[Cite as *Murtha v. Ravines of McNaughton Condominium Assn.*, 2010-Ohio-1325.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Patrick J. Murtha,	:	
Plaintiff-Appellant,	:	
		No. 09AP-709
v.	:	(C.P.C. No. 08CVH10-15677)
Ravines of McNaughton Condominium Association et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 30, 2010

Michael J. O'Reilly, for appellant.

Smith, Rolfes & Skavdahl Co., L.P.A., and *M. Andrew Sway,* for appellees.

APPEAL from the Franklin County Court of Common Pleas.

PER CURIAM.

{¶1} Plaintiff-appellant, Patrick J. Murtha, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion of defendants-appellees, Ravines of McNaughten Condominium Association and several named and unnamed individual members of the Board of Directors of the association, to stay proceedings pending arbitration and to appoint an arbitrator. Because the trial court did not err in (1)

concluding the parties' dispute did not involve title to or possession of real estate, (2) finding defendants did not waive the arbitration provision, (3) determining the arbitration provision was not unconscionable, (4) appointing an arbitrator, and (5) not allowing plaintiff to voir dire the proposed arbitrator, we affirm.

I. Procedural History

{¶2} In 2007, plaintiff purchased a residential condominium unit in a development that the Ravines of McNaughten Condominium Association (individually "defendant") managed; plaintiff recorded title to the property on March 2, 2007. Shortly before plaintiff's purchase, defendant filed with the County Recorder's office a Ninth Amendment to the Declaration of Condominium. The amendment prohibits a Ravines of McNaughten condominium owner from leasing his or her unit unless certain exceptions apply. Plaintiff applied for a hardship exception to the no-leasing rule, but defendant denied his application.

{¶3} Plaintiff's own review of the Declaration of Condominium led plaintiff to conclude a clause that prohibited changing "the fundamental purposes to which units are restricted," except upon a vote of 100 percent of unit owners, rendered the Ninth Amendment defective. (Declaration of Condominium, Article XIX, Section 1(a)(iv).) Because only 75 percent of unit owners approved the Ninth Amendment, and because plaintiff determined the ability to lease his unit was a "fundamental purpose" of his property, plaintiff decided the Ninth Amendment was invalid. With that premise, plaintiff advertised his condominium unit for rent. Defendant informed plaintiff the Ninth Amendment prohibited plaintiff from leasing his unit, but plaintiff entered into a lease

agreement for his unit. Defendant responded with written notice to plaintiff that it intended to evict plaintiff's tenants.

{¶4} Plaintiff in response filed a complaint against defendants on October 31, 2008, seeking (1) a declaratory judgment that the Ninth Amendment was invalid, (2) a preliminary injunction preventing defendant from evicting plaintiff's tenants, and (3) damages for slander of title and breach of fiduciary duty arising from the actions of defendant's individual officers and members of the board of directors. Defendant not only answered and counterclaimed to vindicate the amendment, but ultimately filed a motion seeking to stay proceedings due to an arbitration clause in the Declaration of Condominium. In that same motion, defendant asked the trial court to appoint an arbitrator. On June 22, 2009, the trial court entered a decision granting defendant's motions to stay and to appoint an arbitrator.

II. Assignments of Error

{¶5} Plaintiff appeals, assigning the following errors:

> 1. The Trial Court Erred in Interpreting R.C. 2711.01(B) in Finding that the Subject Dispute Did Not Involve Title To or Possession of Real Estate.
>
> 2. The Trial Court Erred in Finding that Defendants Had Not Waived the Arbitration Provision in Controversy.
>
> 3. The Trial Court Erred in Failing to Find the Arbitration Provision to be Unconscionable.
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> 4. The Trial Court Erred in Appointing an Arbitrator When Defendants' Pleadings Did Not Seek an Order to Enforce Arbitration.

> 5. The Trial Court Erred in Failing to Permit Plaintiff to Conduct a Voir Dire of the Proposed Arbitrator's Qualifications.

