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S.C. SUPREME COURT

The State of South Carolina
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

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Jan 11 2023

SC Court of Appeals

Court of Appeals Case No. 2019-000486
Lower Court Case No. 2018-CP-21-03238
No. 2015-CP-26-06384
No. 2013-CP-21-02795

Nationstar Mortgage LLC..... Plaintiff,

v.

Barbara A. Gibbs, Melvin E. Gibbs, and
Westbrook Phase IV Homeowners Association Defendants,

Of whom Barbara A. Gibbs and Melvin E. Gibbs are the Appellants,

v.

Nationstar Mortgage LLC Respondent.

**RESPONDENT NATIONSTAR MORTGAGE LLC'S
RETURN TO PETITIONERS'
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
The Mortgage Loan Transaction.....	1
Mrs. Gibbs Defaults on Her Mortgage Loan Obligations.....	2
Nationstar’s Foreclosure Action	3
ARGUMENT	5
I. THE LOWER COURTS CORRECTLY CONCLUDED THAT NATIONSTAR’S FORECLOSURE ACTION WAS NOT SUBJECT TO DISMISSAL.....	5
II. THE LOWER COURTS CORRECTLY HELD THAT NATIONSTAR WAS ENTITLED TO SUMMARY JUDGMENT.....	7
III. THE REMAINING ISSUES IN THE PETITION FALL OUTSIDE THE SCOPE OF RULE 242 OF THE SOUTH CAROLINA RULES OF APPELLATE PROCEDURE.....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>ABB, Inc. v. Integrated Recycling Grp. of SC, LLC</i> , 432 S.C. 545, 854 S.E.2d 171 (Ct. App. 2021), <i>reh'g denied</i> (Feb. 12, 2021).....	10
<i>Bank of America, N.A. v. Draper</i> , 403 S.C. 214, S.E.2d 478, 482-83 (Ct. App. 2013)	7
<i>David v. McLeod Regional Medical Center</i> , 367 S.C. 242, 626 S.E.2d 1 (2006)	7, 8
<i>Doe v. Marion</i> , 373 S.C. 390, 645 S.E.2d 245 (2007)	5, 6
<i>Fleming v. Rose</i> , 350 S.C. 488, 567 S.E.2d 857 (2002)	7
<i>Gentry v. Yonce</i> , 337 S.C. 1, 522 S.E.2d 137 (1999)	6
<i>Haggins v. State</i> , 377 S.C. 135, 659 S.E.2d 170 (2008)	9
<i>Hancock v. Mid-South Mgmt Co., Inc.</i> , 381 S.C. 326, 673 S.E.2d 801 (2009)	7
<i>Nationstar Mortg. LLC v. Gibbs</i> , No. 2019-000486, 2022 WL 4362405 (S.C. Ct. App. Sept. 21, 2022).....	8
<i>Savannah Bank, N.A. v. Stalliard</i> , 400 S.C. 246, 734 S.E.2d 161 (2012)	7
<i>Toussaint v. Ham</i> , 292 S.C. 415, 357 S.E.2d 8 (1987)	6
<i>U.S. Bank Trust Nat'l Ass'n v. Bell</i> , 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009).....	6
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998)	9
Statutes	
False Claims Act	9

Racketeer Influenced Corrupt Practices Act (RICO).....9

Other Authorities

S.C. R. App. P. 242(b)9

S.C. R. App. P. 242(d)(2).....10

S.C.R.C.P. Rule 12(b)(6)5

South Carolina Constitution.....9

South Carolina Rules of Appellate Procedure Rule 242.....1, 9, 10

United States Constitution9

STATEMENT OF ISSUES ON APPEAL

- I. Whether Petitioners were entitled to dismissal of Nationstar's foreclosure action?
- II. Whether the lower court properly awarded summary judgment to Respondent Nationstar Mortgage LLC for its foreclosure cause of action?
- III. Whether the Petition is within the scope of Rule 242 of the South Carolina Rules of Appellate Procedure?

STATEMENT OF THE CASE

This case concerns an equitable foreclosure action that Respondent Nationstar Mortgage LLC ("Nationstar") filed against the mortgagor, Barbara Gibbs, on October 23, 2013. Melvin Gibbs is also a named defendant because he received an interest in the collateral encumbered by Nationstar's mortgage loan after the mortgage was recorded. Westbrook Phase IV Homeowners Association is also a named defendant because of liens or assessments that are junior in priority to Nationstar's mortgage. (R. pp. 74, Compl.) Petitioners appealed the summary judgment order that the lower court awarded in favor of Nationstar on its foreclosure claim. The order was affirmed by the court of appeals.

