

Dorfman v American Educ. Servs.

2011 NY Slip Op 30033(U)

January 3, 2011

Supreme Court, New York County

Docket Number: 600929/2004

Judge: Saliann Scarpulla

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

PRESENT: Sahar Scarpulla
Justice

PART 19

Index Number : 600929/2004

DORFMAN, JESSICA

vs.

AMERICAN EDUCATION SERVICES

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is granted with the following conditions: _____
which require the filing of affidavits, no. 006, 007, 008

FILED

JAN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/11

Sahar Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 19

-----X
JESSICA DORFMAN,

Plaintiff,

Index No. 600929/2004

-against-

AMERICAN EDUCATION SERVICES,
AMERICAN STUDENT ASSISTANCE, and
EDUCATION RESOURCES INSTITUTE,

DECISION AND ORDER

Defendants.

-----X

For Plaintiff:
Mark Grossman
60 East 42nd Street, 40th Floor
New York, NY 10022

For Defendant American Student Assistance:
Pitaro & Pitaro
77-11 164th Street
Flushing, NY 11366

For Defendant Education Resources Institute:
Fabiano & Associates, P.C.
1035 7th North Street
Liverpool, NY 13088

FILED

JAN 07 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Papers considered in review of this motions for summary judgment:

- Notice of Motion 1, 2, 3
- Affs in Opp 4, 5, 6
- Replies 7, 8

HON. SALIANN SCARPULLA, J.:

This action involves a sole surviving breach of contract claim asserted by the plaintiff, Jessica Dorfman¹ ("Dorfman"), against the defendants American Student Assistance ("ASA") and The Education Resources Institute, Inc. ("TERI"),² which arose

¹ Plaintiff Jessica Dorfman is now known as Jessica Jones.

² The record shows that the action against defendant American Education Services (AES) has been dismissed.

in connection with certain students loans taken out by Dorfman to finance her law school education. While Dorfman moves for summary judgment in her favor on her breach of contract claim (motion sequence number 007), ASA and TERI each move for summary judgment dismissing such claim (motion sequence numbers 006 and 008, respectively). TERI additionally moves for summary judgment on its counterclaim asserted against Dorfman. The motions are consolidated herein for disposition,

In her complaint, Dorfman alleges that she attended Benjamin N. Cardozo School of Law from 1993 to 1996, and that to partially fund her law school education, she took out various student loans that were financed by KeyBank (as successor to Society National Bank, the original lender) and serviced by AES. The complaint asserts six claims against the defendants, including a breach of contract claim. By order of this court dated November 7, 2007 (Lehner, J.), all asserted claims, except the third (breach of contract claim), were dismissed. In a separate action commenced in this court (Index No.: 602963/05), Dorfman sued the successor lender, Keybank, alleging that she was wrongfully declared to be in loan default. By order dated March 13, 2009 (Lehner, J.), all claims against Keybank were dismissed.

Dorfman took out a total of eight loans with Society National Bank, which were guaranteed by ASA and TERI. Of the eight loans, six were tuition loans issued under the Federal Stafford and Supplemental Loan Programs, in the aggregate principal amount of \$54,500 ("Federal Loans"), and two were "private loans" issued under the Law Access

Loan (“LAL”) Program, in the aggregate principal amount of \$20,500 (“Private Loans”). The Federal Loans and the Private Loans were guaranteed by ASA and TERI, respectively, and were serviced by AES prior to loan default.