III. General Arbitration Principles

{¶6} Arbitration is strongly encouraged as a method to settle disputes. *Williams v. Aetna Finance Co.* (1998), 83 Ohio St.3d 464. "A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision." Id. at 471. "An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected." Id. Because arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which [the party] has not agreed so to submit." *Peters v. Columbus Steel Castings Co.*, 10th Dist. No. 05AP-308, 2006-Ohio-382, ¶11, quoting *Council of Smaller Ent. v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 665 (citation omitted).

{¶7} "The validity of an arbitration agreement involves a mixed question of law and fact." *Corl v. Thomas & King*, 10th Dist. No. 05AP-1128, 2006-Ohio-2956, ¶10, citing *Peters* at ¶11. "Generally, appellate courts review a trial court's decision to grant a stay pending arbitration under an abuse of discretion standard." Id. Nonetheless, the de novo standard is proper when the issue presents a question of law. Id.

IV. First Assignment of Error – Interpretation of R.C. 2711.01(B)

{¶8} Plaintiff's first assignment of error presents a question of law and asserts the trial court wrongly interpreted R.C. 2711.01(B) when it concluded the subject dispute

did not involve title to or possession of real estate, the statutory exceptions to a contractual agreement to arbitrate. Plaintiff contends title and possession are the core issues of his claim.

{¶9} R.C. 2711.01(A) provides that an agreement to settle controversies by arbitration "shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." R.C. 2711.01(A). If an "action is brought upon any issue referable to arbitration under an agreement in writing for arbitration," the trial court, "upon being satisfied that the issue involved in the action is referable to arbitration * * * shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had." R.C. 2711.02(B). An order staying the proceedings pending arbitration is a final order and may be reviewed, affirmed, modified, or reversed on appeal. R.C. 2711.02(C).

{¶10} R.C. 2711.01(B)(1) creates an exception to the general rule that favors the enforceability of arbitration clauses in Ohio. It provides that arbitration clauses in contracts "do not apply to controversies involving the title to or the possession of real estate." R.C. 2711.01(B)(1). Relying on that language, plaintiff argues the controversy here involves both his title to and his ultimate possession of his condominium unit, so that the arbitration agreement in the Declaration of Condominium should not apply to him.

{¶11} Neither party disputes that plaintiff holds the title to his condominium unit, and plaintiff did not file an action to quiet title. Plaintiff nonetheless argues R.C. 2711.01(B)(1) applies to bar arbitration because any provision, such as the Ninth Amendment, that limits alienability of real estate necessarily affects the quality and nature

of title. According to plaintiff, the language of R.C. 2711.01(B)(1) that prohibits arbitration in controversies "involving" title to real estate must be given a meaning broader than the one the trial court afforded it. Plaintiff thus contends a dispute can "involve" title even if it is not a dispute regarding the identity of the property's record owner. Similarly, plaintiff also argues the litigation involves possession of real estate because plaintiff sought an injunction to prevent his tenants from losing possession of the condominium unit. According to plaintiff, a dispute need not involve the title holder's possession to the property when, in the broader sense, some entity's possession of the property is at issue.

{¶12} Plaintiff's argument relies heavily on *Keybank v. MRN Ltd. Partnership*, 8th Dist. No. 88868, 2007-Ohio-5709, and its interpretation of R.C. 2711.01(B). In *Keybank*, the court determined the trial court improperly submitted a case to arbitration because the issues concerned both title to and possession of real estate. *Keybank*, however, required the court to determine who was the title holder to the real estate at issue, and it thus was "[f]oremost * * * a controversy over who actually holds title to the subject real estate in the first instance." Id. at ¶17. The other issues, including the lessee's interest and determination of possession, were secondary; which party held title to the property largely determined them.