The Mortgage Loan Transaction

On February 23, 2005, Barbara Gibbs signed a promissory note ("Note") to borrow the principal sum of \$329,600.00. (R. pp. 74, Compl. ¶ 4, R. pp. 200, Note.) To secure her repayment obligations, Mrs. Gibbs also executed a mortgage ("Mortgage") that encumbered her real property at 4257 Monterey Dr., Florence, SC ("Property") and was recorded with the Register of Deeds for Florence County. (R. pp. 75, Compl. ¶ 6; R. pp. 203, Rec. Mortg.) After origination of the Note and Mortgage, Mrs. Gibbs conveyed an interest in the Property encumbered by the Mortgage to her husband, Melvin Gibbs. Mr. Gibbs is not an obligor on the Note, and he did not sign the Mortgage.

During the repayment term, Mrs. Gibbs agreed to the terms of a modification agreement on January 1, 2006 (“Loan Modification” and together with the Note and Mortgage, the “Mortgage Loan”) that altered the repayment terms for the Mortgage Loan. (R. pp. , Mod. Agr.)

Mrs. Gibbs Defaults on Her Mortgage Loan Obligations

Ultimately, Mrs. Gibbs defaulted on her monthly payment obligations under the Mortgage Loan by failing to remit timely the payment due on August 1, 2013. (R. pp. 4, Foreclosure Judg.; R. pp. 197, Aff. C. Vieau ¶ 9 (6/26/2018).)

In addition to failing to remit all of the monthly payments that came due under the Mortgage Loan, Mrs. Gibbs failed to pay increased monthly escrow amounts to cover an increase in county tax assessments for the Property. (R. pp. 198, Aff. C. Vieau ¶ 15; R. pp. 206-07, Mortg. ¶¶ 3, 4; R. pp. 4, Foreclosure Judg.) Critically, the payments for the Mortgage Loan increased from \$2,197.32 per month to \$2,205.96 per month beginning with the April 1, 2013 payment because of a tax re-assessment for the Property. (R. pp. 198, Aff. C. Vieau ¶ 15.) Nationstar notified Mrs. Gibbs that the payment increased via a mortgage statement sent to her. (R. pp. 198, Aff. C. Vieau ¶ 15.) But Mrs. Gibbs did not remit the increased amount due under the terms of the Mortgage Loan.

In further breach of the mortgage loan’s terms, Mrs. Gibbs also failed to maintain hazard loss insurance for the Property. (R. pp. 197-98, Aff. C. Vieau ¶¶ 11-14.) To protect its security interests in the Property, Nationstar had to advance payment of an insurance premium to maintain coverage for the Property in March 2013 because Mrs. Gibbs ignored Nationstar’s written request to provide proof of existing hazard loss coverage for the Property. (R. pp. 197-98, Aff. C. Vieau ¶¶ 11-14; R. pp. 206-07, Mortg. ¶¶ 3, 5.) After paying an insurance premium, Nationstar sent Mrs. Gibbs a mortgage statement sent to her, to notify her that the monthly payment was increasing

to \$2,990.59' as of June 1, 2013 because of the hazard loss coverage that Nationstar purchased. (R. pp. 198,99, Aff. C. Vieau ¶¶ 17; R. pp. 206-07, Mortg. ¶¶ 3, 5.) Because Mrs. Gibbs failed to cure her existing arrearage and failed to remit the requisite increased monthly payments that came due from April 1, 2013 through August 1, 2013, Mrs. Gibbs ultimately defaulted on her repayment obligations. (R. pp. 74, Compl. ¶ 5; R. pp. 240, Aff. T. Braune ¶¶ 7 & 9 (1/15/2019); R. pp. 197-99, Aff. C. Vieau ¶¶ 9 & 11-20.)

Because of the default, Nationstar sent Mrs. Gibbs a notice of default on or about September 5, 2013 via certified mail to notify her that she needed to pay \$7,226.85 by October 10, 2013 to cure her payment arrearage. (R. pp. 240, Aff. T. Braune ¶ 8; R. pp. 167, Notice of Default; R. pp. 4, Foreclosure Judg.)

