CITATION: Medi Group Incorporated v. Silver Streams Homes (Puccini) Inc., 2024 ONSC 2648
COURT FILE NO.: CV- 23-706786
DATE: 20240506

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MEDI GROUP INCORPORATED, PILBRO III INC., SOLO ELECTRIC LTD., PAVE PLUMBING & HEATING INC., FOREMONT DRYWALL INC., 1382479 ONTARIO INC., 1382503 ONTARIO INC., 2203579 ONTARIO INC. cob FOREMONT DRYWALL CONTRACTING, E.D. CARPENTERS LTD., CARDELL FLOORING LTD., CANADIAN CONCRETE FORMING LIMITED, 1865721 ONTARIO INC.

Plaintiffs

-and-

SILVER STREAMS HOMES (PUCCINI) INC., SILVER STREAMS HOMES INC., 2148991 ONTARIO INC., 2148990 ONTARIO INC., 2147650 ONTARIO INC., 2148993 ONTARIO INC., 2147681 ONTARIO INC., IMRAN JINNAH, ASMA JINNAH, PUCCINI MORTGAGE CORPORATION, DAPAUL MANAGEMENT LIMITED, 388242 ONTARIO LIMITED, 53 PUCCINI MORTGAGE CORPORATION, NASTELL INVESTMENTS LIMITED and JACK GREENBERG

Defendants

BEFORE: FL Myers J

COUNSEL: *Sonja Turajlich*, for the Plaintiffs Pilbro III Inc. and E.D. Carpenters Ltd.

Stephen Schwartz, for the Defendants Silver Streams companies, the numbered companies, Imran Jinnah, and Asma Jinnah

Marco Drudi for the Defendant lenders including Jack Greenberg

HEARD: May 3, 2024

ENDORSEMENT

The Motion and Outcome

[1] The two remaining plaintiffs move for leave to bring a motion to require the defendants to answer questions refused on examination for discovery.

[2] The moving parties need leave to bring the motion because they have set this action down thereby confirming it is ready for trial.

[3] In order to bring the proposed motion now, the plaintiffs also need to vary the schedule set by Conway J. with the consent of all parties on November 8, 2021. In that order, Conway J. required that all interlocutory motions be served and filed (although not heard) by May 1, 2022. That date came and went well before the plaintiffs set the action down for trial and then served and filed this motion.

[4] It has been ten long years for those waiting to see a “culture shift” to eliminate the procedural delays and costs that have conspired to render civil justice inaccessible to most Canadians as discussed by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7.

[5] This case shows that the culture of complacency continues its long-established reign in the civil justice system in Ontario.

[6] The motion is dismissed.

The Basic Facts

[7] Mr. Jinnah, and allegedly Ms. Jinnah, were the principals of the Silver Stream companies that developed the Puccini Project involving the construction of 118 residential homes.

[8] Mr. Greenberg is a lawyer and is allegedly the principal of a group of private lenders who helped finance the project.

[9] The plaintiffs were among the trades who actually built the homes for Silver Stream.

[10] The plaintiffs allege that when the developer had financial problems, they were called into a meeting at which Mr. Jinnah and Mr. Greenberg convinced them to forbear from exercising their lien rights and to continue to build houses. Mr. Greenberg agreed to be escrow agent to receive and manage funds paid into the project by house purchasers.

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[11] The end result, the plaintiffs claim, is that they are owed more money than before they were induced to sign the forbearance and escrow agreement. The plaintiffs invested their funds and sweat to complete homes. This let Mr. Jinnah and Mr. Greenberg bring in sales proceeds that went to the Greenberg lenders rather than to the trades as promised.

[12] Mr. Jinnah made a proposal in bankruptcy and the Silver Stream companies have all failed. So, the real remaining defendants are Mr. Greenberg (and his companies) and Ms. Jinnah.

[13] The plaintiffs assert that they were misled and that Mr. Greenberg has yet to account properly or fully for funds received and disbursed by him as escrow agent. They also assert trust remedies against Ms. Jinnah under the precursor to the *Construction Act*.

A Partial Chronology

[14] On December 13, 2013, the Silver Stream companies failed and commenced insolvency proceedings under the *CCAA* in this court. The plaintiffs' lien claims were sent to arbitration to determine priorities between the plaintiffs and the lenders.

[15] The plaintiffs commenced this lawsuit on October 22, 2014.

[16] The arbitrator released his priorities decision on September 28, 2016. The plaintiff Pilbro was held to have a priority claim for $91,798.91. E.D. Carpenters had priority for $19,527.89. The remaining amount available from houses sales was approximately $12 million and it all went to the Greenberg lenders.