{¶13} Despite plaintiff's best efforts to characterize this as a dispute involving both title to and possession of real estate, it is essentially a dispute involving contract interpretation, as "[c]ondominium declarations and bylaws are contracts between the association and the purchaser." *Acacia on the Green Condominium Assn., Inc. v. Gottlieb*, 8th Dist. No. 92145, 2009-Ohio-4878, ¶20, citing *Nottingdale Homeowners'*

Assn., Inc. v. Darby (1987), 33 Ohio St.3d 32, 35-36. Unlike *Keybank*, plaintiff's action is not at all a controversy over who holds title; nor is it a genuine dispute over who is entitled to possess the property. Defendant seeks neither title nor possession. Instead, the controversy here is about the validity of the Ninth Amendment. Such disputes do not fall within the exception to the validity of arbitration agreements outlined in R.C. 2711.01(B)(1). Rather, they fall within the general rule that disputes between condominium associations and unit owners over actions and decisions of the condominium association are subject to arbitration under a valid arbitration clause. See *Reno v. Bethel Village Condominium Assn.*, 10th Dist. No. 08AP-10, 2008-Ohio-4462 (upholding an arbitration agreement in condominium association's bylaws for a dispute between association and unit owner over association's decision to eliminate parking on the street in front of certain units), appeal not allowed, 120 Ohio St.3d 1507, 2009-Ohio-361.

{¶14} In certain circumstances, resolving a contractual dispute ultimately may implicate issues of title to and possession of real estate. See, e.g., *Kedzior v. CDC Dev. Corp.* (1997), 123 Ohio App.3d 301. *Kedzior* determined R.C. 2711.01(B) precludes arbitrating a dispute between prospective home buyer and developer where, even though the initial question was one of breach of a sales contract, the final disposition of the buyer's claims ultimately would involve determining which party had title to the home.

{¶15} Plaintiff's complaint presents a significantly different scenario. Count one of plaintiff's complaint seeks a declaratory judgment that the Ninth Amendment is invalid, with a corresponding finding that defendant be ordered to rescind it of record. Because

the validity of the Ninth Amendment does not implicate plaintiff's title, plaintiff's case will not devolve into one where the arbitrator, depending on whether he or she finds the Ninth Amendment valid or invalid, will have to determine questions of title and possession. If the arbitrator finds the Ninth Amendment is valid, the remainder of plaintiff's complaint for relief necessarily fails. On the other hand, if the arbitrator finds the Ninth Amendment is not valid, plaintiff will not need the permanent injunction preventing defendant from evicting plaintiff's tenants, because defendant will no longer have the authority to do so. Instead, the arbitrator's decision, at best, will only tangentially affect use of the condominium, and thus it does not fall under the umbrella of a controversy "involving title to or possession of real estate" for the purposes of R.C. 2711.01(B)(1). *Beldon v. Webb* (1997), 122 Ohio App.3d 199 (concluding an arbitrator's decision ordering a privacy fence through the center of a patio the parties held in common did not involve title to or possession of real estate, but only affected use of the real estate to accommodate the parties and preserve the value of the units).

{¶16} Plaintiff's breach of fiduciary duty claim likewise does not "involve" title to or possession of real estate, a conclusion plaintiff does not dispute. Even plaintiff's slander of title claim does not transform this controversy into one "involving the title to or possession of real estate" for purposes of R.C. 2711.01(B)(1). Generally, slander of title involves the wrongful recording of an unfounded claim to the property of another. *Prater v. Dashkovsky*, 10th Dist. No. 07AP-389, 2007-Ohio-6785, ¶11, quoting *Green v. Lemarr* (2000), 139 Ohio App.3d 414, 433. To prevail on a claim of slander of title, a claimant must prove "(1) there was a publication of a slanderous statement disparaging claimant's

title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages." Id. at ¶12, quoting *Green* at 430-31.

{¶17} Here, even if plaintiff's complaint sufficiently stated a claim for slander of title, it properly is submitted to arbitration. See, e.g., *Garcia v. Wayne Homes, LLC*, 2d Dist. No. 2001 CA 53, 2002-Ohio-1884 (sending a claim of slander of title to arbitration where an arbitration clause was incorporated by reference into a purchase agreement for construction of a new home); *Rossi v. Lanmark Homes, Inc*. (Dec. 30, 1994), 11th Dist. No. 94-L-046 (sending all claims to arbitration, including a counterclaim for slander of title, where the contract for the construction and sale of a new house included an arbitration provision).

