

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

Walter Newman, Special Referee

Appellate Case No. 2015-000498

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SC Court of Appeals

A&P Enterprises, LLC, ... Appellant,

v.

SP Grocery of Lynchburg, LLC and Suresh "Sam" Patel Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE RESPONDENTS LACK STANDING TO ASSERT A CLAIM FOR PROMISSORY ESTOPPEL?
2. ARE RESPONDENTS' CLAIMS FOR PROMISSORY ESTOPPEL BARRED BY THE EQUITABLE DOCTRINE OF UNCLEAN HANDS?
3. DO RESPONDENTS' CLAIMS FOR EQUITABLE ESTOPPEL FAIL AS A MATTER OF LAW?
4. DID RESPONDENTS FAIL TO PROVE THE EXISTENCE OF A CONTRACT UNAMBIGUOUS IN ITS TERMS?
5. DID RESPONDENTS FAIL TO PROVE RELIANCE ELEMENT?
6. SHOULD THE SPECIAL REFEREE HAVE GRANTED THE APPELLANT THE RELIEF REQUESTED IN ITS COMPLAINT?
7. WAS THE APPELLANT ENTITLED TO AN ORDER EVICTING RESPONDENTS FROM THE WILLOW DRIVE PROPERTY?
8. WAS THE APPELLANT ENTITLED TO JUDGMENT FOR BACK RENT?

STATEMENT OF THE CASE

Appellant A&P Enterprises, LLC, ("A&P") is a South Carolina LLC whose sole member is Kamlesh K. ("Kim") Patel. (R. pp. 1-8). Appellant brought this action against Respondents S&P Grocery of Lynchburg, LLC, Payel Suresh Patel and Suresh "Sam" Patel, seeking an ejection of Respondents from property Appellant owns in Lee County, South Carolina, along with monetary damages. (R. pp. 24-32). (This matter was initially instituted in the Lee County Magistrate's Court and subsequently transferred to the Lee County Court of Common Pleas. Once transferred, the Appellant filed and served an Amended Complaint on Respondents. (R. pp. 24-32).

S&P Grocery of Lynchburg, LLC, is a South Carolina LLC whose sole member is Sam Patel. (R. pp. 1-8). Payel Suresh Patel is Sam Patel's daughter. (R. pp. 1-8). Respondents timely responded to the Magistrate's Court action and answered and asserted a counterclaim to the Amended Complaint filed in the Court of Common Pleas, seeking to enforce an alleged parol contract between the parties for the property in issue to be conveyed to them. (R. pp. 33-38). The Appellant denied the existence of any such contract. (R. pp. 39-40). Prior to the hearing on this matter Payel Suresh Patel was dismissed pursuant to consent of all parties. (R. pp. 1-8).

The matter was referred to the Honorable Walter Newman, Special Referee for Lee County. A hearing was held on February 18, 2014. (R. pp. 82-240). On April 17, 2014, Judge Newman issued his order finding and ruling that, "Sam Patel owns an equitable interest in the subject real estate, that he cannot be evicted at this time, and that he has the right to purchase the property from A&P Enterprises, LLC according to the terms set forth above, and that he owes the annual real property taxes as incident of

ownership of the equitable interest in this property.” (R. pp. 1-8). Judge Newman's order also granted the Appellant judgment as to certain amounts due and owing to the Appellant from Respondents. (R. pp. 1-8).

Appellant moved for reconsideration and arguments were heard before Judge Newman in Sumter, South Carolina on October 22, 2014. (R. pp. 41-53; 241-286). At the request of the court, both parties submitted legal memoranda following the hearing on Appellant's Motion for Reconsideration. (R. pp. 71-81). On February 18, 2015, Judge Newman issued his order denying Appellant's Motion for Reconsideration. This order was filed and served on the parties to this appeal on or about March 4, 2015. (R. pp. 9-21). This appeal timely followed. (R. pp. 54-70).