[17] Pilbro claims that it is still owed another $554,353.81.

[18] E.D. Carpenters claims that it is still owed another $328,674.01.

[19] The Greenberg lenders say they suffered a shortfall on their loan recovery and are still owed another $5 million.

[20] In June, 2017, the plaintiffs' original counsel was removed from the record. Then the action was dismissed for delay due to the passage of time.

[21] To accommodate the various delays to that point, the parties consented to a motion to reinstate the action brought by new (and current) counsel for the plaintiffs.

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[22] By order dated November 12, 2019 the court imposed the following agreed schedule:

a. examinations for discovery to be completed by March 31, 2020;

b. undertakings to be answered by April 30, 2020;

c. mediation to be completed by June 30, 2020; and

d. the action to be set down for trial by November 1, 2020.

[23] I do not know if anything of note happened in the first ten months of 2020 especially after March when the pandemic was most keenly felt.

[24] The parties did not complete any of the steps scheduled in the November 12, 2019 order. To accommodate the delay, the parties consented to an order made by Cavanagh J on October 28, 2020 imposing the following agreed schedule:

a. examinations for discovery to be completed by February 26, 2021;

b. undertakings to be answered by April 30, 2021;

c. mediation to be completed by July 5, 2021; and

d. the action to be set down for trial by November 1, 2021.

[25] Examinations for discovery were held in October, 2021.

[26] The parties did not complete any of the other steps scheduled in the October 28, 2020 order. To accommodate the delay, the parties consented to an order made by Conway J on November 8, 2021 imposing the following agreed schedule:

a. undertakings to be answered by February 1, 2022;

b. all interlocutory motions to be schedule and the motion record to be delivered by May 1, 2022;

c. mediation to be completed by September 15, 2022; and

d. the action to be set down for trial by November 22, 2022.

[27] The plaintiffs' counsel provided undertakings and refusals charts to counsel for the defendants on December 21, 2021.

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[28] No one answered their undertakings by February 1, 2022 as ordered.

[29] In February, 2022, counsel for the plaintiffs wrote to her counterparts about scheduling the mediation.

[30] No one brought a motion on refusals or to enforce undertakings by May 1, 2022.

[31] In the absence of any reply to her February letter, counsel for the plaintiffs wrote again on May 18, 2022. The defendants made an incomplete response in May. The plaintiffs' counsel followed-up in August, 2022 at which time the lawyers scheduled the mediation for October, 24, 2022.

[32] The mediation was held almost six weeks after the September 15, 2022 deadline in the scheduling order.

[33] The mediation failed.

[34] On October 28, 2022, counsel for the plaintiffs sought the defendants' consent to extend the schedule again to allow the plaintiffs to bring a full day refusals motion before an Associate Judge.

[35] Within a few days, the defendants refused to consent and took the position that the date for bringing motions had passed months earlier on May 1, 2022.

[36] For reasons that are not clear, the plaintiffs could not get back before Conway J. for a 9:30 case conference until November 23, 2022. That was the day *after* the deadline for the plaintiffs to set the action down for trial.

[37] The plaintiffs were in a bind. They answered their undertakings and gave their position on advisements and refusals on November 18, 2022.

[38] The plaintiffs set the action down for trial on November 22, 2022 as required by the existing scheduling order.

[39] At the case conference on November 23, 2022, Conway J. noted that with no insolvency proceedings remaining and the parties discussing a motion before an Associate Judge, there was no reason for the case to remain on the Commercial List. She transferred the action over to the regular civil list.

[40] On April 5, 2023 Glustein J. scheduled this motion as a short motion for May 3, 2024.

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[41] I want to be clear that I am not criticizing any of the lawyers personally in this matter. This action and chronology are not much different than many others. The plaintiffs certainly could have been more proactive. Did the defendants lie in the weeds and by their silence from February to May just wait for relevant dates to pass? Maybe. They certainly did not warn the plaintiffs that their clients' ongoing cooperation had been exhausted.

[42] Throughout the period, the defendants were in breach of the court's order requiring them to deliver their undertakings. But the plaintiffs also let the date for answering undertakings slide by repeatedly.

[43] Mr. Bisceglia wrote a lengthy letter to his colleagues opposite on November 3, 2022 trying to induce them to grant a final consent extension. He did not accuse them of lying in the weeds. But he did say the plaintiffs relied on their silence while everyone scheduled and participated in the mediation as an indication that they would not be seeking to enforce the schedule strictly.