According to federal student loan regulations, Dorfman was required to begin repaying the loans in January 1997, the year after her graduation from Cardozo, but in the event of hardship, she was permitted to request a period of forbearance. However, each time Dorfman was granted a forbearance, accumulated unpaid interest on the loans would be “capitalized” and added to the principal loan balance. With respect to the Federal Loans, the record shows, among other things: (1) Dorfman made no payments under the Federal Loans until March 1999; (2) thereafter, Dorfman was granted a third and final 12-month forbearance through October 2000, and her first post-forbearance payment was due in November 2000; (3) because Dorfman failed to make payment, Keybank, through its servicer AES, declared Dorfman to be in default, and in August 2001, notified ASA that Dorfman had defaulted on her Federal Loans, and demanded that ASA make payment under its guaranty; (4) after ASA paid Keybank the loans (with interest) under its guaranty, it obtained an assignment from Keybank of the Federal Loans and related promissory notes executed by Dorfman; (5) ASA then commenced collection activities against Dorfman, as required by the loan regulations, with respect to the Federal Loans; (6) when ASA garnished a tax refund due Dorfman in the amount of \$3,002, Dorfman entered into a payment schedule with ASA, whereby she agreed to pay ASA

approximately \$952 per month; and (7) after making eight payments, Dorfman failed to make any further payment subsequent to May 2003, and as of April 12, 2010, Dorfman still owed ASA \$121,643.63, which sum included unpaid principal, accrued interest and fees.

With respect to the Private Loans, the record shows, *inter alia*: (1) pursuant to the LAL program, Dorfman executed two loan applications and related promissory notes; (2) Dorfman obtained forbearances of the Private Loans, and her LAL account payment history was kept by AES and TERI; and (3) after Dorfman defaulted on her payment of the Private Loans, TERI paid Keybank pursuant to the guaranty, and obtained from Keybank an assignment of all rights under the loan documents.

In an affidavit, Dorfman acknowledges that she had received “six tuition loans ... totaling approximately \$55,000,” but asserts that the “two alleged non-tuition loans totaling \$20,500 [] were never funded.” She also concedes that “after graduation, I received three forbearances, or suspensions of obligation to make monthly payments, and applied for a fourth, which apparently was denied without my being informed of same.”

In her complaint, Dorfman alleges, upon information and belief, that (1) the amounts owed under the loan documents were “overstated,” and the backup loan information provided to her by the ASA and TERI was “misstated and inaccurate;” and (2) ASA and TERI breached their obligations under the loan documents and related

guarantees by failing to provide her with “critical background information” regarding the loans, and the sums allegedly owed thereunder.

Dorfman now moves for summary judgment on her breach of contract claim, and asserts that “defendants wrongfully declared Dorfman to be in default of eight loan promissory notes, whereas six of the notes which Dorfman is alleged to have defaulted were paid close to in full, and two notes were in fact nonexistent, with the alleged defaults resulting in invocation of the government’s student loan guarantee provisions and a resulting ‘judgment’ against Dorfman pursuant thereto”

ASA and TERI each move for summary judgment dismissing Dorfman’s breach of contract cause of action and seek the recovery of reasonable attorneys fees. TERI additionally moves for summary judgment on its counterclaim asserted against Dorfman.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). To prevail on a breach of contract claim, a plaintiff must allege and prove the following elements: existence of a valid and binding contract, plaintiff’s performance of the

contract, defendant's material breach of the contract, and damages. *See CMI II, LLC v. Newman & Newman, P.C.*, 17 Misc. 3d 1107A (Sup. Ct., N.Y. Co. 2007).

Dorfman's Motion

Here, there is no direct contractual relationship between Dorfman and ASA or TERI. However, when the loan applications and related promissory notes executed by Dorfman were validly assigned to ASA and TERI after they, as guarantors, paid off the Federal Loans and the Private Loans, ASA and TERI stepped into the shoes of Keybank, the assignor, which held a direct contractual relationship with Dorfman. *Matter of Stralem*, 303 AD2d 120, 123 (2d Dept 2003) (“[w]hen a valid assignment is made, the assignee steps into the assignor's shoes and acquires whatever rights the latter had”).³

However, Dorfman failed to establish the second element for a breach of contract claim, i.e., that she performed the contract pursuant to its terms. Indeed, Dorfman concedes that she received forbearances due to her inability to make timely payments and, in any event, that she was only able to (purportedly) pay the loans “close to full within four years from when repayment began.” Because there is no allegation or evidence that Dorfman performed the contract by paying off the loans (i.e., paying the principal amounts and all accrued interest), her breach of contract claim fails as a matter of law, for this reason alone. *See generally Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, 575 (2d

³ Further, a guarantor is subrogated to the rights of the lender after it pays off the loan pursuant to its guaranty.