STATEMENT OF THE FACTS

Appellant A&P operates two convenience stores and one liquor store as well as some apartments. (R. p. 95, ll. 17-22). The principal of A&P is Kim Patel. (R. p. 94, ll. 8-9). Mr. Patel and his wife work full time at each of the convenience stores that A&P operates. (R. p. 96, ll. 11-15). Respondent Sam Patel is his brother. (R. p. 96, ll. 21-24). Prior to 2011, Mr. Sam Patel operated a convenience store located on Willow Drive in Lynchburg, South Carolina. (R. p. 97, ll. 4-10).

In 2011, Respondent Sam Patel began experiencing financial difficulties. (R. p. 96, ll. 21-24; pp. 1-8). He filed a petition for bankruptcy in the United States Bankruptcy Court, District of South Carolina. (R. pp. 1-8; p. 99, l. 21). Kim Patel actually loaned Respondent the money to allow him to institute bankruptcy proceedings in January of 2011. (R. pp. 110, ll. 14 - 111, ll. 6; p. 293). Appellant has not been paid back for this

loan to Respondent. (R. pp. 110, l. 14 - 111, l. 7; p. 293).

As a result of these financial difficulties the Respondent Sam Patel's property went into foreclosure. (R. pp. 96, l. 25 - 97, l. 3). Sam Patel approached the Appellant about purchasing the property and buildings located on it due to his financial problems and pending bankruptcy. (R. pp. 97, 99). Appellant subsequently bought these properties for approximately \$350,000. (R. pp. 1-8; 97). A deed was filed with the Lee County Clerk of Court on October 13, 2011. (R. pp. 1-8; 287-291). This property purchase included two buildings and a liquor store. (R. pp. 98; 287-291). One of these businesses was S.P. Grocery. (R. p. 98). Appellant also bought other property owned by Respondent not at issue in this Appeal. (R. pp. 121-122).

At the time that Appellant purchased the property, Sam Patel was operating the store. (R. pp. 102-103). Judge Newman specifically found that due to financial problems, "and the pending bankruptcy" the "ownership of the convenience store that operated on the property was placed in the name of SP Grocery, LLC ("SP Grocery") during the summer of 2011." (R. pp. 1-8; 102-103).

At the time of the purchase, Appellant told Respondent he (Respondent) could continue to operate the premises. (R. p. 99). Appellant told Respondent that he would not charge him rent for a period of 6 or 7 months. (R. pp. 100; 113-114). With respect to the timing of the rent, Kim Patel testified he told his brother Sam, "You going on - when you help - finance our situation going good, then you can start to pay me about after six, seven months. And he was agree." (R. p. 100). This grace period was to allow his brother to "get back on his feet." (R. pp. 100, 127). After that time, the Respondent was to begin paying rent. (R. p. 100). Appellant testified that he expected rent payments to

start being made in May of 2012. (R. p. 104). In addition to rent, Respondent was to be responsible for taxes, insurance and upkeep. (R. pp. 100, 102). There was no agreement or discussion about Respondent buying the property back. (R. p. 100). Kim Patel testified, "He never going to buy it back. He have no capacity to buy back. I say, you can start rent after six, seven months when you go in your feet." (R. p. 100).

Appellant suggested that the Respondent pay him \$5,000 a month rent. (R. pp. 100-101). Appellant asked Respondent to begin paying rent. (R. p. 103, ll. 15-23). Appellant sent several lease agreements to the Respondent. However, Respondent refused to sign them each time. (R. pp. 103, 124). Because the Respondent was not paying taxes pursuant to his agreement with Appellant, Appellant paid the outstanding property taxes on the property. (R. pp. 105-106). These taxes amounted to approximately \$3,700. (R. pp. 105-106). In addition, on two occasions, the Respondent came to Appellant and asked him to purchase gas to sell at the store because he could not do so. (R. pp. 106-110). Appellant purchased \$17,415 worth of gas from Turner Oil. (R. pp. 108-109, 292). Respondent agreed to pay Appellant back for this gas purchase, but has not done so. (R. pp. 108-109). In addition, the Appellant incurred approximately \$20,000 of liability for gas purchased from Southern Gas and Fuel. (R. pp. 109-110). The Special Referee determined that only a portion of the proceeds from this gas purchase had been repaid by Respondent, leaving approximately \$17,000 due and owing to Appellant. (R. pp. 1-8).

