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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Civil Court Appeal Case No. 2021-CP-08-00513

Appellate Case No. 2021-000768

Aracelis Santos, ... Appellant,

v.

Harris Investment Holdings, LLC, City of Hanahan, City of Hanahan Police Department, John Doe #1 and John Doe #2, employees of the City of Hanahan Police Department, Defendants,

of which

Harris Investment Holdings, LLC is..... Respondent.

RESPONDENT'S RETURN TO PETITION FOR REHEARING *EN BANC*

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At the Court's request, Respondent Harris Investment Holdings, LLC ("HIH") submits this return to Appellant Aracelis Santos' ("Santos") Petition for Rehearing *En Banc* (the "Petition"). Santos seeks rehearing *en banc* following this Court's Opinion of January 25, 2023, which properly affirmed the circuit court's dismissal of Santos' claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP").

Rehearing is not warranted because the Court's opinion is correct in all respects, and Santos fails to demonstrate that this Court overlooked or misapprehended her arguments or any points of law. Instead, Santos merely rehashes arguments that this Court properly rejected in its Opinion. Moreover, rehearing *en banc* is not warranted because the Court's Opinion did not create or entrench any disunity in this Court's precedents, and the issue in this appeal is not an issue of "exceptional importance" to the public at large or to the development of law. For these reasons, as more fully discussed below, the Court should deny Santos' Petition.

STANDARD OF REVIEW

A petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." *Herron v. Century BMW*, 395 S.C. 461, 466, 719S.E.2d 640, 643 (2011) (citation and internal quotation marks omitted). For a petition for rehearing to be granted, Santos must demonstrate that "the Court overlooked or misapprehended [her] argument." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). A petition may be granted only for this limited purpose. *See id*. The purpose of a petition for rehearing is not to have a case tried in an appellate court for a second time. *See id*. As a result, a petition should not rehash matters which a court has already considered and disposed of. *See Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933).

Thus, our appellate courts will deny a petition for rehearing whenever "the points set forth in the petition have all been considered and expressly decided against the respondent by this Court in the opinion filed." *Clemmons v. Nicholson*, 188 S.C. 124, 198 S.E. 180, 183 (1938). Additionally, "[a] hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR. Neither of these criteria is satisfied here.

FACTUAL AND PROCEDURAL BACKGROUND

This dispute arises from HIH's rightful repossession of its property after the expiration of a commercial lease between HIH and Santos dated December 15, 2015 (the "Lease"). Santos sued HIH after HIH retook possession of commercial property in Hanahan that Santos leased from HIH (the "Leased Premises"), and HIH subsequently demolished the building.

This is not the first lawsuit between these parties. HIH previously filed an action in the magistrate's court to eject Santos from the Leased Premises. (R. p. 180; Application for Ejectment.) Following a trial, the magistrate granted HIH's application for ejectment and awarded HIH its attorneys' fees. (R. pp. 11-36, 12/7/2017 Order; R. pp. 37-44, 2/9/2018 Order.) The magistrate ordered that ejectment was proper—a year *before* the Lease term expired—because Santos' operation of a nightclub in the Leased Premises created a public nuisance. Specifically, the magistrate determined that "Santos has maintained [the Leased Premises] as a place where the laws are publicly, repeatedly, persistently, and intentionally violated, thus disturbing the public peace." (R. p. 31; 12/7/2017 Order.) After Santos appealed the magistrate's orders to the circuit court, the magistrate issued an Amended Bond to stay Execution on Appeal, which stayed the warrant of ejectment pending appeal. (R. p. 10; 5/17/2018 Bond Order.) After the circuit court

affirmed the magistrate's rulings (R. pp. 49-51; 6/6/2019 Order), Santos appealed to this Court, which affirmed the circuit court on January 25, 2023. (*See* Appellate Case No. 2019-001169).

While Santos' appeal of the ejectment order was pending in the circuit court, the Lease expired according to its terms. (R. p. 83; 12/15/2015 Lease.) The Lease contained no right of renewal, and it expressly required Santos to surrender the Leased Premises to HIH in "broom clean" condition upon expiration of the term. (R. p. 88; Lease, Sec. 22.) HIH's remedies for Santos' failure to surrender the premises upon expiration of the term included the right to "re-enter and forthwith repossess the entire Premises." (R. p. 89; Lease, Sec. 30.) Upon expiration of the Lease term, HIH repeatedly directed Santos to leave the property and remove her belongings (R. p. 129; 10/16/2018 Ltr. from Merritt Abney; R. p. 131; 2/26/2019 Ltr. from Merritt Abney), but Santos refused.

