

Kamco Supply Corp. v Nevada Constr. Corp.

2010 NY Slip Op 32117(U)

July 21, 2010

Sup Ct, NY County

Docket Number: 105487/01

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN A. MADDEN
Justice

PART 11

Kamco

Plaintiff,

- v -

Nevada Construction, et al.

Defendant.

INDEX NO.

105487/2001

MOTION DATE

1-14-10

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Repeating Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the answered Memorandum Decision + Order.*

FILED
JUL 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

July 21 2010

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

-----X
KAMCO SUPPLY CORP., on
behalf of itself and other persons
similarly situated as
trust fund beneficiaries of Lien Law
Trusts of which NEVADA CONSTRUCTION AND
DRYWALL INC., and ABCOM ASSOCIATES, INC.
as trustees,

Index No. 105487/01

DECISION AND ORDER

Plaintiff,

-against-

NEVADA CONSTRUCTION CORP., U.S.A. CONSTRUCTION
AND DRYWALL, INC., MUTUAL REDEVELOPMENT HOUSES INC.,
SAINT VINCENTS CATHOLIC MEDICAL CENTERS OF NEW YORK,
ABCON ASSOCIATES, INC., LANNY TAYLOR, ESSENTIAL
ELECTRIC CORP., UNIQUE STATEMENTS IN WOOD, INC.,
G&D PAINTING, INC., GRANDVIEW CONTRACTING CORP.,
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, MICHAEL
ZENOBIO, JR. CHRISTOPHER ZENOBIO a/k/a CHRIS ZENOBIO,
DIVERSIFIED CARTING INC., DIRECTOR-
COMMERCIAL INDUSTRIES, LLC, CLEAR IMAGE GLASS,
INC., CITY STORE GATES MFG. CORP., APPLE FLOOR
COVERING, INC. and 'JOHN DOE 1' THROUGH 'JOHN DOE TEN,'

FILED
JUL 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----X
JOAN A. MADDEN, J:

Plaintiff Kamco Supply Corp. ("Kamco") moves for an order pursuant to Lien Law § 77 (3) (a) (vi) and CPLR 909 (1) allowing the disbursement of \$326,365.62 recovered from defendant Abcon Associates, Inc. a/k/a Abcon Associates ("Abcon") as follows: (a) \$2,185.51 for disbursements and \$108,788 for attorney's fees incurred by Marshall Stern, P.C. ("Stern"), counsel to Kamco, in connection with efforts to recover Lien Law 3-A trust funds, (b) \$25,000 to pay for the surety of Jay Stuart Dankberg, who was

appointed Receiver to recover the judgment; (c) the balance to go to claimants based on their percentage of the amount due to the claimants as a whole; and (2) extending the receivership of Mr. Dankberg.

Saint Vincents Catholic Medical Centers of New York ("Saint Vincents") cross moves for an order (1) granting summary judgment on its second cross claim against Abcon, (2) dismissing the complaint against it and releasing and canceling certain bonds discharging St. Vincents and Surety Fidelity and Deposit Company of Maryland from any further liability under the bonds or, alternatively, reducing the bonds in proportion to the satisfaction of Kamco's June 17, 2003 judgment by the \$326,365.62 recovered from Abcon, the distribution of which is the subject of Kamco's motion; and (3) awarding any remainder of the trust fund to Saint Vincent's in satisfaction of its October 6, 2004 judgment against Abcon.

Defendants Abcon, Michael Zenobio, Jr., and Christopher Zenobio a/k/a Chris Zenobio (together "the Abcon defendants") oppose the motion and cross motion.

Background

This action arises out of a construction project to build a primary care facility on two floors of an existing commercial space located at 275-77 8th Avenue, New York, NY ("the premises"). St Vincents, which had leased the premises from its

owner Mutual Redevelopment Houses, Inc. ("Mutual"), hired Abcon as the general contractor on the project. Kamco and certain of the defendants were suppliers and subcontractors on the project. Kamco has been represented throughout this litigation by Stern.

This action began as one to foreclose on a mechanic's lien. On or about April 21, 2001, St Vincents answered and asserted four cross claims against Abcon alleging Abcon's breach of its contract with St. Vincents. Subsequently, based on information that Kamco obtained from St Vincents, Kamco amended its complaint to allege a failure to comply with article 3-A of the Lien Law, which requires a general contractor to maintain certain funds intended for construction projects in trust to assure the payment of suppliers, subcontractors and others working on the project. By decision and order dated December 20, 2001, this court found that Kamco had met the statutory requirements to allow the action to proceed as a Lien Law trust fund action.