Appellant continued to request that the Respondent enter into a lease. (R. p. 140). Each time the Respondent refused to sign these leases on the grounds he could not afford the requested rent payment(s). (R. pp. 103-104). Respondent informed his brother that

business would not allow him to pay this rent. Appellant agreed to reduce the requested amount of rent from \$5,000 a month to \$3,750 a month. (R. p. 105). Appellant testified at trial that he did not purchase the store for his brother. He testified that he purchased it as an investment. He did not ever contemplate selling it back to his brother or to anyone else. (R. pp. 113-114).

Respondent paid no rent to the Appellant. Appellant subsequently brought this action to evict Respondent from the property. (R. p. 114). In addition to the eviction, he also sought money damages for the taxes he paid on the property and for the loans to Respondent. (R. pp. 114-115).

STANDARD OF REVIEW

In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee. *See Pinckney v. Warren*, 344 S.C. 382, 544 S.E.2d 620 (2001); *Wilder Corp. v. Wilke*, 324 S.C. 570, 479 S.E.2d 510 (Ct.App.1996).

LEGAL ARGUMENTS

A. RESPONDENT LACKS STANDING TO ASSERT A CLAIM FOR PROMISSORY ESTOPPEL.

The Respondent Sam Patel takes the position that he and the Appellant Kim Patel entered into an agreement that Appellant would buy the property at issue in this case out of Bankruptcy and Foreclosure and sell it back to the Respondent. Based upon the

testimony of the Respondent Sam Patel, and the evidence presented at the merits hearing, the Special Referee found that:

In 2010 Defendant Suresh "Sam" Patel owned three parcels of improved real estate in Lynchburg, South Carolina ("the property"). On two of these parcels, Sam Patel operated a liquor store and a convenience store called "Tommy's Grill."

(R. pp. 1-8).

The Special Referee further found:

At this time, Sam Patel and his companies were experiencing serious financial difficulties which ultimately forced him to file a bankruptcy petition with the United States Bankruptcy Court, District of South Carolina in 2011. Kim loaned him \$5,000 to help pay for the bankruptcy filing.

The Lynchburg Store, along with other properties that Sam owned went into foreclosure. Prior to the foreclosure sale, the brothers talked, and, although they now disagree over the nature of the conversation, they do agree the result was that Kim would bid on the property at the foreclosure sale. Kim was the successful bidder at the foreclosure sale which was held on May 9, 2011. The deed transferring the property was filed with the Lee County Clerk of Court on October 13, 2011 showing that A&P Enterprises, LLC, (Kim) had bought the property, including the Lynchburg Store....

(R. pp. 1-8).

The Court's order further found that:

Due to Sam Patel's financial problems and pending bankruptcy, the ownership of the convenience store that operated on the property was placed in the name of SP Grocery, LLC ("SP Grocery") during the summer of 2011. Sam Patel's daughter, Payal Patel, owned 100 percent of SP Grocery....

(R. pp. 1-8).

If the Respondents' position in this case is correct, (which Appellant strenuously denies), any equitable interest that was created in the real property at issue in this case would have been under the control and an asset of the bankruptcy estate and would have

existed for the benefit of Respondent Sam Patel's creditors, and not to the Respondent personally. *See, Bragg v. Bragg*, 347 S.C. 16, 553 S.E.2d 251 (2001). Therefore, the Respondents have no standing to assert any claims of promissory estoppel against the Appellant in this case.

The Trial Court erred in granting judgment to the Respondent. Further, the Trial Court erred in denying the Appellant's Motion for Reconsideration on the grounds that the Respondent has no standing to maintain any action against him for Promissory Estoppel. (R. pp. 9-21). Contrary to the Special Referee's Order, the evidence presented before him clearly establishes that the property was purchased by Respondent after, and as a result of the financial difficulties and bankruptcy. (R. pp. 96-97, 293). The Special Referee erred in ruling otherwise and his Orders should be reversed by this Court.