Dept 2008)(conclusory allegation that no consideration was given when the note and guaranty were signed could not defeat summary judgment motion).

Dorfman's allegation that ASA and TERI breached the contract by "misallocation of [her] payments to non-existing loans" and by "false documentation of default" is also without any merit, as explained below. Indeed, based on the documentary evidence submitted by ASA and TERI, Dorfman cannot establish that they breached the contract, as she urges this court to believe. Thus, Dorfman's summary judgment motion on her breach of contract claim must be denied.

ASA and TERI's Motions

As noted above, Dorfman acknowledges that she had applied for and received funding of the Federal Loans, as such "money was paid directly to Cardozo, as stated in the [loan] agreements and as confirmed by Cardozo's records." Hence, the existence of the Federal Loans and the principal amount (\$54,500) owed thereunder is not in dispute. Yet, Dorfman alleges that "the lender and its agents"⁴ had diverted "many of my payments to the non-existent non-tuition loans, and then claimed a default against me" Specifically, Dorfman argues that the promissory notes she signed for the allegedly "non-existent non-tuition loans" (i.e., the Private Loans) were in fact loan applications. In other words, she argues that, even though the promissory notes referenced in the corresponding loan applications, "there is only one document executed per each loan

⁴ Apparently, Dorfman refers to Keybank as "the lender," and "its agents" included AES (as servicer), and ASA and TERI (as guarantor-assignees).

application,” and that “calling a document ‘promissory note’ does not make it one.” In essence, she argues that she only signed loan applications, and no promissory notes.

Dorfman’s argument is frivolous and without merit. Contrary to Dorfman’s contention, copies of the promissory notes and the loan applications she had signed were submitted by ASA and TERI as documentary evidence.

Next, Dorfman argues that TERI cannot show funding of the “two alleged nontuition loans totaling \$20,500,” and that “Keycorp has conceded in writing that it intentionally destroyed what proof of payment it possessed as to all loans.” Dorfman’s argument is apparently based on her mischaracterization of the letter, dated November 13, 2003, written by AES, as servicer, in response to the request of Dorfman’s counsel for copies of the cancelled disbursement checks reflecting funding of the loans. Dorfman’s reliance on such letter is misplaced, as the letter merely stated that it was the policy of Keybank (and AES) not to “retain copies of disbursement checks beyond seven (7) years of disbursements of the loans.” Contrary to Dorfman’s allegation, the letter did not state that Keybank/AES “intentionally destroyed” the disbursement checks, nor did it state that the loans were “never funded.” Indeed, the record contains sufficient and undisputed evidence to reflect that Dorfman requested and received funding of the Private Loans.⁵ For example, in her LAL loan application dated October 13, 1994, wherein Dorfman

⁵ Although Keybank did not retain copies of disbursement checks after seven years as a matter of policy, upon Dorfman’s default, all relevant loan documentation were sent to the two guarantors. As shown below, at least one check for the Private Loans is in the record.

applied for a \$10,500 loan, section 12b of such application stated that she had applied for a \$10,000 LAL loan in 1993.