{¶18} Because plaintiff's complaint seeks a declaration concerning the validity of the Ninth Amendment to the Declaration of Condominium, this is not a dispute "involving the title to or the possession of real estate" within the purview of R.C. 2711.01(B)(1). R.C. 2711.01(B)(1) does not prevent submitting plaintiff's dispute to arbitration, and the trial court did not err in so concluding. *Erie Oil & Gas, Inc. v. Canfield Farms, Inc.* (Oct. 11, 1991), 6th Dist. No. H-90-31 (concluding R.C. 2711.01(B) did not apply where appellee did not claim the right to possession or title of appellant's property that appellant then held). We thus overrule plaintiff's first assignment of error.

V. Second Assignment of Error – Waiver

{¶19} In his second assignment of error, plaintiff asserts the trial court erred in finding defendants did not waive the arbitration provision in controversy. Plaintiff argues

that, even if R.C. 2711.01(B)(1) does not prohibit arbitration, defendants waived the right to enforce the arbitration agreement by actively participating in the litigation without first seeking to proceed with arbitration.

{¶20} Like any other contractual right, the right to arbitrate may be waived. *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1992), 79 Ohio App.3d 126, 128. Due to Ohio's strong policy favoring arbitration, the party asserting a waiver has the burden of proving it. *Tinker v. Oldaker*, 10th Dist. No. 03AP-671, 2004-Ohio-3316, ¶18, citing *Atkinson v. Dick Masheter Leasing II, Inc.*, 10th Dist. No. 01AP-1016, 2002-Ohio-4299, ¶18. "[T]he question of waiver is usually a fact-driven issue and an appellate court will not reverse" the trial court's decision "absent a showing of an abuse of discretion." *ACRS, Inc. v. Blue Cross & Blue Shield of Minnesota* (1998), 131 Ohio App.3d 450.

{¶21} A party asserting waiver must prove (1) the waiving party knew of the existing right to arbitrate; and (2) the totality of the circumstances demonstrates the waiving party acted inconsistently with that known right. Id., citing *Atkinson*; see also *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751. Here, the parties do not dispute defendants knew of their existing right to arbitrate incorporated into the Declaration of Condominium. Instead, the disputed issue is whether, under the totality of the circumstances, defendants acted inconsistently with their right to arbitrate when defendants filed a counterclaim and participated in discovery prior to filing their motion seeking arbitration.

{¶22} To determine whether the totality of the circumstances supports waiver, courts consider (1) whether the party seeking arbitration invoked the jurisdiction of the

trial court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of the proceedings; (2) the delay, if any, by the party seeking arbitration in requesting a stay of proceedings or an order compelling arbitration; (3) the extent to which the party seeking arbitration participated in the litigation, including the status of discovery, dispositive motions, and the trial date; and (4) any prejudice to the nonmoving party due to the moving party's prior inconsistent actions. *Tinker* at ¶20, citing *Baker-Henning Prod., Inc. v. Jaffe* (Nov. 7, 2000), 10th Dist. No. 00AP-36.

{¶23} Here, defendants filed a counterclaim, a factor indicating it invoked the trial court's jurisdiction. About two months later defendants file a motion seeking arbitration. While the motion was pending, defendants participated in ongoing discovery. The trial court concluded defendants did not waive their right to enforce the arbitration provision because they timely filed the motion to stay proceedings. Further noting defendants did not participate in discovery until after they filed their motion to stay, the trial court refused to "penalize [defendants] for being cooperative while [their] motion was pending."

