IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DUANE HARDY,	:	
	:	C.A. No: N14C-08-174 RBY
Plaintiff,	:	
	:	
v.	:	
	:	
JACOBS & CRUMPLAR, P.A., ROBERT JACOBS, THOMAS CRUMPLAR, RAEANN WARNER, EDWARD M. LURIA, STEPHEN NEUBERGER, THOMAS NEUBERGER, AND THE NEUBERGER FIRM, P.A.,	:	
	:	
Defendants.	:	

Submitted: March 26, 2015
Decided: April 2, 2015

Upon Consideration of Defendants' Motion to Dismiss DENIED

ORDER

Kenneth M. Roseman, Esquire, Kenneth Roseman, P.A., Wilmington, Delaware for Plaintiff.

Jeffrey M. Weiner, Esquire, Law Offices of Jeffrey M. Weiner, P.A., for Defendants Jacobs & Crumplar, P.A., Robert Jacobs, Thomas Crumplar, Raeann Warner, Stephen Neuberger, Thomas Neuberger, and The Neuberger Firm, P.A.

John A. Elzufon, Esquire, and Loren R. Barron, Esquire, Elzufon Austin Tarlov & Mondell, P.A., Wilmington, Delaware for Defendant Edward M. Luria.

Young, J.

SUMMARY

Duane Hardy ("Plaintiff"), an apparent victim of both sexual abuse and financial theft, brings the present suit against a number of his former attorneys and their respective law firms ("Defendants"). Defendants were initially retained by Plaintiff to represent him in tort litigation against his sexual abuser. Following the settlement of this lawsuit, Defendants further assisted Plaintiff in the creation of a trust ("Trust"), to hold the proceeds of the settlement. Two of Plaintiff's relatives were selected as the Trustees of this Trust. These Trustees were allegedly thieves, who proceeded to misuse the Trust assets. Plaintiff brought a lawsuit against the Trustees in the Delaware Chancery Court, which found that the Trustees had violated their fiduciary duties.

Plaintiff's current lawsuit against Defendants alleges legal malpractice with respect to the creation of the Trust and the selection of the Trustees. Defendants move to dismiss Plaintiff's Complaint: 1) for failure to state a claim; and 2) because the suit is barred by collateral estoppel. In drafting their motions to dismiss, Defendants repeatedly referenced the prior Chancery Court action against Plaintiff's Trustees. In order to consider this prior action, which the Court deems imperative, the motions are converted to summary judgment motions.

Reviewing Defendants' motions under the summary judgment standard, the Court finds that the factual disputes between the parties require further development through the discovery process. In addition, collateral estoppel does not bar Plaintiff's suit, as the findings of Chancery Court were primarily in regard to the actions of Plaintiff's Trustees, not his attorneys as is the case in the instant matter. Therefore,

Defendants' motions are **DENIED** at this stage of the proceedings.

FACTS AND PROCEDURES

The present litigation originates from a deeply unfortunate chain of events in Plaintiff's life. In the late 1970s-early 1980s, Plaintiff, as a young boy, suffered sexual abuse at the hands of a priest employed by the Catholic Diocese of Wilmington, Inc. ("CDW"). Following the passage of the Delaware Child Victim's Act of 2007, Plaintiff retained the services of the Neuberger Firm, P.A. ("Neuberger Firm"), to represent him in a suit against CDW. Jacobs and Crumplar, P.A. ("Jacobs & Crumplar"), was additionally retained to help in the prosecution of Plaintiff's case. The lawsuit was filed in the Delaware Superior Court, on May 4, 2009.

CDW filed for Bankruptcy on October 18, 2009, resulting in the stay of Plaintiff's action. Plaintiff then filed a Proof of Claim in the Bankruptcy case. In anticipation of receiving payment through the Bankruptcy process, Plaintiff determined to create a Trust, which would eventually hold the proceeds of this process. Edward M. Luria, Esq. ("Luria") was also retained to assist in the creation of this Trust. Plaintiff's sister, Sherry Hardy, and her son Michael Hardy, (together "Trustees") were selected as Trustees of this Trust. The Trust was executed on August 31, 2011. On October 27 and 28, 2011, the Trustees executed a Settlement Statement with the CDW for an initial gross award of $533,508.13. After certain deductions for legal fees and advances, $345,676.88 was distributed into the Trust.