On or about July 2, 2002, the parties entered into a stipulation agreeing to, inter alia, the appointment of a Special Referee to hear and determine all disputes regarding disclosure and the disbursements of trust fund moneys. In light of the stipulation, by decision and order dated July 25, 2002, this court referred the issue regarding the disclosure and the disbursements of trust fund moneys to a Special Referee.

The matter was assigned to Special Referee Nicholas Doyle

("Doyle"). After Abcon failed to bring any witnesses to the original hearing date, Abcon obtained an adjournment through its counsel Neil Greenstein. On the adjourn date, only Abcon's principal Michael Zenobio, Jr. ("Zenobio") appeared at the hearing. The report indicates that Doyle informed Zenobio that a corporation must appear by counsel but that Zenobio told Doyle that Mr. Greenstein was not appearing for personal reasons, and that it was unclear whether Mr. Greenstein's firm still represented Abcon. In his report Doyle wrote that:

In light of the fact that Mr. Greenstein never contacted me, prior to the date of this hearing; that the initial adjournment was granted to Abcon and that Abcon had a lengthy period in which to prepare for this hearing and/or substitute counsel, I find that Abcon was not entitled to an adjournment and was unable to proceed with evidence, at this hearing, due to its appearance without counsel. Accordingly, I find Abcon failed to offer any proof that it produced documentation in response to all of St Vincents' requests and in compliance with the requirements of Lien Law §§ 75 and 76. Therefore I find and recommend that Abcon has failed to rebut the presumption found in Lien Law § 75(4) which is it had applied or consented to the application of trust funds actually received, for purposes other than a purpose of the trust.

Kamco then moved to confirm the Special Referee's report and for summary judgment on its claim under the Lien Law in the amount of \$289,933, representing the difference between the total amount received by Abcon from St Vincents (\$884,009) and the amount paid by Abcon to those entities involved in the project

(\$543,551.39). By decision and order dated March 27, 2003, this court confirmed the report. The court also found that after considering the evidence in the record, that Kamco was entitled to summary judgment on its Lien Law claim. The court held that Abcon's failure to keep books and records as required by Lien Law § 75 gave rise to a presumption that the \$289,933 shortfall was not used for the purpose of the project, and that the evidence submitted by Abcon in opposition was insufficient to raise a triable issue of fact.

Subsequently, based on the unopposed request of Kamco, the court amended the March 27, 2003 decision and order on May 8, 2003, to reflect that summary judgment was granted as against Abcon as well as its principals Michael Zenobio, Jr., and Christopher Zenobio a/k/a Chris Zenobio.

Judgment was entered on June 17, 2003 in favor of Kamco and against the Abcon defendants in the amount of \$372,630.71.¹ In the meantime, the Abcon defendants appealed the court's grant of summary judgment in favor of Kamco on the Lien Law claim, and the judgment entered thereon. By decision dated June 24, 2004, the Appellate Division, First Department dismissed the appeal, finding that "no appeal lies from either order or judgment appealed from, both papers having been entered as a consequence

¹This amount consists of the principal amount of \$289,933, plus interest from April 24, 2000 in the amount of \$82, 142.39 and costs and disbursements of \$555.32.

of defendants-appellants default in appearing." See Kamco v. Nevada Construction, et al, 8 AD3d 196 (1st Dept 2004).

After judgment was entered in favor of Kamco, this court entertained thirteen motions in the action, most related to an attempt to enforce Kamco's judgment.

In addition, to the matters before this court, according to the affirmation of Marshall Stern, Esq., he has represented Kamco in a litigation in Nassau County involving ABCON Trust, which led to the foreclosure sale of Abon's corporate property; and two actions for the foreclosures of properties in Nassau and Suffolk County which were consolidated before a Nassau County judge and resulted in an order of foreclosure of two parcels of property neither which has been sold.

Mr. Stern has also been involved on Kamco's behalf in an action in the Federal District Court for the Eastern District of New York before the Honorable Leonard D. Wexler. The federal action concerned money due and owing Abcon for a claim against the U.S. Postal Service for a termination for convenience at a Queens Postal facility. The United States Postal Service could not decide among the competing claims and deposited the moneys with the Clerk of the Court of the Eastern District of New York and commenced an interpleader action in 2005 naming various judgment creditors of Abcon. Judge Wexler ruled in favor of the bank holding the mortgage of the two foreclosed properties

subject to the consolidated action in Nassau County, and this decision which was appealed by a judgment creditor, was overturned on appeal. Subsequently, Judge Wexler held a settlement conference wherein all the defendants, except Abcon, agreed to settlement, which provided for the payment of \$326,365.62 to Stern, as counsel for Kamco.

