

Carullo v Fishbach
2017 NY Slip Op 32841(U)
April 5, 2017
Supreme Court, Westchester County
Docket Number: 59823/14
Judge: Alan D. Scheinkman
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER- TRIAL READY PART

-----x
IDA CARULLO and LUCA CARULLO,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 59823/14
Motion Date: Feb. 10, 2017

MITCHELL HARVEY FISHBACH, M.D. and
WESTMED MEDICAL GROUP,

Seq. No. 3

Defendants.
-----x

SCHINKMAN, J.

The following papers were read on this motion by plaintiffs for an order restoring this matter to the trial calendar and setting the matter down for a firm trial date.

- Order to Show Cause - Affirmation in Support of
Marvin D. Fuhrman, Esq. dated Jan. 31, 2016 - Exhibits A -P
- Affirmation in Opposition of Alan B. Friedberg, Esq. on behalf of
Defendant Mitchell Harvey Fishbach, M.D. dated Feb. 8, 2017
- Exhibits A-G
- Affirmation in Opposition of Katherin M. Crossling, Esq. on behalf
of Defendant Westmed Medical Group dated Feb. 8, 2017
- Exhibits A-B
- Transcript of Proceedings held on Feb. 10, 2017

Upon the foregoing papers and the proceedings held on February 10, 2017, the motion is decided as follows:

Factual and Procedural Background

Plaintiffs commenced this medical malpractice action on June 24, 2014. Plaintiffs allege that defendant Mitchell Harvey Fishbach, M.D. (hereinafter "Dr. Fishbach") and defendant WestMed Medical Group (hereinafter "WestMed") failed to properly treat plaintiff Ida Carullo's condition of atrial fibrillation with anticoagulants, which plaintiffs allege would have prevented her stroke. Plaintiffs specifically allege, inter alia, that as a result of defendants' failure to treat plaintiff Ida Carullo with anticoagulants, plaintiff Ida Carullo suffered a stroke on December 22, 2012, which left her with left-sided paralysis.

On November 10, 2015, plaintiffs filed the note of issue, wherein they certified that all discovery was complete. Thereafter, conferences in the Settlement Conference Part of this court were held on multiple dates, with the last conference held on November 2, 2016. The parties were unable to settle the action and, at the last conference, the parties agreed to a trial date of January 4, 2017 (Def. Fishbach's Ex. C [Executed Trial Date Scheduling form dated November 2, 2016]).

On November 18, 2016, plaintiffs informed defendants that they intended to have plaintiff Ida Carullo examined for the purposes of a life care plan and would exchange the same prior to trial (Def. Fishbach's Ex. D).

On November 28, 2016, plaintiffs had plaintiff Ida Carullo examined by Anne Ambrose, M.D., M.S., a physiatrist.

By Order to Show Cause entered on December 1, 2016, plaintiffs moved for an order adjourning the trial date, or, alternatively, vacating the note of issue and marking the case off the trial calendar. On December 20, 2016, at oral argument of the motion, plaintiffs argued that, after the last settlement conference, they "went out to prepare the case for trial ... [and] because the plaintiff has sustained a neurological devastating stroke[,] we wish to obtain a life care plan and have her examined by a life care planner [on] November 28th. We expect that report by the end of this week. We are requesting at least a 30 day adjournment so we can exchange that" (Plaintiffs' Ex. C at 4, lines 17-24). Plaintiffs further argued that the failure to obtain a life care planner was not willful and there was no prejudice to defendants. Defendants objected and argued, inter alia, that the motion is being made on the eve of trial, there was never any representation that they would settle the case, plaintiffs were only trying to "dress up" their case and were trying to avoid being in violation of the requirement that IME reports be exchanged 30 days prior to trial. After oral argument on the motion in the Trial Ready Part, the court (Colabella, J.H.O.) denied plaintiffs' motion on the record.

Plaintiffs assert that they received a life care plan for plaintiff Ida Carullo from Dr. Ambrose on December 21, 2016. By letter dated that same date, plaintiffs served defendants with the life care plan and notified defendants that plaintiffs would seek to call Dr. Ambrose as a witness at trial to testify in accordance with the life care plan.