B. RESPONDENTS' CLAIMS FOR PROMISSORY ESTOPPEL ARE BARRED BY THE EQUITABLE DOCTRINE OF UNCLEAN HANDS.

Further the Respondents' counterclaims for promissory estoppel fail due to the doctrine of unclean hands. One of the most commonly referred to equitable principles or maxims is that of "unclean hands." 12 S.C. Jur. Equity, Section 7. The doctrine of unclean hands "closes the door" to a party "tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Straight v. Gross*, 383 S.C. 180, 678 S.E.2d 443 (S.C. Ct. App. 2009); *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (S.C. Ct. App. 2010); *Ingram v. Kasey's Associates*, 328 S.C. 399, 493 S.E.2d 856 (S.C. Ct. App. 1997).

As set forth above, the alleged purchase arrangement testified to by the Respondent Sam Patel (again denied by the Appellant) in effect creates an agreement to circumvent the workings of the United States Bankruptcy Court. The Respondents'

version of the facts (again, disputed by Appellant) is tantamount to a fraud created to protect or recover assets that were or should have been included in Respondent Sam Patel's bankruptcy estate. It should not be enforced by this Court.

Respondent's claims in this case are barred by the doctrine of unclean hands. Judge Newman's Order is clearly erroneous and should be reversed by this Court.

C. RESPONDENTS' CLAIMS FOR EQUITABLE ESTOPPEL FAIL AS A MATTER OF LAW.

The Respondents' counterclaim for promissory estoppel fails as a matter of law. Our Courts recognize an equitable remedy in promissory estoppel if the claimant can prove the following:

1. The presence of a contract unambiguous in its terms;
2. Reasonable reliance on the promise by the party to whom the promise is made;
3. The reliance is expected, and;
4. The party to whom the promise is made sustains injury in reliance on the promise.

Satcher v. Satcher, 351 S.C. 477, 570 S.E.2d 535 (S.C. Ct. App. 2002); *Rushing v. McKinney*, 370 S.C. 280, 633 S.E.2d 917 (S.C. Ct. App. 2006); *Woods v. State*, 314 S.C. 501, 431 S.E.2d 260 (S.C. Ct. App. 1993); *Citizens Bank v. Gregory's Warehouse*, 297 S.C. 151, 375 S.E.2d 316 (1988). For the reasons set forth below, Respondents have failed to prove these elements and their case for promissory estoppel fails as a matter of law.

1. Respondents Failed to Prove the Existence of a Contract Unambiguous in Its Terms.

The South Carolina Court has held that while Promissory Estoppel is a "flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations." *Craft v. South Carolina Commission for the Blind*, 385 S.C. 560, 685 S.E.2d 625 (S.C. Ct. App. 2009); *Rushing v. McKinney*, 370 S.C. 280, 633 S.E.2d 917 (S.C. Ct. App. 2006). The promise to be enforced must be unambiguous with clearly articulated, definite terms. *See, Craft v. South Carolina Commission for the Blind*, 385 S.C. 560, 685 S.E.2d 625 (S.C. Ct. App. 2009); *Barnes v. Johnson*, 402 S.C. 458, 742 S.E.2d 6 (S.C. Ct. App. 2012); *Rushing v. McKinney*, 370 S.C. 280, 633 S.E.2d 917 (S.C. Ct. App. 2006). The South Carolina Court has held that "because one may properly invoke promissory estoppel absent elements typically required for a contract...the doctrine still requires, *by clear and convincing evidence* a 'promise unambiguous in its terms.'" *Barnes v. Johnson*, 402 S.C. 458, 742 S.E.2d 6 (S.C. Ct. App. 2012) (emphasis added). Alleged agreements with "unclear terms," "lacking details," or "without clearly articulated terms" have all been found insufficient by the South Carolina Court for purposes of invoking promissory estoppel. *Barnes v. Johnson*, 402 S.C. 458, 742 S.E.2d 6 (S.C. Ct. App. 2012); *Rushing v. McKinney*, 370 S.C. 280, 633 S.E.2d 917 (S.C. Ct. App. 2006); *Satcher v. Satcher*, 351 S.C. 477, 570 S.E.2d 535 (S.C. Ct. App. 2002). The Court has held that even where an actual promise is proven to exist, an unclear, non specific promise is ambiguous and will not support a promissory estoppel claim. *Satcher v. Satcher*, 351 S.C. 477, 570 S.E.2d 535 (S.C. Ct. App. 2002).