{¶24} Appellate review acknowledges the discretion vested in trial courts in determining whether a party has waived the right to arbitration. As a result, the appellate court in *Milling Away, LLC v. Infinity Retail Environments, Inc.*, 9th Dist. No. 24168, 2008-Ohio-4691 concluded the trial court did not abuse its discretion in staying litigation pending arbitration where the defendant in that action filed a counterclaim and waited six months before invoking his right to arbitration. By contrast, the appellate court in *Hauser & Taylor, LLP v. Accelerated Systems Integration, Inc.*, 8th Dist. No. 84748, 2005-Ohio-1017 concluded the trial court did not abuse its discretion in denying a motion to stay

pending arbitration where the defendants in the action filed numerous pleadings, including a counterclaim, and waited until after the trial court appointed a neutral accountant before filing a motion requesting a stay pending arbitration. See also *Baker-Henning,* supra (holding trial court did not abuse its discretion in granting stay pending arbitration where, even though plaintiff filed the complaint, plaintiff did so only in response to defendants' R.C. 1311.11 notification, and plaintiff waited only two days before moving the court for a stay pending arbitration).

{¶25} Here, defendants' answer and counterclaim are inconsistent with a request for arbitration. Defendants, however, filed their request for a stay pending arbitration within about two months after their pleadings, a time period considerably shorter than the time lapse involved in *Milling Away*. Similarly, although defendants participated in discovery following the request for a stay, we cannot say the trial court was wrong in refusing to punish defendants for cooperating in discovery that likely produced pertinent information wherever the controversy ultimately is resolved. Lastly, plaintiff does not demonstrate prejudice in defendants' delay in requesting arbitration, primarily because the delay was not as long as in, for example, *Hauser & Taylor*.

{¶26} In the final analysis, although the factors present a somewhat close question, we cannot say the trial court abused its discretion in concluding that the totality of the circumstances supports a determination that defendants did not waive their right to arbitration. Accordingly, we overrule plaintiff's second assignment of error.

VI. Third Assignment of Error – Unconscionability

{¶27} In his third assignment of error, plaintiff asserts the trial court erred in failing to find the arbitration provision to be both substantively and procedurally unconscionable because (1) plaintiff was in a weak bargaining position; (2) plaintiff was not an original party to the Declaration of Condominium; and (3) plaintiff is not permitted to select the arbitrator.

{¶28} An appellate court applies de novo review to a trial court's legal determination of whether an arbitration provision is unconscionable, but an appellate court should accord deference to the trial court's factual findings. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶2, 34. The party raising the issue of unconscionability must demonstrate both procedural and substantive unconscionability. Id. at ¶33; *Williams Creek Homeowners Assn. v. Zweifel,* 10th Dist. No. 07AP-689, 2008-Ohio-2434, ¶42, 49.

{¶29} "Procedural unconscionability pertains to circumstances surrounding the parties' bargaining on an agreement, such as the parties' age, education, intelligence, business acumen, and experience." *Reno* at ¶7, citing *Taylor Bldg*. at ¶43. Additional concerns for procedural unconscionability include who drafted the agreement, " 'whether alterations to printed terms were possible,' " and whether there were " 'alternative sources of supply' " for the items subject to the agreement. *Taylor Bldg.* at ¶43, quoting *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834. Procedural unconscionability also involves consideration of (1) whether the stronger party believes no reasonable probability exists that the weaker party will fully perform the contract; (2) the

stronger party knows "the weaker party will be unable to receive substantial benefits from the contract"; and (3) the stronger party knows "the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement." *Taylor Bldg*. at ¶44, quoting Restatement of the Law 2d, Contracts (1981), Section 208, Comment *d*.

{¶30} "In determining substantive unconscionability, we consider the terms of the agreement and 'whether they are commercially reasonable.' " *Reno* at ¶8, quoting *Khoury v. Denney Motors Assoc., Inc.*, 10th Dist. No. 06AP-1024, 2007-Ohio-5791, ¶12. "We consider 'the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability.' " Id., citing *Khoury* at ¶12, citing *Cronin v. California Fitness*, 10th Dist. No. 04AP-1121, 2005-Ohio-3273.