Nationstar's Foreclosure Action

Because Mrs. Gibbs failed to cure her payment arrearage by October 10, 2013, Nationstar filed a foreclosure action with the Court of Common Pleas for Florence County ("Florence Circuit Court") on October 23, 2013. This foreclosure action was assigned case number 2013-CP-21-02795. Mr. and Mrs. Gibbs were served with Nationstar's foreclosure complaint on November 8, 2013. (R. pp. 96-97, Certs. of Serv.) Thereafter, Mr. and Mrs. Gibbs moved to dismiss Nationstar's complaint. (R. pp. 263, Mot. to Dismiss.) Mr. Gibbs subsequently filed an answer. (R. pp. 43, Ans.) Mrs. Gibbs never filed a responsive pleading in response to the complaint after Nationstar filed its certification of Petitioners' non-compliance with the South Carolina Supreme Court's Administrative Order for Foreclosures. (R. pp. 100, Cert. of Non-Compliance (filed 12/18/2013); R. pp. __, Cert. of Non-Compliance (filed 4/10/2014); R. pp. 4, Foreclosure Judg.)

The lower court entered the first order of reference on March 11, 2014, to refer the foreclosure action to Special Referee Benjamin D. Moore. (R. pp. 27, Order of Ref. (entered

3/11/2014).) After referral of the action to the special referee, Nationstar filed and served a motion for summary judgment and memorandum in support for its foreclosure claim.

In two previously dismissed appeals filed with this Court (Nos. 2014-000596 and 2015-001873) during the foreclosure action, Mr. Gibbs sought appellate review of orders of reference entered in the foreclosure action and the lower court's denial of his motion to dismiss. (R. pp. 37, Order Dismissing Appeal No. 2014-000596; R. pp. __, Order Dismissing Appeal No. 2015-001873.) This Court dismissed the appeals because the lower court's order of reference and denial of the motion to dismiss did not raise any immediately appealable issues at that time (R. pp. 37, Order Dismissing Appeal No. 2014-000596; R. pp. __, Order Dismissing Appeal No. 2015-001873.)

After dismissal of the first appeal, the special referee recused himself from the foreclosure because Mr. Gibbs had amended a complaint that he filed in a *pro se* action in the United States District Court for the District of Colorado to add the special referee as a defendant. (R. pp. 29, Recusal Ord. (entered 5/19/2014); R. pp. 35, Recusal Ord. (entered 5/30/2014).) At a subsequent hearing, the lower court granted a motion for reference and referred the foreclosure case to the Master-in-Equity for Horry County. Because of the referral, the action was transferred to the Horry County Court of Common Pleas for Horry County ("Horry Circuit Court"), which assigned the case number 2015-CP-26-06384. After the conclusion of the second appeal, Petitioners sued the Master-in-Equity for Horry County in the United States District Court for the District of Maryland. Upon motion by Nationstar, the Master-in-Equity recused herself from the action (R. pp. 109, Mot. to Recuse & Vacate Ord. of Reference; R. pp. 111, Mot. to Restore Action to 12th Cir.; R. pp. 23, Recusal Ord. (entered 3/5/2018)), and the Horry Circuit Court returned the action to the Florence Circuit Court. (R. pp. 20, Venue Ord. (entered 10/10/2018); R. pp. 17, Venue Order 12/18/2018).

In preparation for a hearing for its motion for summary judgment, Nationstar supplemented its motion by filing and serving an updated affidavit of indebtedness, an updated affidavit of fees and costs, and an Affidavit of Plaintiff as to Payment Application (“Affidavit as to Payments”). (R. pp. 239, Aff. T. Braune; R. pp. 250, Aff. H.G. Murrell (dated 2/06/2019); and R pp. 196, Aff. C. Vieau.) During the hearing for Nationstar’s motion for summary judgment, the lower court presented Mrs. Gibbs with the opportunity to present arguments and evidence in response to Nationstar’s motion for summary judgment, but she elected not to present any argument or evidence during the hearing. (R. pp. 184, lines 16-25 & R. pp. 185, lines 1-7, Hrg. Tr. (02/20/2019).) Given the arguments and materials presented by the parties, the lower court granted Nationstar’s motion for summary judgment by an order entered on March 4, 2019. (R. pp. 4, Foreclosure Judg.) The Court of Appeals affirmed the lower court and Petitioners seek a writ of certiorari from that decision.

