully discussed in the Dishingers’ opening brief, under *Woodland Theatres*, Ms. Potter waived forfeiture of the lease for purposes of the unlawful detainer statute (and its provision for treble damages) when she accepted rent payments from the Dishingers after serving them with a notice to quit. After she had accepted rent, Ms. Potter simply was not in a position to pursue the statutory remedies (without reinitiating the statutory process by serving a new notice to quit).

That is not to say that Ms. Potter was without potential contractual remedies for eviction and damages under the terms of the lease; however, those remedies were independent of the statutory remedies. And contrary to the implicit suggestion

in Ms. Potter's argument, the trial court's judgment of unlawful detainer and treble damages is not sustainable under the terms of the lease. Specifically, with respect to the treble damages award, although the remedies provisions contained in the lease permit the landlord to recover damages from the tenant for a default (*see* Br. of Appellant, Addendum C, pages 13-14 of Lease), there is no provision for *treble* damages. Thus, the trial court's treble damages award – which clearly is the Dishingers' principal concern in this appeal – cannot be saved by Ms. Potter's lease-based analysis.

RESPONSE TO MS. POTTER'S ASSIGNMENTS OF ERROR
ON CROSS-APPEAL

- A. Ms. Potter fails to show that the trial court erred in refusing to give her requested jury instructions concerning the meaning of “prevailing rental rate.”**

In her first assignment of error on cross-appeal, Ms. Potter argues that the trial court erred in refusing to give her requested jury instructions on the meaning of “prevailing rental rate.” Br. of Appellee 18. For the following reasons, the trial court did not err in declining to give the requested instructions.

Ms. Potter acknowledges that the jury was presented with a fact question as to the intended meaning of the term “prevailing rental rate,” as used in the lease between the parties (Br. of Appellants, Addendum C, page 24 of Lease). There is no dispute that the parties offered competing and contradictory evidence on that question at trial. Ms. Potter acknowledges in her brief that the Dishingers' evidence supported the view that “prevailing rental rate” meant the most frequent or

prevalent rate, not the market rate, and that her own evidence supported the contrary view that “prevailing rental rate” meant market rate. Br. of Appellee 17-18.

Given the competing positions concerning the meaning of “prevailing rental rate,” the trial court correctly refused to give Potter’s requested instructions. *See Vitale v. Belmont Springs*, 916 P.2d 359, 361 (Utah Ct. App. 1996) (“A trial court’s decision regarding jury instructions presents a question of law, which is reviewed for correctness.”). Those instructions were nothing more than a directive to the jury to adopt Ms. Potter’s proposed interpretation of the disputed term over the Dishingers’ proposed interpretation of that term. The instructions therefore were obviously improper, if the jury was to function as it should in deciding a fact question – *i.e.*, by giving due consideration to all the evidence and the views of both parties. Indeed, the requested instructions, by directing the jury to adopt Ms. Potter’s view of the evidence, would have constituted improper comment on the evidence by the judge. *See State v. Lovato*, 702 P.2d 101, 109-10 (Utah 1985) (“In the context of the specific evidence relating to these items, the “factors” propounded by the defendant [in his requested jury instruction] would have unduly emphasized portions of the testimony and would have been an improper comment by the judge on the evidence.”). In short, Ms. Potter’s first assignment of error is without merit.

B. Ms. Potter fails to demonstrate that she fairly presented her argument concerning administrative and late fees to the trial court; therefore, this Court should not consider that argument.

As a second assignment of error, Ms. Potter argues – somewhat confusingly – that the trial court erred in not awarding her administrative and late fees she claims the Dishingers owed her under the plain language of the lease between the parties. Br. of Appellee 20-22. Ms. Potter, however, fails to show that she presented to the trial court the argument she now makes on appeal. For that reason, this Court should not consider her assignment of error.

The single citation to the record that Ms. Potter provides this Court as evidence of preservation of her argument concerning administrative and late fees is “R. 637, p.16.” Br. of Appellee 21.¹ That citation is to a page of the trial court transcript where Ms. Potter entered her objections to the court’s refusal to give certain of her requested jury instructions (Nos. 16, 19, 22, and 21). Thus, it is unclear whether Ms. Potter is arguing that she is entitled to a reversal of a portion of the trial court’s judgment on the ground that the court erroneously refused to give her requested jury instructions on administrative and late fees, or that such a reversal should come because the trial court itself should have awarded those fees.

¹ In the “Issues and Standards on Review” section of Ms. Potter’s brief, she refers to “R. 634, ¶16” as the record support for preservation of her argument concerning administrative and late fees. Br. of Appellee 3. That citation, however, appears to be a typographical error, and thus the Dishingers will assume that Potter meant to refer the Court to “R. 637,” as set forth in the argument portion of her brief (Br. of Appellee 21). The Dishingers also will assume that Ms. Potter’s citations to “¶16” and “p.16” are meant to refer to line 16 of the referenced page.

In any event, regardless of which argument Ms. Potter actually is making, she fails to demonstrate that the argument was preserved below.

“It is axiomatic that, before a party may advance an issue on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon.” *Salt Lake County v. Carlston*, 776 P.2d 653, 655 (Utah Ct. App. 1989). If an issue was not brought to the attention of the trial court in a timely and informative manner, it is “deemed waived, precluding this court from considering [the] merits on appeal.” *Id.* Nothing but a cursory objection to four of Ms. Potter’s requested instructions (the specific texts of which are not identified) appears in the paragraph beginning at line 16 of record page 637 – the citation to the record provided by Ms. Potter. That objection concerning essentially unidentified instructions is wholly insufficient to preserve for review the argument regarding administrative and late fees that Ms. Potter now presents on appeal. Accordingly, this Court should not consider it.

CONCLUSION

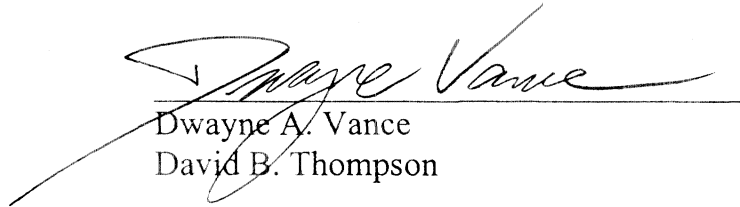
Based on the foregoing arguments and those contained in the Dishingers’ opening brief, this Court should reverse the trial court’s judgment of unlawful detainer and treble damages against the Dishingers, and remand the case to the trial court for (1) entry of judgment in favor of the Dishingers on their accord and satisfaction claim (or, alternatively, on the ground that Ms. Potter – for purposes of the unlawful detainer statute – waived forfeiture of the lease by accepting rent after

serving a notice to quit) and (2) calculation and award of the Dishingers' reasonable attorney's fees at trial and on appeal.

Dated this 20th day of September, 2000.

Respectfully submitted,

TESCH, THOMPSON & VANCE, LLC



Dwayne A. Vance
David B. Thompson

Counsel for James and Nancy Dishinger,
Plaintiffs/Appellants/Cross-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2000, I caused two (2) copies of the foregoing Reply Brief of Appellants and Brief of Cross-Appellees to be mailed, postage prepaid, to Robert M. Felton, counsel for Defendant/Appellee/Cross-Appellant herein, at the following address:

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