[44] The critical point is not that there is plenty of embarrassment to go around. The critical point is that in 2022 civil litigation was still being conducted with the same old culture of complacency in Toronto. The plaintiffs were not crossing every procedural "t" and dotting every procedural "i" because they did not expect to be caught out by a sudden "gotcha" by their experienced and capable colleagues opposite.

[45] To highlight this point, the plaintiffs adduced the following evidence from one of the client's mouths:

> 92. Therefore, up until Mr. Drudi's email of November 2, 2022 and Mr. Schwartz's email of November 3rd, 2022, [refusing to consent to a further extension] given the Defendants' silence throughout, I believed that the Defendants would not object to These Plaintiffs bringing a motion on undertakings and refusals of the Defendants. Up until this time, I also expected that the Defendants would provide answers to the undertakings and answers/position on their undertakings and refusals.
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> * * *
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> 99. In order to protect their interests, given the position being taken by the Defendants as outlined above, These Plaintiffs set the action down for trial prior to the November 22, 2022 set down deadline which was in effect pursuant to the Order of Madam Justice Conway of November 8, 2021. These Plaintiffs sought to do so on a without

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> prejudice basis and to preserve their rights to bring the motion on the outstanding undertakings and refusals.
>
> 100. I am advised by Emilio Bisceglia and do verily believe that the Defendants have expressed no intention to-date of answering the outstanding undertakings, under advisements or refusals.
>
> 101. I believe that no prejudice will result to the Defendants if the Order of Madam Justice Conway of November 8, 2021 is varied; and, further, if leave is granted, all to permit These Plaintiffs to bring a motion on the outstanding undertakings and refusals of the Defendants.
>
> 102. I believe that the information sought is relevant to the matters in issue and required for the Court to make a determination at the trial of this matter.
>
> 103. Accordingly, These Plaintiffs will be prejudiced if the relief sought herein is not granted; namely, an Order to vary the Order of Madam Justice Conway and leave to bring a motion on the Defendants' outstanding undertakings and refusals.

The Outstanding Refusals

[46] Mr. Greenberg and his companies answered their undertakings and clarified their position on refusals on October 24, 2023. That was two years after being examined for discovery and some 20 months after they were ordered to answer their undertakings.

[47] The Jinnahs answered their undertakings on April 22, 2024 just in time for this motion. That was two-and-a-half years after being examined and some 26 months after the court ordered them to answer.

[48] I have reviewed the refusals charts. The plaintiff is looking for evidence of Ms. Jinnah’s involvement in other businesses with Mr. Greenberg to try to bolster a claim for personal liability against her. The plaintiffs are looking for evidence that there is a non-arm’s length relationship between the Jinnahs and Mr. Greenberg and that Ms. Jinnah was more actively involved in the business than the defendants claim.

[49] As against Mr. Greenberg, the plaintiffs are still looking for transparency into the flow of funds received and disbursed by him as escrow agent. They want his law firm trust ledgers. They want an accounting of all money advanced

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on the Puccini Project by Mr. Greenberg's companies and all funds he received in trust regarding the project.

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[50] It is actually quite interesting that Mr. Greenberg would appear to be advancing a position that a lawyer, who was counsel for the developers and, at the same time, the principal of lenders, would not have to be a fully open book in taking on yet another role as escrow agent for all. Does he not expect to face a burden as a potentially conflicted fiduciary and a licensed lawyer to be squeaky clean and crystal clear in his financial dealings and, especially, his reporting to beneficiaries?

[51] Oddly, it is Mr. Jinnah who provided some responding evidence on this motion touching the funds received by Mr. Greenberg. There is no evidence from Mr. Greenberg.

[52] I can only assume that Mr. Greenberg and his companies are aware of the rules that prohibit a party from using at trial documents that are not produced and from giving evidence at trial on matters refused. Whether his position on this motion impairs his ability to meet whatever legal or evidentiary burden may be cast upon him at trial is for him and his counsel.

The Law

[53] Rule 48.01 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, provides that any party, “who is ready for trial may set the action down for trial”.

[54] When the record is passed and the action is set down for trial, Rule 48.07(a) deems *all* parties ready for trial.

[55] In passing the trial record, a party confirms they are ready for trial. That means that the discovery phase of the action is over (subject to undertakings that must be answered as a matter of commitment and ethics). That is why, with limited exceptions, Rule 48.04 (1) precludes a party who has set an action down for trial from initiating or continuing, “any motion or form of discovery without leave of the court”.