Accordingly, four months after the Lease expired, HIH exercised its rights under the Lease and South Carolina law and retook possession of its Leased Premises while officers of the Hanahan Police Department were present. (R. p. 54; 3/2/2021 Compl. ¶ 4.) Contractors retained by HIH subsequently demolished the building in accordance with a permit obtained from the Town of Hanahan. (*Id*.)

Santos filed the instant action, in which she alleged that HIH wrongfully repossessed and demolished the building and conspired to do so with the City of Hanahan and its police department. (R. pp. 52-64; 3/2/2021 Compl.) HIH moved to dismiss Santos' Complaint for failure to state causes of action against HIH (R. pp. 65-67; 4/2/2021 Mot. to Dismiss.) HIH argued that it was entitled to retake possession under the express terms of the Lease and South Carolina law and that Santos' individual causes of action were legally deficient (R. pp. 68-81; 5/25/2021 Mem. in Support). After a hearing, the circuit court issued a Form 4 Order granting HIH's Motion to

Dismiss in toto (R. pp. 4-6; 6/14/2021 Form 4 Order), and subsequently denied Santos' Motion for Reconsideration (R. pp. 7-9; 6/29/2021 Order Denying Reconsideration). This Court affirmed the circuit court's dismissal of Santos' claims On January 25, 2023. On February 6, 2023, Santos filed her Petition seeking rehearing *en banc* of the Panel's decision.

ARGUMENT

Santos' Petition is based on the same facts and arguments raised in her prior briefing to this Court. The Court correctly understood Santos' arguments and properly rejected them. Thus, rehearing is unwarranted. Further, rehearing *en banc* would also be improper because Santos fails to show that consideration by the full Court is necessary. Santos fails to show that the Court's opinion in this case disrupts this Court's precedent, nor does she identify how the issue in this appeal involves a question of "exceptional importance."

I. The Court correctly held that the circuit court did not err by issuing a Form 4 Order without detailed conclusions of law.

As in her prior briefing, Santos again complains that neither the parties nor this Court know the grounds for the circuit court's ruling because it granted HIH's Motion to Dismiss via a Form 4 Order. This Court properly held that the circuit court was not required to include specific findings in its Order. (Op. 5964, p. 4.) *See Kinghorn as Tr. for the Mildred Ann Kinghorn Tr. dated 28 Apr. 2004 v. Sakakini*, 426 S.C. 147, 151, 825 S.E.2d 748, 750 (Ct. App. 2019) ("Thus, pursuant to Rule 52(a), SCRCP, the circuit court is not required to state its findings of fact and conclusions of law in decisions on motions to dismiss, summary judgment motions, or any other motion except those dealing with involuntary dismissal."); *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 526–27, 753 S.E.2d 428, 433 (2014) (stating that "findings [of facts] and conclusions [of law] are not required for appellate review" because Rule 52 provides that such findings and conclusions "are unnecessary on decisions of motions under Rules 12 or 56"). The use of Form 4 orders has been a

staple of practice in South Carolina courts for many years, and it has been approved by our Supreme Court.[1]

This Court also already properly rejected Santos' argument that the circuit court denied her due process by failing to state its findings in the Form 4 Order. The Court correctly determined that the parties provided an ample record allowing this Court to conduct meaningful appellate review. (Op. 5964, p. 4.) *See Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating "not all situations require a detailed order, and the [circuit] court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal"); *Easterling v. Burger King Corp.*, 416 S.C. 437, 453, 786 S.E.2d 443, 452 (Ct. App. 2016) (disagreeing with the argument that the appellate court was "unable to ascertain the basis behind the circuit court's order because the circuit court ruled upon the motion for summary judgment via Form 4 order" and finding "the parties provided an ample record for [the appellate] court to conduct meaningful appellate review").

Furthermore, the lack of stated grounds in the circuit court's Order does not prevent appellate review because this Court can affirm the circuit court's decision upon any ground appearing in the Record on Appeal. *See* Rule 220(c), SCACR.

[1] By order dated June 24, 2008, the South Carolina Supreme Court approved the form used by the circuit court in this case. *See* Rule 84, SCRCP ("The Supreme Court shall prescribe the content and format of forms required by these rules."); *see also Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 629 n.4, 779 S.E.2d 826, 830 (Ct. App. 2015) (citing Order re: Form 4, Judgment in a Civil Case, No. 2008–06–24–01 (S.C. Sup. Ct. filed June 24, 2008)). The Form 4 form has subsequently been revised several times, with the latest revision in 2017. *See* Order re: Revised Judgment in a Civil Case Form (SCRCP Form 4C), No. 2017-02-15-01 (S.C. Sup. Ct. filed February 15, 2017).