In addition, in an affidavit, Shawn Baldwin, Keybank's Risk Manager, stated that Dorfman had obtained eight loans from Keybank, which consisted of six Federal Loans and two Private Loans, and that Dorfman was delinquent on the repayment of her loans.⁶ Indeed, Baldwin stated that if the loan proceeds were never disbursed to Dorfman by Keybank, "guarantors ASA and TERI would never have paid \$74,920.62 and \$26,060.11, respectively, to Keybank." Further, as noted above, a copy of the disbursement check that was paid directly to Dorfman for one of the Private Loans is in the record to show that she had received funding.⁷

Notwithstanding, Dorfman alleges that ASA and TERI diverted or misallocated her payments from tuition loans to non-tuition loans. This allegation has no merit whatsoever, as documentary evidence reflects otherwise. In fact, there were many instances where Dorfman communicated with AES and acknowledged the existence of the Private Loans and the Federal Loans, as well as directed AES as how her loan

⁶ Baldwin's affidavit was submitted in connection with the action commenced by Dorfman against Keybank in 2005, a copy of which is annexed as Exhibit AA to the Blair Affidavit submitted in this action. As noted above, all claims asserted against Keybank in that action were dismissed, and Dorfman has not appealed.

⁷ Such disbursement check was payable to Dorfman alone, "as opposed to the disbursements of her Federal Loans, which were made by way of two party checks payable jointly to Dorfman and Cardozo Law School." Also, Dorfman did not produce any of her bank records for the relevant time period, "which would have confirmed that she indeed received and deposited disbursements of the Private Loans."

payments should be allocated. For example, in her March 30, 1998 letter, she wrote "Enclosed please find \$287.00 to keep payments current on my private loans," and in her April 18, 1998 letter, she wrote "My private loans that are currently held by Keycorp have come due and I am currently not in a position to pay them back." Similarly, in her January 13, 1998 letter, she wrote "My FEDERAL loans have come due, and I am currently not a position to pay them back." By letter dated February 23, 1999, she wrote "Please use the enclosed check in the amount of \$531.48 toward the PRIVATE LOANS ... A check in the amount of \$1900 will follow tomorrow to cover the amount owed for Federal Loans." Thereafter, by letter dated July 2, 1999, AES informed Dorfman that she was in default of two LAL (Private) Loans, and that the aggregate amount then owed was \$27,247.33, which included unpaid principal, accrued interest and late fees. By letter to AES, dated March 9, 2000, Dorfman wrote "Enclosed please find payment (\$1,119.50) for my Private Loans only. A request for forbearance on my federal loans has been submitted. Please do not allocate any portion of this payment towards my federal loans."

The above documents, among others, not only demonstrate Dorfman's acknowledgment of the existence of Private Loans and the Federal Loans, but also show that she had directed AES as to how her payments should be applied among such loans. Yet, in her affidavit, Dorfman stated that "defendants failed to prove the funding of the two loans I challenge. The fact that they alleged payment on these loans, by diverting the crediting of payments from the tuition to the non-tuition loan, does not establish their

existence.” The foregoing evidence, which consisted (in part) of Dorfman’s own writings, clearly refutes her contention.

Finally, in an effort to avoid the payment obligations under the loans, Dorfman, by her counsel, argues that the promissory notes are “invalid.” In effect, Dorfman argues that, under § 3-104 of the Uniform Commercial Code, which addresses the various forms of “negotiable instruments,” the instant promissory notes are “invalid” because the repayment terms therein were not specified. Dorfman points to the following language in the notes: “When you receive my signed Promissory Note with my application, you are not agreeing to lend me money ... You have the right not to make a loan or to lend an amount less than the Loan Amount Requested” In support of her argument, Dorfman relies upon *Ian Woodner Family Collection, Inc. v Abaris Books, Ltd.* (284 AD2d 163 [1st Dept. 2001]).

Dorfman’s argument is unpersuasive, and her reliance on *Ian Woodner* is misplaced. Notably, in addition to the limited language selectively chosen and quoted by Dorfman, the promissory notes stated, among other things, that:

I agree to accept an amount less than the Loan Amount Requested and to repay that portion of the Loan Amount Requested that you actually lend to me ... After you agree to make a loan to me, you will send me a Disclosure Statement. In addition to other information, the Disclosure Statement will tell me the amount of my disbursement and the amount of your origination fee and the guaranty fees ... I will review the Disclosure Statement upon receiving it and will contact you if I have any questions.