[56] In *Fulop v. Corrigan*, 2020 ONSC 1648 (CanLII), Perell J. discussed the test for granting leave to a party to bring a discovery motion after having set an action down for trial. He wrote:

> [77] The predominant contemporary approach to whether leave should be granted is a flexible approach that recognizes that there may be no single test for leave to initiate or continue a motion or form of discovery, and the weight to be given the various discretionary factors will depend upon the circumstances of the particular case. In considering whether there is justification for granting leave, the court may consider a variety of factors including: (1) what the party seeking

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> leave knew at the time of the passing of the trial record; (2) whether there has been a substantial or unexpected changed in the circumstances since the action was set down for trial; (3) the purpose of the request for leave; (4) the nature of the relief being requested; (5) whether the party opposing the relief would suffer any prejudice; and (6) whether the relief sought would likely be granted if leave were given to bring the motion notwithstanding the filing of the trial record. [Notes omitted.]

[57] I decline to engage in the debate about whether there is one test or two. In this case the parties agree that there has been no substantial or unexpected change in circumstance since the plaintiffs set the action down for trial. What the plaintiffs did not expect was the defendants to refuse to grant a fourth extension of time without notice that their position had changed.

[58] The test to vary a case management schedule – like the test for leave under rule 48.04 – turns on the assessment of the overall justice of the request. That means balancing the purpose and effect of the request, relative prejudice, and the public interest in the operation of an efficient and affordable civil justice system

[59] The plaintiffs rely on the decision of the Court of Appeal in *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 (CanLII). In that case, I refused to reinstate an action that had been administratively dismissed because counsel had taken few steps to move the action along as time had passed. Along the way to overruling my decision, the Court of Appeal wrote:

> [26] When reviewing a registrar's dismissal for delay under the former rule 48.14, the weight of authority from this court has leaned towards the first policy consideration. As Laskin J.A. stated in *Hamilton (City)*, at para. 20, quoting with approval the motion judge's comment, "[T]he court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds." While failure to enforce the rules may undermine public confidence in the capacity of the justice system to process disputes fairly and efficiently, as Sharpe J.A. observed in *119*, at para. 19, nonetheless:
>
> > [P]rocedural rules are the servants of justice not its master … We should strive to avoid a purely formalistic and mechanical application of time lines that would penalize parties for technical non-compliance and frustrate the fundamental goal of resolving

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> disputes on their merits. [T]he Rules and procedural orders are construed in a way that advances the interests of justice, and ordinarily permits the parties to get to the real merits of their dispute. [119, at para. 19. Citations omitted.]

> [27] The court's preference for deciding matters on their merits is all the more pronounced where delay results from an error committed by counsel. As the court stated in *Habib*, at para. 7, "[O]n a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel." In *Marché*, Sharpe J.A. stated, at para. 28, "The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor" (citations omitted).

> [28] In determining whether to reinstate an action that has been dismissed for delay, keeping in mind the above observations, the court must consider the rights of all the litigants. This necessarily requires consideration not only of the plaintiff's right to have its action decided on its merits, but also consideration of whether the defendant has suffered non-compensable prejudice as a result of the delay, whether or not a fair trial is still possible, and even if it is, whether it is just that the principle of finality and the defendant's reliance on the security of its position should nonetheless prevail. See e.g. *119*, and *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, 319 D.L.R. (4th) 412. [Notes in original.]

[60] The first five years of this action were consumed with the *CCAA* proceedings and then new counsel coming on board. Even starting at the 2019 reinstatement of the dismissed action, it was to be set down on November 1, 2020. There were no lawyers' errors. The action was set down two years later, on November 22, 2022, because no one treated the schedule as mattering until the defendants' position emerged in November, 2022.

[61] I could say that the plaintiffs are *dominus litis* or master of the litigation and drop all failures at their feet. But these are only failures if things like scheduling orders, delay, costs of delay, and access to civil justice matter. It is fair to observe that the 1984 authors of the *Rules of Civil Procedure* thought they were designing a system aiming to eschew procedure in favour of obtaining "justice on the merits." Many rules, like Rule 26.01, provide for leave to take steps provided there is no prejudice that cannot be

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compensated by an adjournment or costs. That is, delay and costs were not perceived to be inconsistent with "justice on the merits."

[62] We know now however that delay and cost are part and parcel of the justness of the outcome. The Supreme Court of Canada wrote in *Hryniak v Mauldin*, 2014 SCC 7,

> However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication.