On January 4, 2017, the trial date of this action, plaintiffs made an oral application in the Trial Ready Part to vacate the note of issue so plaintiffs would be able to use the life care plan at trial. In support of the application, plaintiffs' counsel admitted that the life care plan was served late and asserted that he did not want plaintiffs to be prejudiced because of his late service of the life care plan (Def. Fishbach's Ex. G at 3-4). Both defendants objected to the application on the ground that the court had previously denied the relief being sought. Plaintiffs' counsel then asserted that he could not go forward with the trial, and the court dismissed the action without prejudice, and advised plaintiffs' counsel that he had "one year to bring it back" (*id.* at 5, line 13-

14). The court specifically stated on the record that it was making no ruling on the admissibility at trial of the life care plan or testimony of Dr. Ambrose (*id.* at 8, lines 17-23).

Plaintiffs now seek to “restore” the action to the trial calendar on the grounds that (1) plaintiffs have a meritorious cause of action, (2) the delay in disclosing the psychiatrist and the inability to proceed to trial was not intentional or willful, and (3) defendants cannot establish they will sustain any prejudice by restoring the action to the trial calendar. Oral argument on the motion was taken on February 10, 2017.

Plaintiffs’ Contentions in Support of the Motion

In support of the motion, plaintiffs contend that they have a meritorious cause of action and a reasonable excuse for not being ready to proceed to trial. Plaintiffs also contend that public policy favors the resolution of cases on the merits.

Plaintiffs rely upon the affidavit of Dr. Bruce Decter, a cardiologist, which is annexed in support of plaintiffs’ motion, in support of their contention that they have a meritorious cause of action. In the affidavit, Dr. Decter opines that defendants departed from good and accepted medical practice when they discontinued plaintiff’s use of Warfarin on November 3, 2008, and placed her on aspirin. Dr. Decter further opines in his affidavit that the failure to use an anticoagulant to prevent plaintiff’s stroke, which was foreseeable, violated the proper standard of medical care. Finally, Dr. Decter opines, in relevant part, that defendants’ departures from the proper standard of medical care caused plaintiff to sustain the stroke, which has left her paralyzed on her left side and confined to a wheelchair.

As to the reasonable excuse for failing to proceed to trial, plaintiffs contend that CPLR 3101 (d)(i) governs disclosure of an expert who is expected to testify at trial and does not require such disclosure prior to the filing of the note of issue. Plaintiffs also contend that the disclosure of an expert after the filing of the note of issue does not render the disclosure untimely. Plaintiffs rely upon *Rivera v Brinbaum* (102 AD3d 26 [2d Dept 2012]) in support of their further contention that the fact that disclosure takes place after the filing of the note of issue does not, by itself, render the disclosure untimely. Moreover, plaintiffs contend that a preclusion of an expert testimony is not mandated merely because of noncompliance with CPLR 3101(d)(1)(i), unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.

Plaintiffs assert that the delay in disclosing their expert psychiatrist was neither intentional nor willful. Plaintiffs’ counsel contends that the delay in having plaintiff examined by the psychiatrist was due to the prospect of settlement, and asserts that such has been held to be good cause for delaying the retention of an expert. Plaintiffs’ counsel further contends that the examination was delayed, in part, because of plaintiff Ida Carullo’s devastating injuries. Plaintiffs’ counsel asserts that the injuries created a severe hardship for plaintiff Ida Carullo to be transported to the psychiatrist’s office.

Plaintiffs' counsel also contends that the examination was delayed to avoid, if possible, the expense of such an examination. Plaintiffs' counsel further asserts that he did not retain the physiatrist until after the November, 2016 conference in the Settlement Conference Part, at which time it was clear there would be no settlement, and that the physiatrist's report was immediately served upon defendants after it was received.

Plaintiffs also argue that defendants were not prejudiced by the service of the physiatrist's report since they were aware that plaintiff is paralyzed and confined to a wheelchair, as set forth in the Bill of Particulars and defendants experts' records. Moreover, plaintiffs' counsel contends that defendants cannot now claim any prejudice since, although defendants' opposed plaintiffs' application for an adjournment of the trial date, defendants did not seek any further disclosure. Plaintiffs further argue that if defendants had not opposed the application for an adjournment of the trial, they would have had the opportunity to conduct any additional discovery they felt was necessary. Additionally, plaintiffs contend that the court's dismissal of the case, when plaintiffs were unable to proceed to trial, removed any possible claim of prejudice by defendants in the event the case is restored. Finally, plaintiffs contend that defendants have not been exposed to greater damages; and, even if they have been exposed to greater damages, greater liability does not constitute prejudice.