ARGUMENT

I. THE LOWER COURTS CORRECTLY CONCLUDED THAT NATIONSTAR’S FORECLOSURE ACTION WAS NOT SUBJECT TO DISMISSAL.

Because Nationstar stated a claim for foreclosure of a mortgage in the complaint the lower courts properly concluded that Nationstar’s foreclosure action was not subject to dismissal. Indeed, Petitioners do not truly contend the complaint was subject to dismissal. Rather, Petitioners contend their evidence was sufficient to demonstrate the allegations in the complaint were inaccurate. (Pet. p 6 (“Appellants by Affidavits and bank records proved they had not missed a mortgage payment ...”)) This argument is irrelevant to the lower courts’ decisions with respect to Petitioners’ motion to dismiss.

“[I]n reviewing the dismissal of an action pursuant to Rule 12(b)(6), S.C.R.C.P., the appellate court applies the same standard of review as the lower court.” *Doe v. Marion*, 373 S.C.

390, 395, 645 S.E.2d 245, 247 (2007). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Id.* at 395, 645 S.E.2d 247-48 (citing *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137, 139 (1999)).

Extraneous evidence is not a ground to secure dismissal of a complaint. Instead, South Carolina courts determine whether dismissal of a complaint is appropriate by focusing on the allegations in the complaint. *See Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) (“A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.”). Accordingly, Petitioners’ reference to materials beyond the allegations in Nationstar’s complaint never entitled them to dismissal of Nationstar’s foreclosure action.

A review of the allegations in the complaint reveals that Nationstar fully pleaded a viable foreclosure claim as required by South Carolina law. In South Carolina, “the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor’s default on that debt.” *U.S. Bank Trust Nat’l Ass’n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009). Pursuant to the following allegations, Nationstar fully stated a claim for foreclosure of a mortgage in its complaint:

- Barbara Gibbs signed a promissory note on February 23, 2005 to borrow the principal sum of \$329,600.00 (R. pp. 74, Compl. ¶ 4);
- To secure her repayment obligations, Mrs. Gibbs also executed a mortgage that encumbered Mrs. Gibbs’s real property at 4257 Monterey Dr., Florence, SC, and the mortgage was recorded with the Register of Deeds for Florence County on March 4, 2005 in Book A909 at Page 1711 (R. pp. 75, Compl. ¶ 6); and
- Mrs. Gibbs defaulted on her repayment obligations (R. pp. 76, Compl. ¶ 16).

In addition to alleging the elements of a foreclosure claim, Nationstar also established its right to foreclose the mortgage by alleging the assignment of Mrs. Gibbs's Mortgage Loan to Nationstar along with Nationstar's status as the holder of Mrs. Gibbs's mortgage loan. (R. pp. 75, Compl. ¶¶ 8-9.) Because Nationstar alleged that it was the holder of Mrs. Gibbs's mortgage loan, Nationstar fully alleged its standing to foreclose the Mortgage that Mrs. Gibbs signed. *See, e.g., Bank of America, N.A. v. Draper*, 403 S.C. 214, 223-24, 746, S.E.2d 478, 482-83 (Ct. App. 2013) (affirming summary judgment award to foreclosing plaintiff that presented evidence that it was the holder of the mortgage loan at issue pursuant to S.C. Code Ann. §§ 36-1-201(20) & 36-3-602(a)).

Viewing the allegations upon the face of the complaint in the "light most favorable to" Nationstar, the allegations reflect a properly pleaded cause of action for foreclosure. Accordingly, the lower court properly determined that dismissal of Nationstar's foreclosure complaint was not warranted.

II. THE LOWER COURTS CORRECTLY HELD THAT NATIONSTAR WAS ENTITLED TO SUMMARY JUDGMENT.

Because Petitioners failed to present evidence that Mrs. Gibbs timely remitted the full amount of every payment coming due under the Mortgage Loan, the lower courts properly concluded that there was no genuine issue of material fact to be determined at trial.

"When reviewing an order granting summary judgment, the appellate court applies the same standard as the lower court." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of

evidence.” *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012)(citing and quoting *Hancock v. Mid-South Mgmt Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)) (internal, quotations omitted). Moreover, “[a] court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Regional Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