Since the judgment was entered in the amount of \$372,630.71 on June 17, 2003, interest has accrued, according to Mr. Stern, at a rate of the \$33,536.76 per year, so that as of June 2009, accrued interest would equal \$204,015.31 and the amount of the unpaid judgment with interest would equal \$573,851.29. Stern also asserts that the settlement would be applied to the unpaid interest first, thus leaving the principal amount of \$250,280.71, plus interest accruing thereafter.

Kamco's Motion

Kamco now moves to distribute the money obtained in the settlement to pay Stern's disbursements and attorneys' fees, to pay the premium for a bond for Jay Stuart Dankberg, the receiver appointed to collect all profits and interests of Abcon's principals, and to disburse the remaining amounts to the claimants based on their percentage of the amount of the \$336,332.14 which Kamco asserts is the total amount due to the claimants. Kamco also seeks to extend the receivership of Mr. Dankberg.

In support of its application for attorneys' fees, Mr. Stern submits his affirmation describing the work he has performed on behalf of the claimants, attaches time records and states that he has a retainer agreement with Kamco under which he is to obtain one-third of the amount collected. He also asserts that attorneys doing similar work charge between \$325 and \$450 an hour, and that he is entitled to approximately \$108,788.60 in attorneys' fees based on one-third of the settlement moneys recovered thus far, or by multiplying the hours expended times the hourly rate charged in such matters.

The Abcon defendants oppose the motion, arguing that there is insufficient evidence to substantiate the amounts owed to each claimant, since the amounts allegedly owed by each claimant is based solely on Mr. Stern's affirmation, and that an evidentiary hearing is necessary. In support of its position, the Abcon defendants submit the affidavit of Michael Zenobia, Jr., who challenges the amounts of the claims, asserting that certain of the claimants did not perform work on the job and others have been paid, while others are owed less money than indicated on the schedule submitted by Kamco.

The Abcon defendants also argue that there has never been a judicial determination as to the amounts owed to each claimant or the class as a whole and that the court's decision granting summary judgment in Kamco's favor was based solely on a finding

that the Abcon defendants violated Section 3-A of the Lien Law and therefore owed the difference between the total amount received by Abcon from St Vincents and the amount paid by Abcon to those entities involved in the project. In addition, they assert that the dismissal of the appeal was not on the merits but based on their default in appearing.

The Abcon defendants further argue that Kamco has failed to provide sufficient proof to warrant an award of attorneys' fees and disbursements, and that a hearing is needed to determine the reasonable amount of attorneys' fees. The Abcon defendants also object to the use of the money to pay the premium on the receiver's bond, asserting that there is insufficient proof of the need for such a receiver.

In reply, Kamco argues that Abcon is foreclosed by the court's decision and order granting summary judgment on the Section 3-A of the Lien Law claim from challenging the validity of the underlying claims. As for the distribution of the recovered funds, Kamco argues that only the trust beneficiaries have standing to challenge such distribution and that none of them have done so, although they were served with the motion.

The court will first address the issue of Stern's right to recover attorneys' fees. CPLR 909 provides that "[i]f a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees

to the representatives of the class based on the reasonable value of legal services rendered....²" Under CPLR 909 "the customary source for the payment of a victorious class representative's attorney's fees is the fund, if any, generated by the judgment or the settlement." Alexander, Practice Commentaries, McKinney's Book 7B, CPLR 603 to 1005, at 228, citing, Sternberg v. Citibank Credit Services, Inc., 110 Misc2d 804, 809 (Sup Ct Nassau Co 1981).

As the class representative in this action to recover pursuant at article 3-A for the diversion of trust assets, Kamco may recover attorneys' fees from the amounts recovered on behalf of the trust fund beneficiaries. See ARA Plumbing & Heating Corp. v. Abcon Associates, Inc., 44 AD3d 598 (2d Dept 2007) (upholding the award of attorneys' fees under CPLR 909 after non-jury trial to recover damages for diversion of trust assets).

Here, while Kamco has adequately shown that an attorneys' fee award is appropriately made to it from the monies recovered from Abcon, the amount of such award has not been sufficiently demonstrated. First, although Kamco agreed to a pay Stern one-third of any recovery, the fee award must be based on the "reasonable value of legal services rendered," (CPLR 909) which

²CPLR 909 also provides for recovery from the opponent of the class action if justice requires. However, given the issues involved in collecting the judgment against the Abcon defendants, Kamco is not seeking such relief at this time.

is generally calculated using the lodestar fee methodology of computing the reasonable number of hours spent by counsel multiplied by hourly rate for counsel's services. Washington Federal Savings & Loan Ass'n v. Village Mall Townhouses, Inc., 90 Misc2d 227, 232 (Sup Ct Queens Co. 1977).