Dr. Fishbach's Contentions in Opposition

Dr. Fishbach opposes plaintiffs' motion to "revive" their action on the ground that their excuse is entirely unreasonable. Specifically, Dr. Fishbach asserts that plaintiffs' hope that the case would settle is an insufficient excuse for their failure to comply with disclosure deadlines and their resulting unpreparedness for trial. Dr. Fishbach notes that plaintiffs certified in the note of issue that all independent medical examinations ("IMEs") were completed, and it appears that trial counsel believed that the trial should not proceed until a new IME was conducted and the life care plan created in order to bolster damages. Additionally, Dr. Fishbach argues that plaintiffs' counsel was aware of his client's condition and the potential need for a life care expert during the pendency of the case and at the time plaintiffs filed the note of issue. Dr. Fishbach further asserts that, despite the foregoing, plaintiffs failed to raise the issue of a life care plan when the trial date was scheduled.

Dr. Fishbach also contends that plaintiffs' counsel's attempt to bolster the case with a life care plan, which is inadmissible due to plaintiffs' failure to comply with § 202.17 of the Uniform Rules for Trial Courts (22 NYCRR), cannot be considered a valid excuse for an adjournment of trial.

Finally, Dr. Fishbach argues that the plaintiffs' late disclosure of the life care plan and the expected testimony of plaintiffs' expert physiatrist that it will cost \$219,000 a year for plaintiff Ida Caurillo's care has prejudiced defendants. Dr. Fishbach contends that the disclosure two weeks before trial was late and plaintiffs' opted not to proceed to trial on the trial date so that the life care plan would not be precluded. Dr. Fishbach argues that plaintiffs' reason for not proceeding to trial was not a reasonable excuse.

WestMed's Contentions in Opposition

Westmed also opposes the motion. WestMed asserts that plaintiffs admittedly delayed retention and disclosure of a life care planning expert and refused to proceed to trial because they wanted to use a life care planning expert to bolster damages at trial. WestMed contends that plaintiffs' counsel has engaged in gamesmanship designed to prejudice and disadvantage the defense. Additionally, WestMed contends that the late disclosure of plaintiffs' expert, the application to dismiss the case without prejudice, and the present motion to restore the case and submit trial evidence from a life care planning expert were all done in bad faith. WestMed argues that plaintiffs made a tactical decision to disclose the expert at the last moment in violation of the Uniform Rules for Trial Courts (22 NYCRR) § 202.17(g) and CPLR 3101(d).

Moreover, WestMed asserts that since the matter has been dismissed, plaintiffs must move pursuant to CPLR 5015 to vacate the default, rather than to restore the case to the trial calendar. Accordingly, WestMed contends that the motion to restore the case must be denied on this procedural ground.

WestMed also contends that, in any event, the matter should not be restored to the trial calendar because plaintiffs requested the dismissal in bad faith. WestMed contends that plaintiffs had ample evidence to prove damages, including plaintiff Ida Carullo's rehabilitation hospitalization and outpatient treatment records. Accordingly, WestMed contends that plaintiffs purposefully created the expert disclosure issue to delay trial, gain a tactical advantage, and disadvantage defendants.

WestMed further asserts that it will be unfairly prejudiced by restoring the case to the trial calendar and further prejudiced if plaintiffs are permitted to proceed to trial with a life care planning expert. WestMed argues that the sole reason for the dismissal was to allow for the passage of time to cure plaintiffs' admittedly late notice of a damage expert, their life care planner. Therefore, WestMed asserts that if the case is restored, defendants will suffer prejudice because plaintiffs will be allowed to present evidence that increases projected damages by a purported \$3,000,000.