Unfortunately, Plaintiff's Trustees proved to be completely untrustworthy, syphoning assets of the Trust for personal use. On February 28, 2012, Plaintiff filed suit against the Trustees for breach of fiduciary duties in the Delaware Court of

Chancery. On July 29, 2014, the Court of Chancery ruled in Plaintiff's favor, finding that the Trustees had breached their fiduciary duties.

On August 21, 2014, Plaintiff filed an action sounding in legal malpractice against Thomas Neuberger, the Neuberger Firm, Jacobs & Crumplar, Thomas Crumplar, Raeann Warner (both attorneys at Jacobs & Crumplar) and Luria (together, "Defendants"), resulting from the rendering of legal services with respect to the Trust and selection of Trustees. Defendants move to dismiss Plaintiff's Complaint.

STANDARD OF REVIEW

The Court's standard of review on a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6) is well-settled. The Court accepts all well-pled allegations as true.[1] Well-pled means that the complaint puts a party on notice of the claim being brought.[2] If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.[3] The test for sufficiency is a broad one.[4] If any reasonable conception can be formulated to allow Plaintiff's recovery, the motion to dismiss must be denied.[5] Dismissal is warranted only when "under no reasonable interpretation of the facts alleged could the

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[1] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super. Ct. Mar. 31, 2009).

[2] *Savor, Inc. v. FMR Corp.*, 2001 WL 541484, at *2 (Del. Super. Ct. Apr. 24, 2001).

[3] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[4] *Id.*

[5] *Id.*

complaint state a claim for which relief might be granted."[6]

Where matters outside the pleadings are presented in a motion to dismiss, the Court must determine whether to convert the filing to a summary judgment motion.[7] "If extraneous matters have been offered to establish their truth, the court must convert the motion to dismiss to a motion for summary judgment."[8] Summary judgment is granted upon showing that there is no genuine issue of material fact, where the moving party is entitled to judgment as a matter of law.[9] The Court views the evidence in the light most favorable to the non-moving party.[10] The moving party bears the burden of showing that no material issues of fact are present, but once a motion is supported by such a showing, the burden shifts to the non-moving party to demonstrate that there is a genuine dispute as to material issues of fact.[11]

DISCUSSION

Pursuant to Superior Court Civil Rule 12(b)(6), Defendants, by two separate motions, move to dismiss Plaintiff's Complaint sounding in legal malpractice, for failure to state a claim. As Defendants have joined one another's motions, and as

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[6] *Thompson v. Medimmune, Inc.*, 2009 WL 1482237, at *4 (Del. Super. Ct. May 19, 2009).

[7] *Mell v. New Castle Cnty.*, 835 A.2d 141, 144 (Del. Super. Ct. 2003).

[8] *Id.*

[9] Super. Ct. Civ.R. 56(c).

[10] *Windom v. Ungerer*, 903 A.2d 276, 280 (Del. 2006).

[11] *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

these motions make essentially similar arguments, the Court considers these motions together.

As a threshold matter, Defendants' motions make reference to a prior litigation, which was fully adjudicated on the merits by the Delaware Court of Chancery: *Hardy v. Hardy*, 2014 WL 3736331, at *1 (Del. Ch. July 29, 2014). Importantly, Plaintiff was a party to that suit, and some of the factual circumstances underlying the *Hardy* case overlap with the instant matter. However, Plaintiff opposes this Court's consideration of that suit, arguing that it is beyond the pleadings. Plaintiff correctly asserts that, generally, matters outside of the complaint may not be reviewed on a motion to dismiss.[12] Despite this interdiction, there are limited exceptions when a Court may turn to outside facts, when contemplating a motion to dismiss.[13] The Court evaluates these exceptions within the context of the present case.