The Respondents have failed to meet their burden to establish an unambiguous promise with clearly articulated terms as required by South Carolina Law. Therefore, the

Respondents' claim for promissory estoppel fails as a matter of law. The only evidence of any agreement is the testimony presented by the Respondents (denied by Appellant) that the Appellant agreed to sell back the property to the Respondents once the Respondent Sam Patel got back on his feet and recovered financially. Respondent was unable to present any evidence of any terms of the alleged conflict, other than the fact that Appellant "promised" to allow him to purchase the property back at "sometime" in the future. In fact the evidence was so flimsy that the Special Referee specifically found that there was never any meeting of the minds as far as the terms or conditions of the alleged contract were concerned. (R. pp. 1-8).

Looking at the evidence presented to the Magistrate in the light most favorable to the Respondents, the only evidence Respondents presented regarding this alleged agreement was that Appellant "promised" that the store it purchased would one day be returned to Respondents. (R. pp. 151-152). Other than this alleged promise, the Respondents presented absolutely no terms of any alleged agreement or contract of sale of the property. In fact, the Court specifically found as a matter of law that the parties did not reach a meeting of the minds as to any terms of the alleged agreement. (R. pp. 1-8). Sam Patel admitted during his testimony before the Special Referee that there were no terms set for this alleged "promise." (R. 152). Looking at the evidence in a light most favorable to Respondents, Respondents have failed to establish anything other than a "vague promise" on the part of Appellant to sell him the property at an undefined price at an undefined time. This evidence is not sufficient to establish a claim against Appellant for promissory estoppel. The Trial Court erred in holding that the Respondents proved the necessary elements of promissory estoppel. (R. pp. 1-21).

2. Respondents Failed to Prove Reliance Element.

Further, the Respondents' promissory estoppel argument fails on the grounds that they have failed to prove the reasonable reliance factor. The South Carolina Court has held that alleged reliance on an ambiguous promise is not reasonable. *Rushing v. McKinney*, 370 S.C. 280, 633 S.E.2d 917 (S.C. Ct. App. 2006). As set forth above, the alleged promise here was ambiguous on its face. It was devoid of any terms or conditions, timelines or performance requirements. Any reliance on this alleged "promise" (denied by the Appellant) by the Respondents was unreasonable. Therefore, the Respondents failed to meet their burden of establishing the reliance element for promissory estoppel and therefore their promissory estoppel claim fails as a matter of law. The Trial Court's Order finding that Respondents had an ownership interest under a theory of promissory estoppel is not supported by the evidence presented to him and should be reversed by this Court.

D. THE SPECIAL REFERREE ERRED IN FAILING TO GRANT THE APPELLANT THE RELIEF REQUESTED IN ITS COMPLAINT.

1. The Appellant was Entitled to an Order Evicting Respondent from the Willow Drive Property.

As set forth above, the Special Referee erred in finding and ruling as a matter of law that "Sam Patel owns an equitable interest in the subject real estate, that he cannot be evicted at this time, and that he has the right to purchase the property from A&P Enterprises, LLC according to the terms set forth above, and that he owes the annual real property taxes as incident of ownership of the equitable interest in this property." (R. pp. 1-21). The Special Referee erred in finding and ruling as a matter of law that the Appellant was not entitled to an Order of Eviction as a result of the Respondents' failure

to pay rent due and owing to the Appellant.