This process involves "fixing reasonable hourly rate for the time the attorneys [and]... requires definite information not only as to the way in which time was spent (discovery, oral argument, negotiation, etc.) but also as to the experience of the various lawyers performing each task...." Id. at 231-232 (internal citations omitted).

The court then adjusts the resulting amount by taking into account various factors including:

- (1) the novelty and difficulty of the questions presented;
- (2) the skill required to perform the legal services properly;
- (3) the preclusion of other employment by the attorney due to acceptance of the case;
- (4) whether the fee is fixed or contingent;
- (5) time limitations imposed by the client or the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) *the amount involved and the results obtained*;
- (8) the undesirability of the case;
- and (9) awards in similar cases.

Rahmey v. Blum, 95 AD2d 294, 303-304 (2d Dept 1983) (emphasis in the original). Another factor considers in the risk involved in the litigation. Id., at 304.

Furthermore, an evidentiary hearing must be held to

determine the amount of the attorneys' fees and substantial documentation must be presented at the hearing. See Friar v. Vanguard Holding Corp., 125 AD2d 444 (2d Dept 1986); Becker v. Empire of America Federal Savings Bank, 177 AD2d 958, 958 (4th Dept 1991).

Accordingly, Kamco's application for attorneys' fees award is granted to the extent of finding that Kamco is entitled to such an award from the monies recovered thus far from Abcon, and setting the matter down for a hearing as to the appropriate amount of the award. The amounts due and owing to Kamco's counsel for disbursements can be presented at that time.

Next, as the distribution of the fund to the claimants must await the determination of the amount of attorneys' fees due and owing to Kamco, Kamco's request to distribute the fund to the claimants must be held in abeyance. Furthermore, while the Abcon defendants have no standing to challenge the amounts to which the claimants of the fund are entitled, the court nonetheless finds that the evidentiary support for the amount of the claims is lacking and notes that any distribution of funds to the claimants must be supported by proof of such claims and their amounts.

Following the determination of the amount of reasonable attorney's fees, Kamco may renew its application for distribution of the fund to the claimants upon evidence that the claimants performed the work at the project and are owed the amounts they

seek. At that time, Kamco may also renew its application to extend the receivership of Mr. Dankberg and to pay the premium on the receiver's bond.

St Vincents' Cross Motion

Saint Vincents cross moves for an order (1) granting summary judgment on its second cross claim against Abcon, (2) dismissing the complaint against it and releasing and canceling certain bonds discharging St. Vincents and Surety Fidelity and Deposit Company of Maryland from any further liability under the bonds or, alternatively, reducing the bonds in proportion to the satisfaction of Kamco's June 17, 2003 judgment by the \$326,365.62 recovered from Abcon; and (3) awarding any remainder of the trust fund to Saint Vincent's in satisfaction of its October 6, 2004 judgment against Abcon. While the cross motion was pending, this court so-ordered a stipulation between St. Vincents and Kamco amending the cross motion to join Mutual, the owner of the premises, and Fidelity and Deposit Company of Maryland, the surety which issued bonds to discharge the lien on the premises, as cross movants.

The Abcon defendants oppose the cross motion, arguing that it is not supported by sufficient documentary evidence and is untimely. The Abcon defendants also assert "upon information and belief" that St. Vincents is in Chapter 11 bankruptcy and is

therefore stayed from seeking relief. They further argue that as St. Vincents is not a trust fund beneficiary, it cannot recover any part of the fund.

In response, St. Vincents submits evidence that five of the claimants identified by Kamco as being entitled to disbursement of the settlement moneys have assigned their rights to recover to St Vincents in return for St Vincents' payment of their unpaid invoices.³ St. Vincents also submits documentary evidence of the assignments, its payment of the assignors' invoices and evidence of the assignors' claims.

As a preliminary matter, St. Vincents has submitted sufficient evidence to warrant granting it summary judgment on its second cross claim seeking recovery against Abcon for its failure to discharge liens filed against the premises. The court previously granted summary judgment on this cross claim in its decision and order dated February 24, 2004. In granting this relief, the court noted that after Abcon refused to discharge the liens, St. Vincents brought three special proceedings to discharge the liens pursuant to Lien Law § 19(2) by posting bonds and thus incurred certain costs and expenses, including payment

³These claimants and the amounts of their claims are as follows: Nova Plumbing and Heating, Inc. (\$15,000), Upright Expeditors, Inc. (\$3,300), Aero Mechanical (\$16,900), Ambrosio Plumbing and Heating, Inc. (\$23,677), and Misan Electric, Inc. (\$8,000).

of premiums on the bonds.