To the extent that the case is restored, WestMed contends that the prejudice to defendants should be minimized by precluding plaintiffs from offering testimony from the proposed life planning expert at the time of trial. WestMed asserts that in the absence of a showing of good cause for the late notice regarding the expert, the preclusion of the expert testimony is appropriate. Further, WestMed argues that although CPLR 3101(d)(i) does not provide a definitive time frame within which the parties must serve expert disclosure, it does mandate that the disclosures be served in a sufficient time prior to the commencement of the action to give "appropriate notice." WestMed also asserts that it is within the trial court's discretion to preclude expert testimony for failure to reasonably comply with the statute.

WestMed notes that a Trial Readiness Order was issued by this court on October 21, 2015, which provides that all disclosure has been completed or waived, and the matter is ready for trial. Additionally, WestMed notes that plaintiffs filed the note of issue on November 10, 2015, a full year before plaintiffs' application to adjourn the trial date, which stated that all disclosure was complete and the case was ready for trial. Moreover, WestMed asserts that, on November 2, 2016, all the parties agreed upon the trial date of January 4, 2017, and the parties signed a Trial Scheduling Order which states that the date for trial was the "FINAL TRIAL DATE" and the trial may not be adjourned "[a]bsent unforeseen and exigent circumstances." Additionally, WestMed notes that plaintiffs, by email of plaintiffs' counsel on November 18, 2016, 45 days before trial, advised defendants they were ready to proceed to trial on January 4, 2017 and was arranging for his client to be examined by a life care planning expert. Therefore, Westmed argues that plaintiffs had every opportunity to comply with the rules of the Court and the CPLR, but instead deliberately chose not to timely disclose their life care planning expert. Moreover, WestMed contends that plaintiffs exchanged their report of their life care planner on December 21, 2016, on the eve of trial, and failed to exchange the expert's curriculum vitae until after the case was dismissed.

WestMed further asserts that there is no reasonable argument as to why plaintiffs could not have retained the life care planner during the year following the filing of the note of issue. Westmed contends that plaintiffs' argument that they believed that the case would settle is without merit. WestMed also notes, inter alia, that New York courts have held that absent a showing of good cause for late notice of an expert, preclusion of expert testimony is warranted, and late expert disclosure is not admissible if there is prejudice by the untimely disclosure. WestMed contends that the late disclosure of the expert has prejudiced it since it prepared for trial based upon plaintiffs' Bill of Particulars and deposition testimony on damages that existed at the time the trial date was selected on November 2, 2016.

Finally, WestMed asserts that the court previously denied plaintiffs' motion to adjourn the trial due to plaintiffs' retention of a life care planning expert on December 20, 2016. Therefore, WestMed contends that the prior determination as to the adjournment of the trial for the retention of a life care planning expert has been litigated, and plaintiffs' expert life care planner should be precluded from testifying at trial.

Analysis

Initially, this court agrees with WestMed that plaintiffs, in the Order to Show Cause, improperly seek to restore the action to the trial calendar since the dismissal of the action must first be vacated before the action can be restored to the trial calendar. This court, however, has the power to overlook omissions or defects in a motion, and treat a motion to restore as a motion made pursuant to CPLR 5015(a)(1) (*Orange County Dept. of Social Svcs. ex rel. Misty F.-R. v Germel Y.*, 101 AD3d 1019 [2d Dept 2012], *lv dismissed* 20 NY3d 1086 [2013]; *Electric Ins. Co. v Grajower*, 256 AD2d 833 [3d Dept 1998], *lv dismissed* 93 NY2d 848 [1999]; *Echevarria v Bank*, 111 AD2d 781 [2d Dept 1985]; *see also Boyle v Krebs & Schulz Motors, Inc.*, 18 AD2d

1010 [2d Dept 1963] [vacated the dismissal and restored the case to the trial calendar where the only relief sought was to restore the case to the calendar]].