South Carolina law provides that a tenant may be evicted when he or she fails to pay rent when due or demanded. S.C. Code Ann. § 27-37-10(A). Section 27-37-10, which provides that a tenant may be ejected if the tenant fails or refuses to pay rent when due or when demanded, or if the terms and conditions of the lease have been violated, was enacted to give the lessor the right to terminate the lease in absence of a contractual provision, which was not recognized at common law. *Kiriakides v. United Artists Communications, Inc.* 312 S.C. 271, 440 S.E.2d 364 (1994).

In the case before the Court, the evidence presented before the Special Referee clearly and conclusively established that despite due and diligent demand, the Respondents willfully and intentionally failed to pay any rent to Appellant. (R. 99-101; 103-104; 124; 127). There was no evidence presented that the Respondents made one single rent payment despite repeated demands for them to do so. Therefore, the Appellant was entitled to an Order of the Court evicting the Respondents from the Willow Drive premises.

2. The Appellant was Entitled to Judgment for Back Rent.

The evidence presented at trial conclusively established that the Respondents had never paid any rent for their use of the Willow Drive property. Respondents admitted that he never paid Appellant any money for rent despite Appellant demanding that he do so. The Appellant presented testimony that \$3,750 a month rent was to begin being paid to him commencing in May of 2012. (R. pp. 104-105). As of the date of the filing of the Amended Complaint, the Appellant was owed approximately \$82,500 in back rent. (R. pp. 24-32). The Appellant was entitled to an Order of the Special Referee awarding it

unpaid rent from May of 2012 forward, plus prejudgment interest and attorneys fees as allowed by law. (R. pp. 24-32).

In addition, the Appellant was entitled to this relief under the theory of *quantum meruit*. To prevail on a *quantum meruit* claim, a plaintiff must establish (1) he conferred a benefit upon the defendant; (2) the defendant realized that benefit; and (3) retention of the benefit by the defendant under the circumstances make it inequitable for the defendant to retain it without paying its value. *Swanson v. Stratos*, 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct.App.2002); *see also Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616–17, 703 S.E.2d 221, 225 (2010) (providing the same requirements).

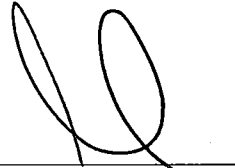
The evidence presented at trial established that the Respondents have had use of the Willow Drive property since it was purchased by the Appellant. Respondents have had full use of the property without paying any rent or property taxes on it. Respondents have been able to operate their business on the Appellant's property without paying Appellant for this benefit. It is inequitable for the Respondents to have had this right and use without making any payment for it. Therefore, the Appellant is entitled to an Order of this Court granting it judgment as to the amount due and owing to it for back rent (as well as the \$3,785.45 in taxes that the Appellant paid on this property). The Trial Court erred in concluding otherwise. (R. pp. 1-21).

CONCLUSION

The Special Referee erred in granting Respondent an ownership interest in the subject property under a theory of Promissory Estoppel. The Special Referee's Order is not supported by the evidence presented before him at the Trial. As set forth above, the Respondents failed to meet their burden of proof to establish a valid claim for promissory

estoppel under the factors and tests set forth under South Carolina Law. Further, the Special Referee erred in failing to evict the Respondents from the Willow Drive property and to award Appellant money damages for back rent.

The undersigned respectfully submits that Appellant is entitled to an Order of this Court reversing the Special Referee's Order and entering judgment for the Appellant for back rent and related damages.



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with
Rule 211(b) of SCARP.



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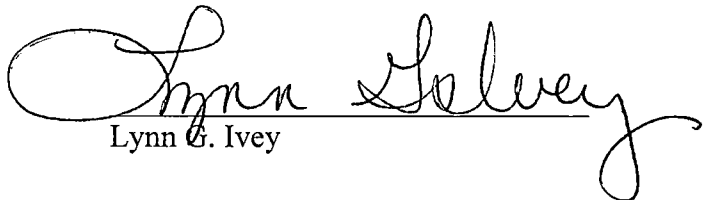
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PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, PA, certify that I have served the Final Brief of Appellant on counsel of record for Respondent in this action by depositing a copy of same in the United States Mail, postage prepaid, on August 28, 2015, addressed as follows:

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