Moreover, and as an example, in the promissory note relating to the 1993 LAL loan application, the “Loan Amount Requested” by Dorfman was “\$10,000.00,” and as to which “Jessica Dorfman promise[d] to pay to your order on the terms of this Promissory Note all of the principal sum of the Loan Amount Requested, to the extent it is advanced to me or paid on my behalf ...” plus interest and fees.⁸ The note also contained many defined terms, such as Disbursement Date, Interim Period, and Repayment Period, which set forth the terms and conditions of the note. In addition, the note contained numerous detailed provisions that dealt with, inter alia, Interest, Terms of Repayment, Late Charges, Prepaid Finance Charges, Deferment of Repayment, Forbearance and Collection Costs. The promissory notes were signed both by Dorfman and the lender, and the related loan applications were signed by Dorfman and certified by the school. Notably, in the notes, in bold capital letters, Dorfman acknowledged that “I WILL NOT SIGN THIS PROMISSORY NOTE IF IT CONTAINED ANY BLANK SPACES. BY SIGNING THIS PROMISSORY NOTE I ACKNOWLEDGE THAT I HAVE READ IT, IT CONTAINS NO BLANK SPACES AND THAT I HAVE RECEIVED AN EXACT COPY.” Based on the foregoing, the contention that the promissory notes are invalid for lack of specific terms is unpersuasive and without merit.

⁸ It is understandable why a lender would lend an amount less than the “Loan Amount Requested,” because the actual loan amount would depend on the school’s certification that the student-borrower complied with the federal loan regulations and requirements, as well as taking into consideration, inter alia, the cost of attendance, estimated financial aid and expected family contributions. Moreover, origination and guaranty fees would be deducted from the principal loan amount, before the net proceeds of the loan would be disbursed.

The *Ian Woodner* case, *supra*, that Dorfman relies upon is inapposite. In that case, the issue before the court was whether the plaintiff - holder of a promissory note signed by the defendant - satisfied the requirement of CPLR 3213, which governs motions for summary judgment in lieu of complaint. Notably, CPLR 3213 pertains only to actions by plaintiffs that are based upon instruments for the payment of money only or upon a judgment. In the instant case, ASA and TERI's motions are for summary judgment, pursuant to CPLR 3212 (as opposed to CPLR 3213), which seek dismissal of the breach of contract claim. Accordingly, Dorfman's reliance on *Ian Woodner* is misplaced.

Dorfman also contends that she did not need the Private Loans because her parents supported her while she was in law school. In such regard, she attached checks, as exhibits, to show that she received such financial support. Dorfman's contention (and the checks) cannot refute the existence of the Private Loans (and the Federal Loans), which is clearly supported by documentary evidence that includes, among other things, the loan applications and promissory notes, as well as AES' loan account history and correspondence with Dorfman, which reflect her acknowledgment of the loans and her direction for the allocation of loan payments. Indeed, contrary to her contention, the undisputed evidence reflects that she borrowed the money and enjoyed the benefits of the loans.

Because Dorfman's opposition papers and arguments do not raise a material issue as to the fact that she had applied for the Federal Loans and the Private Loans, received

the loan proceeds and defaulted on her repayment obligations,⁹ and there is no evidence to support the allegation that ASA and TERI breached the contract, summary judgment is granted in favor of ASA and TERI dismissing the breach of contract claim against them.

TERI's Counterclaim

Unlike ASA, which has not asserted a counterclaim against Dorfman for failing to repay the Federal Loans,¹⁰ in its answer to the complaint, TERI asserts a counterclaim "in the sum of \$16,845.97, plus interest at the rate of 4.36% per annum from May 4, 2005," against Dorfman based upon her failure to repay the Private Loans.