II. The Court properly affirmed the circuit court's dismissal of Santos' claims based on grounds that appear in the Record on Appeal.

Santos spends the majority of her Petition arguing that rehearing *en banc* is warranted because this Court "turns its back on precedent" by considering "new grounds for the first time on appeal" that were not "preserved for appellate review." Santos misstates the preservation rule. Only an appellant has the obligation to preserve issues for appellate review. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) ("In contrast, different preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, reverse for any reason appearing in the record."). This preservation requirement does not apply to respondent. "A prevailing party need never raise an additional sustaining ground below, nor secure a ruling on it, in order for the issue to be preserved for appellate review." *Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church*, 421 S.C. 211, 287 n.69, 806 S.E.2d 82, 122 (2017). The appellate court rules expressly provide that the "appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. Thus, the Court did not misapply the preservation rules.

Moreover, this Court affirmed the circuit court's ruling on the same grounds that HIH argued to the circuit court and to this Court—namely, that the Lease and South Carolina authorized HIH to retake possession and to demolish its own building. Thus, this Court did not "step in and analyze the case on new grounds for the first time on appeal" (Petition at 4.) The Court relied on the same grounds cited by HIH in support of its motion below, which the record supports.

III. Rehearing is inappropriate because the Court correctly concluded that Santos failed to state a claim against HIH.

The gist of Santos' Complaint is that HIH improperly retook possession of the Leased Premises and demolished the building. The Court correctly concluded that the Lease had expired months before HIH retook possession, that HIH had repeatedly instructed Santos to vacate, and

that HIH had the right, under the Lease and South Carolina law, to retake possession of the Leased Premises. *As a matter of law*, therefore, Santos had no legal right to the Leased Premises when HIH retook possession, and her Complaint failed to state a claim against HIH.

A. The Court correctly found that Santos had no legal right to the Leased Premises after the expiration of the Lease term.

Santos spends much of her Petition arguing that the Court impermissibly engaged in contract interpretation of the Lease. But that is what courts do. The interpretation of an unambiguous contract is a *question of law*. *Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co.*, 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) (stating the construction of an unambiguous contract is a question of law for the court). Moreover, because Santos references the Lease extensively in her Complaint (R. p. 54; 3/2/2021 Compl. ¶ 6), this Court correctly held that the circuit court properly considered the Lease in connection with HIH's motion. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (providing that when considering a Rule 12(b)(6) motion, a court may consider documents referenced in or attached to the complaint). This Court, in turn, properly relied on the Lease in affirming the circuit court's Order. *See* Rule 220(c), SCACR.

The Lease disposes of Santos' claims against HIH. The Lease term ended on November 30, 2018. (R. p. 83; Lease, p. 1.) The Lease contained no right of renewal, and it expressly required Santos to surrender the Leased Premises at the conclusion of the term. (R. p. 88; Lease, Sec. 22.) The Lease expressly granted HIH the right, upon Santos' failure to surrender the premises, to "re-enter and forthwith repossess the entire Premises." (R. p. 89; Lease, Sec. 30.) Because the Complaint relates to HIH's alleged conduct in retaking possession and demolishing the Leased Premises *after* expiration of the Lease term, this Court correctly found that Santos failed to state a cognizable claim as she had no legal right to continue to occupy HIH's property. (Op. 5964, p. 5.)

Santos again rehashes the argument from her prior briefing that she was entitled, under Section 22 of the Lease, to remain in the Leased Premises after the Lease term expired by paying 150% of the amount of rent. But, as explained in HIH's Respondent's Brief, that is not what this provision says. Section 22 states as follows:

> **22. HOLDOVER.** Tenant shall surrender to Landlord, at the end of the term of this lease or upon cancellation of this lease, said Premises broom clean and in as good condition as the Premises were at the beginning of the term of this lease, ordinary wear and tear and damage by fire and windstorm or other acts of God excepted, or Tenant will pay to Landlord all damages that Landlord may suffer because of Tenant's failure to do so. Tenant will indemnify and save Landlord harmless from and against all claims made by any succeeding Tenant of said Premises against Landlord because of delay in delivering possession of Premises, so far as such delay is occasioned by failure of Tenant to so surrender Premises. If Tenant remains in possession of the Premises or any part thereof after the expiration of the Agreement, such holdover places the Tenant in default and the Monthly Base Rental shall be increased to one hundred fifty percent (150%) of the last month's Monthly Base Rental unless given a month to month tenancy in writing from the Landlord.