[63] The Court of Appeal seems to be in the throes of a debate about how to treat delay in civil proceedings. In *Mihoren v. Quesnel*, 2021 ONCA 898 (CanLII), the majority reinforced *HB Fuller's* holistic approach toward justice on the merits. The minority judge would have placed emphasis on preventing delay to try to bring an end to the "culture of complacency." In a subsequent decision, *Burgess v. University Health Network*, 2022 ONCA 105 (CanLII), a unanimous panel to the Court of Appeal noted the *Mihoren* decision but then ruled:

> This court has recognized that the passage of an inordinate length of time after a cause of action arises presumptively gives rise to trial fairness concerns. As Sharpe J.A. stated in *1196158 Ontario Inc.*, at para. 42: "If flexibility is permitted to descend into toleration of laxness, fairness itself will be frustrated. As the status hearing judge recognized, even if there is no actual prejudice, allowing stale claims to proceed will often be unfair to the litigants." The problem is pronounced in this case, and the appellants have presented no persuasive argument to rebut this presumption.

[64] These decisions are not inconsistent legally because the test is so contextual that it allows for different emphasis on different facts in different cases. It is telling that the decision of Sharpe JA in *1196158 Ontario Inc.* was written in 2012. The harm associated with delay was not new or invented in *Hryniak*. It was already a problem of longstanding that finally made its way up to the SCC in 2014. Perhaps it will again someday soon.

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[65] The plaintiffs' evidence is that there will be no prejudice to the defendants if the order sought is made; whereas the plaintiffs will be prejudiced by losing their right to discovery.

[66] I accept the witness's belief in his argument. But it is not a correct legal analysis. The prejudice to the defendants is that despite all parties being ready for trial since November, 2022, as a result of their desire to bring this motion, the plaintiffs have not yet filed the Certificate required by Part IV of the *Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region*. As a result, the action has not yet been assigned a trial date or a pretrial conference date 18 months after having been set down for trial.

[67] Under s. 61 of the *Practice Direction,* the action should have been struck from the trial list six months after it was set down for trial because the plaintiffs did not deliver the requisite certificate. Plus, s. 68 of the *Practice Direction* provides:

> Rule 48.04 provides that a party who sets an action down for trial or consents to placing the action on the trial list cannot initiate or continue any form of discovery or interlocutory motion without leave of the court. **Leave will be granted only in rare circumstances.** [Emphasis added.]

Analysis

[68] The parties have already lost a year just waiting for this motion to be heard. If leave is granted to the plaintiffs to bring a refusals motion before an Associate Judge now, at least another year will pass before that motion can be heard. There is an appeal as of right from the decision of the Associate Judge on that motion to a single judge of this court. That will take another year (or, if the appeal will take more than two hours to argue, 20 months given the current scheduling backlog).

[69] This action commenced in 2014. It bears a 2023 Court File No. because it was assigned a new number on moving from the Commercial List. In my view, the parties are extremely near or even past the time when "unnecessary expense and delay, can prevent the fair and just resolution of" this dispute. Waiting another two to three years for a refusals motion that was ordered to have been brought two years ago, undermines the fairness of the process and the justness of the outcome. It makes a mockery of the orders of judges setting agreed schedules. It perpetuates the culture of

complacency that accords no value to the parties' needs to get their disputes resolved fairly – efficiently and affordably.

[70] The questions asked of Ms. Jinnah appear to me to be peripheral to the main trust argument against her. The questions asked of Mr. Greenberg look more important. But they apparently were not important enough for the plaintiffs to act on them prior to mediation despite the schedule requiring them to do so. My sense however is that Mr. Greenberg may be hoisting himself on his own petard by not answering voluntarily and making the type of transparent disclosure one expects from a fiduciary – especially a lawyer with an apparent conflict of interest among his many roles.

[71] The plaintiffs set the action down for trial knowingly. They had no practical choice but to do so. But the entire predicament in which the plaintiffs find themselves is simply due to the culture of complacency that continues to infect the civil justice system at least in Toronto. I do not find it unjust to hold parties to court orders and to the impact of important formal steps like setting an action down for trial barring compelling circumstances. In fact, if the court is to do its part combatting procedural complacency, then it must be less diffident in accepting that efficiency and affordability are vital elements of obtaining justice on the merits. In other words, the court should enforce its scheduling orders and the associated *Rules of Civil Procedure*.

[72] This is not a rare case as discussed in the *Practice Direction*. It is altogether too common.

[73] The motion is dismissed. I am not willing to exercise my discretion to award costs to the defendants despite their success. They participated knowingly and willingly in ignoring court-ordered schedules year after year. Their delay in answering undertakings was inappropriate. I do not know whether they deliberately lay in the weeds or that is just the appearance of the effect of their continued failure to fulfil the court's orders, their delay of mediation discussions, their participation in a late mediation without complaint, and their sudden denial of the plaintiffs' request to extend the schedule in November, 2022. In my view it is fair and just for them to bear their own costs.

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FL Myers J

Date: May 6, 2024

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