In support of the present motion, plaintiffs assert that (1) the delay in prosecuting the case and retaining an expert physiatrist was not the result of willful or intentional conduct, (2) they have a meritorious case, and (3) defendants will not sustain any prejudice. Accordingly, plaintiffs assert the requisite elements for the vacatur of the dismissal pursuant to CPLR 5015(a)(1) for plaintiffs' failure to proceed to trial, including a meritorious cause of action and a reasonable excuse for the default (*see Skutlesky v JN Natural Fruit Corp.*, 138 AD3d 1099, 110 [2d Dept 2016]; *Dimitriadis v Visiting Nurse Svc. of New York*, 84 AD3d 1150 [2d Dept 2011]; *Klein v Persaud*, 84 AD3d 959 [2d Dept 2011]). Prejudice or a lack of prejudice to the opposing party is also a factor to be considered in determining a motion to vacate a dismissal based upon default (*Moore v Day*, 55 AD3d 803 [2d Dept 2008]). Moreover, plaintiffs' motion papers make it clear that plaintiffs seek an order vacating the dismissal of the action, as well as an order restoring the action to the trial calendar.

In view of the foregoing and the fact that plaintiffs included a general prayer for relief in the Order to Show Cause, this court, in the exercise of its discretion, deems plaintiffs' motion to be a motion seeking to vacate the dismissal of the action and, upon the vacatur of the dismissal, to restore the action to the trial calendar.

Defendant Fishbach, however, correctly contends that plaintiffs' counsel's hope that the case would settle as the result of settlement conferences is not a reasonable excuse for the default in proceeding to trial or the failure to exchange plaintiffs' new expert's report sufficiently in advance of the trial date. In the absence of any settlement negotiations, a party's counsel's participation in settlement conferences does not constitute a reasonable excuse for plaintiffs' delay (*Mannino Dev. Inc. v Linares*, 117 AD3d 995 [2d Dept 2014]; *Antoine v Bee*, 26 AD3d 306 [2d Dept 2006]; *but see Katina, Inc. v Town of Hempstead*, 13 AD3d 343 [2d Dept 2004] [actively engaged in settlement negotiations excused failure to respond to 90-day notice]).

Nevertheless, under the circumstances present in this action and in the exercise of this court's discretion, vacatur of the dismissal of plaintiffs' action and the restoration of the action to the trial calendar are warranted in the interests of justice (*Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257 [1st Dept 2001]; *Batista v St. Luke's Hosp., Women's Hosp. Div.*, 46 AD2d 806 [2d Dept 1974]). Independent of statutory provisions, including CPLR 5015(a), a court, in the exercise of its inherent power and control over its own proceedings, may vacate its prior judgment or order entered on default in the interests of justice (*F & C Gen. Contrs. Corp. v Atlantic Mut. Mtge. Corp.*, 202 AD2d 629 [2d Dept 1994]; *Town of Greenburgh v Schroer*, 55 AD2d 602 [2d Dept 1976]). Therefore, a court maintains an inherent power to relieve a party from judgments taken through "mistake, inadvertence, surprise or excusable neglect" (*Bowles v Goldgeli*, 167 AD2d 498, 498 [2d Dept 1992], *citing Ladd v Stevenson*, 112 NY 325, 332 [1889]). Moreover, a court will not allow a party's claim to be compromised by an attorney's neglect or error where the other party cannot show prejudice (*Epstein v Lenox Hill Hosp.*, 108

AD2d 616 [1st Dept 1985], *recalled, vacated, reh den* 112 AD2d 873 [1st Dept 1985][to permit former attorney to intervene and submit papers on motion], *reinstated, amended in part* 114 AD2d 824 [1st Dept 1985]).

In the present action, the physician affidavit submitted by plaintiffs in support of the motion demonstrates that plaintiffs have a meritorious cause of action (*see Quintero v Kim*, 43 AD3d 895 [2d Dept 2007]). Therein, plaintiffs' expert cardiologist opined that defendants departed from good and accepted medical practice when they discontinued plaintiff's use of Warfarin on November 3, 2008 and placed her on aspirin. The expert further opines in his affidavit defendants' departures from the proper standard of medical care caused plaintiff to sustain the stroke, which has left her paralyzed and confined to a wheelchair.

Moreover, a denial of plaintiffs' motion to vacate the dismissal and restore the case to the trial calendar will deny plaintiffs their day in court since the Statute of Limitations would bar this action insofar as defendants' alleged medical malpractice occurred in 2012 (*see CPLR 214-a*). There is a strong public policy in favor of resolving cases on the merits (*Hyde Park Motor Co. v Sucato*, 24 AD3d 724 [2d Dept 2005]; *Gerdes v Canales*, 74 AD3d 1017 [2d Dept 2010]; *Perez v Travco Ins. Co.*, 44 AD3d 738 [2d Dept 2007]).