{¶31} The arbitration provision in Article XX of the Ravines of McNaughten Declaration of Condominium is identical to the language of the arbitration provision subject to dispute in *Reno*. See *Reno* at ¶16 (Tyack, J., dissenting). In *Reno*, this court determined the arbitration provision was not substantively unconscionable because the arbitration provision provides the arbitrator must be independent, and R.C. 2711.10(B) allows the common pleas court to vacate an arbitrator's award if there is evidence of the arbitrator's "partiality." Id. at ¶11. Because the arbitration agreement here is identical to the one at issue in *Reno*, it is not substantively unconscionable. Accordingly, we overrule plaintiff's third assignment of error.

VII. Fourth Assignment of Error – Appointment of Arbitrator

{¶32} Plaintiff's fourth assignment of error asserts the trial court erred in appointing an arbitrator when defendants' motion only moved for a stay of arbitration.

{¶33} Defendants titled their January 26, 2009 motion as "Defendants' Motion to Stay Proceedings Pending Arbitration and Motion to Appoint Arbitrator." In the first paragraph of the motion, defendants expressly requested the trial court (1) to stay the proceedings pending arbitration, and (2) to allow defendants to appoint an arbitrator pursuant to R.C. 2711.04, which states that "[i]f, in the arbitration agreement, provision is made for a method of naming or appointing an arbitrator or an umpire, such method shall be followed."

{¶34} Defendants also expressly moved the court to appoint David Kaman to be the arbitrator, directing the trial court to Article XX, Section 2 of the Declaration of Condominium, which provides that the Board select an independent arbitrator. In its entirety, defendants' motion "state[d] with particularity the grounds therefore, and * * * set forth the relief or order sought." Civ.R. 7(B)(1). The trial court, then, properly responded to defendants' clear, requested relief. Plaintiff's fourth assignment of error is overruled.

VIII. Fifth Assignment of Error – Voir Dire

{¶35} Plaintiff's fifth and final assignment of error asserts the trial court erred in denying plaintiff's request to conduct a voir dire of the proposed arbitrator's qualifications.

{¶36} Plaintiff does not cite any authority for his contention that the trial court was required to allow him to conduct a voir dire of the proposed arbitrator's qualifications prior to the arbitrator's actual appointment. Cf. e.g., R.C. 2711.02 (not requiring a trial court to

hold a hearing on a party's motion to stay proceedings pending arbitration but allowing the trial court's to exercise its discretion in determining whether to grant a hearing). *Ault v. Parkview Homes, Inc.*, 9th Dist. No. 24375, 2009-Ohio-586, ¶8, citing *Maestle v. Best Buy Co*., 100 Ohio St.3d 330, 2003-Ohio-6465, at ¶16. Moreover, although plaintiff generally alleges a possible bias in defendants' recommended arbitrator, plaintiff presents nothing to support the allegation, apart from the arbitrator's involvement in the residential condominium business. Similarly, plaintiff sets forth no specifics for his contention that voir dire would develop matters not apparent from his allegations about the proposed arbitrator. Given the lack of specifics in plaintiff's argument, coupled with the lack of legal support for plaintiff's assertions regarding voir dire of the recommended arbitrator, we are compelled to conclude plaintiff's recourse in being able to challenge the arbitrator's award at the conclusion of arbitration proceedings renders the trial court's decision within its discretion. See R.C. 2711.10 and 2711.11. Accordingly, we overrule plaintiff's fifth assignment of error.

IX. Disposition

{¶37} In sum, the trial court did not abuse its discretion in granting defendants' motion to stay proceedings pending arbitration and motion to appoint an arbitrator. The trial court properly interpreted R.C. 2711.01(B)(1) not to bar arbitration in this case, did not abuse its discretion in deciding defendants did not waive the arbitration provision, correctly determined the arbitration provision is not unconscionable, and did not abuse its discretion in denying plaintiff's request to conduct a voir dire of the proposed arbitrator's

qualifications. Having overruled plaintiff's five assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, SADLER and McGRATH, JJ., concur.

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