In support of such counterclaim, TERI annexed to its motion for summary judgment various documentation, including, among others, schedules and charts, as well as due diligence worksheets and loan payment account history. Based on such documents and his calculations, TERI's Director of Collections Alan Blair submits an affidavit indicating that, as of May 27, 2010, with respect to the first Private Loan, the balance then due was \$10,820.02, and with respect to the second Private Loan, the balance then due was \$10,979.58. He explains that although the balances owed on the Private Loans seem

⁹ In dismissing all of Dorfman's claims against Keybank, Justice Lehner determined that the loans in questions are valid and that Dorfman was in default of the loans. The record does not show that Dorfman appealed Justice Lehner's decision.

¹⁰ After paying off the Federal Loans, ASA was required to comply with the myriad federal student loan regulations, which included, inter alia, notifying the defaulting borrower of his or her payment obligations, notifying the national credit bureaus, and attempting to collect on the outstanding debt. Ultimately, ASA would be paid by the U.S. Department of Education pursuant to a reinsurance agreement.

high, Blair explained that “the unpaid balance [on the loans] continues to accrue interest, which is then added to the principle balance of each of the subject loans.”

Dorfman does not refute TERI’s computation of the amounts owed under the loans. Instead, she asserts that “defendants have overstated the amounts owed” Also, her assertion that she paid the loans “close to full” is contradicted by the statements of ASA and TERI. Because TERI has tendered sufficient evidence to support its counterclaim, and Dorfman has failed to produce evidentiary proof to establish the existence of material issues of fact that would require a trial, summary judgment is granted in favor of TERI on its counterclaim. Any issue with respect to the exact amount of the counterclaim will be heard by a special referee of this court.

Attorneys’ Fees and Expenses

In their summary judgment motions, ASA and TERI both request an award of attorneys’ fees and costs. In the promissory notes, Dorfman agreed to pay reasonable attorneys’ fees and costs incurred by the lender in connection with enforcing the notes, if she was in default. Because Dorfman is contractually liable for paying attorneys’ fees and expenses, ASA and TERI shall each file and serve an application for an award of the actual and reasonable attorneys’ fees and expenses incurred in this action. Any issues arising in connection with the award of attorneys’ fees and expenses will be heard by a special referee.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Jessica Dorfman's summary judgment motion on her sole remaining breach of contract claim against defendants is denied; and it is further

ORDERED that the summary judgment motion by defendant American Student Assistance for dismissal of the breach of contract claim against such defendant is granted, the complaint insofar as asserted against such defendant is dismissed, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the summary judgment motion by defendant Education Resources Institute for dismissal of the breach of contract claim against such defendant is granted, and the complaint insofar as asserted against such defendant is dismissed, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the summary judgment motion by defendant Education Resources Institute on its counterclaim asserted against plaintiff Jessica Dorfman is granted and the Clerk of the Court is directed to enter judgment accordingly; and it is further

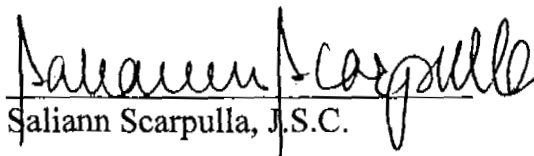
ORDERED that issues with respect to the exact amount of defendant Education Resources Institute's counterclaim and the award of attorneys' fees and expenses in favor of defendants American Student Assistance and Education Resources Institute, are referred to a Special Referee of the court to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation by the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall hear and determine the aforesaid issues; and it is further

ORDERED that counsel for defendant Education Resources Institute shall, within 30 days from the date of this decision, serve a copy of this decision with notice of entry, together with a completed Information Sheet (which is available on the court's website), upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R).

This constitutes the decision and order of the Court.

Dated: New York, NY
January 3, 2011

ENTER:


Saliann Scarpulla, J.S.C.

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