Additionally, defendants have not established that they will be prejudiced by vacating the dismissal and resolving plaintiffs' claims on the merits.

Although this court cannot condone plaintiffs' counsel's failure to proceed to trial based upon counsel's late exchange of the life care plan of plaintiffs' expert psychiatrist, the imposition of motion costs, attorney's fees and expenses upon counsel personally, rather than the denial of the adjudication of plaintiffs' medical malpractice claim on the merits, is appropriate under the circumstances of this case (*Munroe v Manning*, 43 AD3d 892 [2d Dept 2007] [vacatur of default should have been conditioned upon the payment of the sum of \$10,000]; *Folk v State of New York*, 185 AD2d 267 [2d Dept 1992]; *Urban v Maloney*, 40 AD2d 531 [2d Dept 1972]; *see Heffney v Brookdale Hosp. Ctr.*, 102 AD2d 609, 610-611 [2d Dept 1984], *lv dismissed* 63 NY2d 770 [1984][court cannot condone plaintiff's counsel's unexcused failure to comply with court deadlines, which led to a 10-month delay, but the imposition of monetary sanctions rather than judgment in favor of defendant appropriate in view of public policy favoring disposition of cases on the merits]). To avoid severe harm to an innocent party as the result of the neglect of the party's counsel, the court may grant relief, such as the vacatur of dismissal based upon default (*Urban v Maloney*, 40 AD2d at 532). Notably, there is no pattern of neglect by plaintiffs' counsel in the present action (*compare Star Industries, Inc. v Innovative Beverages, Inc.*, 55 AD3d 903 [2d Dept 2008] [law office failure not a reasonable excuse for default in view of pattern of willful default and neglect]).

The imposition of the payment of the costs, attorney's fees and expenses upon plaintiffs' counsel personally is warranted in light of his failure to timely proceed to trial and exchange plaintiffs' psychiatrist's report (*Urban v Maloney*, 40 AD2d at 532 [imposition of costs upon

plaintiffs' attorney personally for vacatur of default in medical malpractice in view of plaintiffs' attorney's fault in failing to move case to trial with reasonable speed and his failure to respond to notice). Insofar as plaintiffs' counsel asserted that plaintiffs could not proceed to trial on the trial date, defendants incurred unnecessary attorney's fees and expenses in preparing for trial for that date, which had been agreed upon by counsel for the parties. Unlike plaintiffs, defendants were ready to proceed to trial. Moreover, defendants vehemently objected to plaintiffs' prior request, two weeks before the trial date, for an adjournment of the trial, and also objected to the court's dismissal of the action without prejudice to move within one year for relief from the dismissal.

This court has not considered or determined the admissibility of plaintiffs' expert psychiatrist or that expert's life care plan, as such determination is properly made by the trial court.

In view of the foregoing, it is

ORDERED that, upon the payment by plaintiffs' counsel to each defendant the sum of \$3,750 for motion costs, attorney's fees and expenses within 20 days of entry of this decision and order, the motion is granted to the extent that the prior order dismissing the action is vacated and the action is restored to the trial calendar; and it is further

ORDERED that, on or before May 1, 2017, plaintiffs' counsel shall file proof of payment as to each defendant of the sum of \$3,750 on the NYSCEF website and submit a hard copy of the proof of payment to the Trial Ready Part; and it is further

ORDERED that, in the event that plaintiffs' counsel fails to pay each defendant the sum of \$3,750, defendants shall, on or before May 4, 2017, file an affidavit of noncompliance on the NYSCEF website and submit a hard copy of the affidavit of noncompliance to the Trial Ready Part; and it is further

ORDERED that counsel for all parties shall appear in the Trial Ready Part, Courtroom 1200, at 9:30 A.M. on April 7, 2017 for the previously scheduled status conference, and on May 8, 2017 for trial; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order, with notice of entry, within seven days of entry.

Dated: White Plains, New York
April 5, 2017


HON. ALAN D. SCHEINKMAN, J.S.C.

NYSCEF DOC. NO. 168

RECEIVED NYSCEF: 04/06/2017

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