St Vincents now seeks recovery of payments for premiums made to renew the bonds after the court's February 24, 2004 decision and order. In support of this relief, St Vincents submits evidence that since February 24, 2004, it has paid \$24,588 in renewal premiums. This evidence includes affidavits from individuals from the surety bond company indicating that St Vincents had paid each renewal invoice in connection with the discharge of the mechanics lien, and the renewal invoices which indicate that the invoices are paid. Under these circumstances and as the evidence submitted by St Vincents is uncontroverted, summary judgment is appropriately granted on the second cross claim in the amount of \$27,588 .

St. Vincents also requests that court dismiss the claims against it and release and cancel certain bonds or at least reduce the bonds in proportion to the satisfaction of Kamco's June 17, 2003 judgment by the \$326,365.62 recovered from Abcon.⁴ In support of its position, St Vincents asserts that "it is the law of the case that Abcon converted more money from the project (\$289,933) than the quantum of liens file against the premises (\$265,944.20)" (Cuddy Affirmation, ¶ 20). He also notes that

⁴St Vincents seeks to reduce the bond by 57%, in light of the \$326,365.62 received in federal interpleader action from Abcon which is 57% of the \$573,851.29 judgment with accrued interest.

Kamco has obtained and entered a judgment against Abcon and its principals in the amount of \$372,630.71 and that Kamco has recovered an amount of \$326,326.62 which is more than the liens on the property. In addition, St Vincents points out that neither Kamco nor the trust beneficiaries have sought any relief against St Vincents.

Until the claims of the trust beneficiaries are satisfied, it is premature to dismiss the complaint against St. Vincents or to discharge the bonds in their entirety. In addition, while St. Vincents is entitled to reduce the amount of the bond based on the recovery from Abcon, the amount of this reduction will depend on the extent to which the claims of the trust beneficiaries are satisfied following the award of reasonable attorneys' fees. Accordingly, the request to reduce the bond is denied without prejudice to renewal after there is a determination as to the amount of recovery by the trust beneficiaries.

Next, while St. Vincents is entitled to receive trust funds moneys based on the assignment of claims to it by certain trust beneficiaries, it provides no legal authority to support its position that a judgment creditor that is not a trust beneficiary can recover from the trust fund. In any event, St. Vincents acknowledges that it is not entitled to obtain use of the trust fund to satisfy its outstanding judgment against Abcon until the beneficiaries of the trust have been paid. Moreover, as

indicated above, it is unclear whether the trust beneficiaries will be paid in full after an award of reasonable attorneys' fees is made. Thus, St. Vincents' request that it be awarded any remainder of the trust fund to satisfy its judgment against Abcon is denied without prejudice to renewal in the event that the claims of the trust beneficiaries are satisfied.

Conclusion

In view of the above it is

ORDERED that Kamco's motion seeking the distribution of attorneys' fees and disbursements from the amount obtained from the Abcon defendants is granted to the extent of setting the matter for a hearing before a Judicial Hearing Officer (JHO) or Special Referee to hear and report as to the amount of attorneys' fees and disbursements to which Kamco is entitled as class representative; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR except that in determining the amount of attorneys' fees the JHO/Special Referee shall utilize the method of calculating attorneys' fees as specified in this decision and order; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@court.state.ny.us) for placement at the earliest possible

date on calendar of the Special Referee Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the References link under Courthouse procedures), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for Kamco shall, within 15 days of this decision and order submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the

trial of the issues specified above shall proceed from day to day until completed; and it is further


ORDERED that the motion to confirm or reject the Report of the JHO/Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that following the court's determination as to the amount of reasonable attorneys' fees, Kamco may renew its request to distribute the remaining moneys in the fund to the claimants and to extend the receivership of Jay Stuart Dankberg and to distribute \$25,000 of the money collected by Abcon to pay the premium on the receiver's bond; and it is further

ORDERED that the cross motion by St. Vincents as joined by defendants Mutual and Fidelity and Deposit Company of Maryland is granted to the extent of granting summary judgment in St Vincents' favor on the second cross claim and the Clerk is directed to enter judgment in favor of St Vincents and against defendant Abcon Associates, Inc. in the amount of \$24,588, together with interest at the statutory rate from December 1, 2009; and it is further

ORDERED that the cross motion is otherwise denied without prejudice to renewal.

DATED: July 21, 2010



J.S.C.

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