There are situations where, in a motion to dismiss, the prohibition against extra-pleadings materials is excepted: 1) where the document is integral to the plaintiff's claim and incorporated into the complaint; and 2) where the document is not being relied upon to prove the truth of its contents.[14] A third exception arises "where complainant refers to the other proceedings or judgment, and specifically

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[12] *See e.g., Doe 30's Mother v. Bradley*, 58 A.3d 429, 443 (Del. Super. Ct. 2012) ("[g]enerally, the universe of facts considered in a motion to dismiss are those plead within the confines of the complaint")(internal quotations omitted).

[13] *Vanderbilt Income & Growth Assoc., LLC v. Arvida/JMB Mangers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

[14] *Id.*

bases his right of action, in whole or in part, on something which appears in the record of the prior cause."[15] The parties speak solely to this third circumstance.[16]

It is Defendants' position that Plaintiff's Complaint refers to and is founded upon the *Hardy* case. In that matter, Plaintiff brought a breach of fiduciary duty suit against the Trustees of his Trust, who are his two relatives. Defendants, although not parties to that suit, were involved in the creation of that Trust, as Plaintiff's legal counsel. *Hardy* found that the Trustees had engaged in numerous self-interested transactions, and had, thus, breached their fiduciary duties to Plaintiff. Plaintiff's current suit, among other things, alleges malpractice by Defendants in the selection of said Trustees.[17] In addition, Plaintiff's Complaint is said to seek damages arising from the breach of fiduciary duty adjudicated in the prior case.[18] As such, Defendants urge that the Court may consider the *Hardy* litigation.

Certainly, there is ample overlap between the Plaintiff's claim in the case at bar, and matters "appear[ing] in the record of the prior case."[19] In finding that the Trustees had breached their fiduciary duties, the Chancery Court established

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[15] *Frank v. Wilson & Co*., 32 A.2d 277, 280 (Del. 1943).

[16] The Court, further, does not find the first two exceptions applicable to the case at bar.

[17] Plaintiff's Amended Complaint, at ¶ 6b ("[t]he defendants failed to advise the Trust Beneficiary that the proposed Trustees were unfit to serve in that capacity").

[18] Specifically, Defendants cite to paragraph 7 of Plaintiff's acomplaint "[a]s a result of the aforesaid negligence, the plaintiff incurred special damages including the loss of Trust Assets, Attorneys Fees, interest on the Trust Assets, and the loss of use of Trust Assets." Defendants J&C's and Neuberger's Reply Brief, at p.3.

[19] *Frank*, 32 A.2d at 280.

damages. Moreover, the negligence alleged is, in part, the failure to monitor these misbehaving Trustees.[20] However, nothing in Plaintiff's Complaint refers specifically to the *Hardy* litigation. The Delaware Supreme Court's *Frank v. Wilson & Co.*, cited by both parties, does not make explicit the extent of reference necessary: "where complainant *refers* to other proceedings..."[21] That is, whether the case need be expressly referenced; or, rather, be referred to by implication. At best, the reference here is by implication, where Plaintiff refers to attorneys fees incurred, among the damages he seeks.[22]

However, the Court has already noted the significance of *Hardy* to this litigation as a whole, and particularly to the arguments raised in Defendants' motions to dismiss. Therefore, as is soundly within the Court's discretion, *Hardy* will be considered in the Court's contemplation of these motions. Of course, pursuant to Superior Court Civil Rule 12(b)(6), this then requires the motions to be converted to summary judgment motions.[23] The motions are so converted.

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[20] See Plaintiff's Amended Complaint, at ¶ 6e ("[t]he defendants failed to take any action to monitor the conduct and performance of the Trustees").

[21] 32 A.2d at 280 (emphasis added).

[22] The Court notes Defendants' citation to *Commonwealth Land Title Ins. Co. v. Funk*, Del. Super., C.A. No. N14C-04-119 (Dec. 22, 2014) in support of their contention that this Court may consider *Hardy*. *Commonwealth* is distinguishable, however, as the Plaintiff in that suit *directly,* as opposed to implicitly, cited to the cases considered by the *Commonwealth* Court in the complaint. Such is not the case here.