In their brief, Petitioners contend that because they submitted affidavits and various records detailing payments of \$2,197.32 to Nationstar from January 2012 and to December 2013, a material question of fact regarding Mrs. Gibbs’s default existed. (App. Br. at 2-3, ¶¶ 14.a.-14.b & at 6, ¶ 21; R. pp. 253, Aff. B. Gibbs at ¶ 4 (2/26/2019); R. pp. 271, Aff. M. Gibbs ¶ 17 (2/26/2019); R. pp. ___, Aff. B. Gibbs at ¶ 4 (3/11/2019); R. pp. ___, Aff. M. Gibbs at ¶ 17 (3/11/2019).) Petitioners also noted that Nationstar returned payments that they remitted for alleged payments due for October 3, 2013 through December 4, 2013. (R. pp. 253, Aff. B. Gibbs at ¶ 4 (2/26/2019); R. pp. 271, Aff. M. Gibbs ¶ 17 (2/26/2019); R. pp. ___, Aff. B. Gibbs at ¶ 4 (3/11/2019); R. pp. ___, Aff. M. Gibbs at ¶ 17 (3/11/2019).) None of this evidence, however, creates any material issue of fact because Petitioners failed to present any evidence showing that they timely remitted the increased monthly payment of \$2,205.96 due for the months of April 1, 2013 and May 1, 2013, or the increased monthly payment of \$2,990.59 that came due as of June 1, 2013 and thereafter. (R. pp. 198, Aff. C. Vieau ¶¶ 15 & 17 & Exs. I & J.)

As the court of appeals appropriately held below, “Nationstar submitted evidence as to insufficient payments and Homeowners’ failure to secure insurance, which constituted Homeowners’ default. Although Homeowners argue they provided evidence of payments, we find

it was not enough to refute Nationstar's proof of default.” *Nationstar Mortg. LLC v. Gibbs*, No. 2019-000486, 2022 WL 4362405, at *1 (S.C. Ct. App. Sept. 21, 2022). Because Petitioners failed to present any evidence challenging the increase in the monthly payments identified by Nationstar and because Petitioners never presented any evidence showing timely submission of the required payments, the Petition must be denied.

III. THE REMAINING ISSUES IN THE PETITION FALL OUTSIDE THE SCOPE OF RULE 242 OF THE SOUTH CAROLINA RULES OF APPELLATE PROCEDURE.

As this Court is aware, a writ of certiorari is reserved for cases “where there are special and important reasons.” S.C. R. App. P. 242(b); *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170 (2008). These reasons include, but are not limited to, novel questions of law, important constitutional issues, a dissent in the Court of Appeals and decisions that conflict with prior decisions of this Court or federal decisions. *Id.*

None of these issues are present here. This is an appeal of a judgment in a foreclosure case, a well-settled area of South Carolina law. Nothing in this action even remotely approaches a special and important issue.

Because they have no important reason to seek a writ, Petitioners have manufactured an alternative reality where they now seek review of whether Nationstar suborned perjury, violated the Racketeer Influenced Corrupt Practices Act (RICO), the False Claims Act (FCA) and some unspecified provisions of the United States Constitution and the South Carolina Constitution. (Memo. in Support of Pet. pp 2-4.) Petitioners also appear to assert the South Carolina courts have been bribed. (Memo. in Support of Pet. pp 3-5.) However, none of these issues are even before this Court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled

upon by the trial judge to be preserved for appellate review.”). The only question for the lower courts was whether Nationstar was entitled to summary judgment on the record presented.

Moreover, “[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” S.C. R. App. P. 242(d)(2). Petitioners’ Petition is replete with arguments and questions that are outside the scope of Rule 242. None of these issues were properly raised in Petitioner’s Initial Brief to the Court of Appeals. (*See* Appellants’ Initial Brief, April 17, 2019.) Rather, Petitioner only defaulted to these irrelevant questions in their Reply Brief, which is not permitted. *ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct. App. 2021), *reh'g denied* (Feb. 12, 2021) (a party cannot raise an issue for the first time in an appellate reply brief). Consequently, even if these issues were relevant, which they are not, and had been raised in the trial court, which they were not, they cannot support a petition for writ of certiorari under Rule 242.

The judgment in this matter is supported by an appropriate interpretation of South Carolina law and procedure and competent evidence of Petitioners’ failure to remit all amounts due, a point they do not and cannot contest. All other issues in the Petition are irrelevant and improperly raised.

CONCLUSION

For the foregoing reasons, Nationstar respectfully requests that this Court deny the Petition.

Respectfully submitted on this 10th day of January 2023.



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S.C. SUPREME COURT

CERTIFICATION OF COMPLIANCE WITH RULE 211(B), S.C.A.C.R.

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Jan 11 2023

SC Court of Appeals

The undersigned counsel for Respondent Nationstar Mortgage LLC, hereby, certifies that Nationstar Mortgage LLC's Final Brief complies with Rule 211(b), S.C.A.C.R.



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