(R. p. 88; Lease, Sec. 22.) This section expressly required Santos to "surrender" the Leased Premises "at the end of the term of this lease." The section did not grant Santos the option to stay beyond the expiration date by paying 150% of the rent. Rather, the section imposed a *penalty* on Santos, in the form of increased rent, for illegally holding over after the end of the Lease term. (R. p. 88.) Accordingly, the Court properly held that Santos had no legal right to continue to occupy the Leased Premises following the expiration of the Lease. (Op. 5964, p. 5.)[2]

[2] The Court also already correctly rejected Santos' arguments regarding restaurant equipment that allegedly was in the Leased Premises when the building was demolished. (Op. 5964, p. 5 n.2.) The Lease expressly provides that "trade fixtures shall be removed from the Premises before the end of this lease or shall become part of the Premises and the property of Landlord" (R. p. 86; Lease, Sec. 11), and that "[a]ll personal property, merchandise, fixtures and equipment placed or moved into the Premises shall be at the risk of Tenant or the owners thereof and Landlord shall not be liable for any damages, loss or theft of said personal property, merchandise, fixtures, or equipment, from any cause whatsoever." (R. p. 88; Lease, Sec. 19.) As explained above, the Court properly affirmed the circuit court's dismissal based on its review of the Lease, which Santos referenced in the Complaint and included in the Record on Appeal. *See* Rule 220(c), SCACR; *Brazell*, 384 S.C. at 516, 682 S.E.2d at 826.

Santos also repeats her argument that the Bond Order somehow allowed her to continue to occupy the Leased Premises after the Lease expired. The Bond Order did no such thing. The Bond Order merely stayed the sheriff's execution of the warrant of ejectment while Santos appealed the magistrate's order evicting her for operating the Leased Premises as a public nuisance. The Bond Order did not direct HIH to do, or to not do, anything, and it did not address what should or should not happen *upon the subsequent expiration of the Lease term*. HIH therefore did not violate any provision of the Bond Order, and the Bond Order did not give Santos the right to remain in the Leased Premises after the expiration of the Lease. Accordingly, the Court properly rejected Santos' contention that the Bond Order allowed her to continue to remain in the Leased Premises and correctly ruled that once the Lease term expired, the ejectment action, including the Bond Order, became moot. (Op. 5964, p. 5.)

Further, as HIH explained in Respondent's Brief, HIH also had the right to retake possession after expiration of the Lease term under South Carolina law. Where a tenant has no right to continue in possession upon expiration of the lease term, the landlord may expel her from the premises without legal process and may not be held liable for doing so. *Rush v Aiken Mfg. Co.*, 58 S.C. 145, 36 S.E. 497, 499 (1900) (holding that the landlord could retake possession upon expiration of the lease term without process of law); *Barbee v. Winnsboro Granite Corp.*, 190 S.C. 245, 2 S.E.2d 737, 738 (1939) (affirming that "the rule in this state is that, where the tenancy has terminated, the landlord may enter upon and retake possession of the premises, and he commits no trespass upon the real estate in so doing, even if force is used in making such entry, and therefore, in such a case, he is not liable to a civil action for trespass.").[3] Furthermore, nothing in the

[3] South Carolina is not alone in this regard. Despite the widespread existence of ejectment statutes, most jurisdictions permit a commercial landlord to exercise self help in retaking possession of the leased property upon expiration of the term. (*See* Respondent's Final Br., at n. 3.)

commercial ejectment statutes indicates that the legislature intended to make the ejectment remedy exclusive or to abrogate the self help remedies available under the common law. *See* S.C. Code Ann. § 27-37-10, et. seq. Thus, HIH had the right, under both the Lease and South Carolina law, to retake possession without legal process upon expiration of the Lease term.