[23] *See Doe 30's Mother*, 58 A.3d at 444 ("[t]his practice allows the trial court full discretion to accept and consider extraneous submissions when adjudicating a motion to dismiss under Rule 12(b)(6), thereby requiring conversion of the motion" to a summary judgment motion); *Parsons v. Mumford*, 1997 WL 819122, at *2 (Del. Super. Ct. Nov. 25, 1997)

In general, the entry of summary judgment in negligence actions is an infrequent occurrence.[24] This is because the movant must show "not only that there are no conflicts in the factual contentions of the parties but that, also, the only reasonable inference to be drawn from the uncontested facts are adverse to the plaintiff."[25] Several elements of a negligence action, for example, the showing of proximate cause, are "[o]rdinarily...questions of fact to be determined by a jury."[26] Moreover, "summary judgment is also inappropriate when the Court determines that it is desirable to inquire more thoroughly into the facts in order to clarify the application of the laws to the circumstances."[27]

Defendants' arguments concerning the adequacy of Plaintiff's claims reduce to two central points: 1)Plaintiff has not sufficiently plead the existence of a duty; and 2) Plaintiff has not sufficiently plead the breach of said duty. These elements derive from the standard for a properly presented legal negligence claim, which demands: 1) the employment of an attorney; 2) the attorney's neglect of a professional obligation; and 3) resulting loss.[28] In arguing that, as Plaintiff's counsel, they owed

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("[b]ecause State Defendants' motion to dismiss is supported by matters outside the pleadings, the motion must be treated as a motion for summary judgment); Super. Ct. Civ. R. 12(b)(6).

[24] *Upshur v. Bodie's Dairy Market*, 2003 WL 21999598, at *3 (Del. Super. Ct. Jan. 22, 2003).

[25] *Id.* (internal quotations omitted).

[26] *Id.*

[27] *Mell,* 835 A.2d at 145 (internal quotations omitted).

[28] *Oakes v. Clark*, 2013 WL 3147313, at *1 (Del. Jun. 18, 2013).

no duty for the acts alleged, Defendants cite to *Flaig v. Ferrara*[29], asserting that the decision states, as a matter of law, that attorneys are not obligated to "initiate investigation of a client's affairs in Delaware."[30] Specific to the wrongs alleged by Plaintiff, Defendants aver that they cannot be held liable for failing to advise Plaintiff as to the selection of trustees, and the disposition of the trust assets in general, given the holding in *Flaig*. However, nowhere in *Flaig* is there any mention of investigating a client's affairs, or an attorney's duty with respect to such action. *Flaig*'s primary holding is that Rules of Professional Conduct, alone, may not be "us[ed]...as a legal standard to show an independent breach of duty..."[31] *Flaig* does not control here.

In addition, in arguing that, as a matter of law, Plaintiff cannot show duty, Defendants seek this Court's recognition that, pursuant to Delaware Rule of Evidence 601, Plaintiff was, and is, competent.[32] The crux of this averment is that, since Plaintiff was competent at the time of the creation of the trust, and selection of trustees, Defendants owed no duty to him regarding their selection. Defendants, again, rely upon *Flaig*, insist that this decision absolves attorneys from, in essence, saving clients from themselves – in this case choosing thieving trustees. As an initial matter, the Court notes that Plaintiff does not dispute the fact that he was and is competent, as defined by D.R.E. 601. However, the Court does not see much

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[29] 1996 WL 944860, at *1 (Del. Super. Ct. Apr. 15, 1996).

[30] Defendants Jacobs & Crumplar's and Neuberger Firm's Motion to Dismiss, at 13.

[31] 1996 WL 944860 at *3.

[32] D.R.E. 601 states in relevant part: "every person is competent to be a witness except as otherwise provided in these rules."

significance in that. Suits sounding in legal malpractice are consistently brought by former clients, where the question of the client's legal competency is not an issue.[33] Defendants cite no authority which would support the assertion that attorneys only owe duties to *incompetent* clients, when creating trusts. Therefore, no determination as to Plaintiff's competency need be made, despite Plaintiff's silence on the matter.