This Court's decision does not, as Santos contends, condone breaking any law. HIH's actions were expressly authorized by the Lease and the common law. Moreover, Santos' Complaint alleges that Hanahan law enforcement was present on the scene when HIH retook possession. (R. pp. 54, 55-56; 3/2/2021 Compl. ¶¶ 4, 12.) Santos does not allege, nor could she, that force was used against her at any time. Thus, the Complaint fails to allege facts that would establish a breach of the peace or that HIH broke any law by retaking possession of its own property. *See Barbee*, 190 S.C. at 245, 2 S.E.2d at 738 ("It is entirely well settled that, unless the tenant is driven off either by actual force applied to him, or as the only apparent way of avoiding its use [against him] at the time, he cannot be regarded as forcibly expelled, and there is no forcible entry.") (quoting *Smith v. Detroit Loan & Building Association*, 73 N.W. 395, 398 (Mich. 1897)).[4]

B. The Court correctly held that the circuit court did not err in dismissing the claims against HIH without granting Santos leave to amend.

Santos also reasserts in her Petition the argument from prior briefing that she should have been given an opportunity to amend her Complaint. But the Court correctly found that any amendment would have been futile because HIH had the right under the Lease and South Carolina law to retake possession and to demolish its building. (Op. 5964, p. 5.) *See Skydive Myrtle Beach,*

[4] Although HIH denies that any restaurant equipment belonging to Santos was in the building when it was demolished, the allegation that equipment was demolished with the building would not establish a breach of the peace, particularly since HIH repeatedly directed Santos in writing to vacate and remove any belongings from the building after expiration of the Lease. (*See id.*; *see also* R. pp. 129, 131.) As the Court appropriately concluded, Santos "assumed the risk of damage to her property by failing to remove it from the premises more than four months after the expiration of the Lease." (Op. 5964, p. 8, n. 2.)

Inc. v. Horry County, 426 S.C. 175, 185, 192, 826 S.E.2d 585, 590, 594 (2019) (providing a circuit court does not err in granting a Rule 12(b)(6) motion without granting leave to amend the complaint if such an amendment would be futile). The Court correctly determined that "the entire premise for [Santos'] complaint does not warrant relief." (Op. 5964, p. 5.)

Moreover, the Court correctly noted that Santos has never attempted to explain how she would amend the Complaint to state a claim or what additional facts she could allege that would entitle her to relief under any theory of recovery.[5] *See also Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840–41 (Ct. App. 2012) (holding the circuit court did not err by dismissing the complaint with prejudice and noting an appellate court will not reverse such a ruling when the plaintiff has not identified any new facts that would alter the analysis). Nor did Santos ever move to amend her Complaint pursuant to Rule 15, SCRCP. (Op. 5964, p. 6.)[6] Having

[5] Although not specifically addressed by this Court in its opinion, HIH also sought dismissal on the ground that the specific counts alleged against HIH were legally deficient for various reasons. Santos never responded to these arguments at any stage of this proceeding. Thus, as explained in Respondent's Brief, Santos failed to preserve any argument regarding the pleading defects in her specific counts against HIH. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.") (*See* Respondent's Br., at 10-18.)

[6] The Court correctly noted that a party seeking leave to amend "must either attach a copy of the proposed amendment to the motion or set forth the substance thereof." U*.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1362 (11th Cir. 2006); *see also Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 906 (6th Cir. 2002) (holding a court must be able to determine whether "justice so requires" an amendment, "and in order to do this, the court must have before it the substance of the proposed amendment"); D*.R. Horton, Inc. v. Landbank Fund VIII, LLC*, No. 4:08-CV-1711-TLW-TER, 2009 WL 10678195, at *1 (D.S.C. Mar. 31, 2009) ("The cases interpreting Rule 15 require the party seeking to amend to attach a copy of the proposed amendments to the motion, and failure to do so may result in denial of the leave to amend."). In addition, a party "should not be allowed to amend [his] complaint without showing how the complaint could be amended to save the meritless claim." *Atkins*, 470 F.3d at 1362 (alteration in original) (citation and internal quotation marks omitted).

never explained how she would attempt to cure her defective pleading, Santos cannot now complain that the Court did not allow her to amend.[7]

CONCLUSION

For the foregoing reasons, the Court should deny Santos' Petition.

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[7] The Court also correctly concluded that, even if the circuit court should have given Santos an opportunity to amend, this Court can still affirm because Santos has not identified to this Court any new facts that she could allege to cure the pleading deficiencies. (Op. 5964, p. 6.) *See Spence v. Spence*, 368 S.C. 106, 130–31, 628 S.E.2d 869, 882 (2006) ("On the other hand, when a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice.").

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PROOF OF SERVICE

I hereby certify that I have served a copy of **Respondent's Return to Petition for Rehearing *En Banc*** on counsel for Appellant Aracelis Santos in this action by mailing a copy of the same by United States Mail, postage prepaid, and via electronic mail, to the following AIS information address(es):

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March 9, 2023