In addressing the breach of duty element of a legal malpractice claim, Defendants cite to *Hardy*. As per Defendants, *Hardy* held, definitively, that Plaintiff had competent legal counsel. Defendants' cite to a portion of *Hardy*, stating in relevant part: "[Plaintiff] had the benefit of impartial advice from a competent and disinterested party."[34] According to Defendants, this statement negates any possibility that they breached a duty, or were negligent in professional obligations, while rendering trust creation services to Plaintiff. The Court finds this to be an overstatement of the cited language in *Hardy*. The issue in *Hardy* was whether the trustees had breached their fiduciary duties to Plaintiff. To the extent Defendants' representation of Plaintiff was addressed by *Hardy*, it was tangential. The Chancery Court's statement in *Hardy* that Defendants' rendering of services was "competent," may be persuasive to the eventual trier of fact in this litigation, but it is not a determination, as a matter of law, that there was no breach.

Defendants' final argument regarding Plaintiff's purported ineffectual

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[33] *See e.g., Oakes*, 2013 WL 3147313 at *1 (in evaluating sufficiency of legal malpractice claim, no mention was made of whether Plaintiff was competent or not); *Weaver v. Lukoff*, 1986 WL 1721, at *1 (Del. Jul. 1, 1986) (same).

[34] 2014 WL 3736331 at *8.

presentation of the breach of duty element, is based on extra-jurisdictional authority: *Simko v. Blake*.[35] According to Defendants, the Supreme Court of Michigan in *Simko*, distinguished an error in professional judgment from a breach of duty, with only the latter being a deviation from the standard of reasonable care.[36] As a starting point, *Simko*, as an opinion issued by a court outside of Delaware, is not precedential. Moreover, the *Simko* Court made a determination, as a matter of law, that the action of the allegedly negligent counsel was an error in professional judgment, rather than a breach of duty.[37] Such a ruling in the case at bar, given the summary judgment standard, would require a finding that there is no factual dispute as to whether, for example, the choice of trustee was made at counsel's urging, or was entirely Plaintiff's own initiative.[38] Only then could there be an inquiry into whether, if it were counsel's suggestion, such advice was error in professional judgment, or breach of reasonable care. Defendants themselves indicate unresolved factual disputes.

Where there are factual disputes as to material issues, the Court must deny a motion for summary judgment.[39] Plaintiff's Complaint alleges three major instances of legal negligence: 1) failure to investigate the background of trustees; 2) failure to advise Plaintiff properly on the selection of trustee; and 3) failure to monitor the

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[35] 532 N.W.2d 842 (Mich. 1995).

[36] *Id.*, at 847.

[37] *Id.*

[38] Defendants repeatedly aver that Plaintiff chose the Trustees on his own.

[39] Super. Ct. Civ. R. 56(c).

conduct of the trustees. If true, Plaintiff may have a cognizable claim for negligent provision of legal services.[40] At this early stage of the litigation, where discovery has not yet taken place, we have the factual assertions of Plaintiff in his Complaint, and Defendants' factual denials in their motions to dismiss. This is a quintessential factual dispute. Summary judgment, at this point, is inappropriate. Indeed, Delaware authority provides that, where additional discovery is necessary to resolve such factual disputes, a motion for summary judgment should be denied.[41] In addition, as Plaintiff points out, Delaware courts recognize that in suits for legal malpractice, expert testimony is usually necessary to establish the standard of care for a professional.[42] Thus far, no expert testimony has been presented.

While the assertion that Defendants, representing Plaintiff in the acquisition of a settlement, had some on-going obligation to monitor the actions of the Trustees seems, superficially, strained, qualified experts may differ on the topic. That is factually undetermined at this point. Given the lack of evidentiary support to bolster either parties' version of events, this Court must deny the summary judgment motions on this basis.

The last argument the Court considers is Defendants' assertion that Plaintiff's

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[40] Requiring: 1) the employment of an attorney; 2) the attorney's neglect of a professional obligation; and 3) resulting loss. *Oakes*, 2013 WL 3147313 at *1. There is no dispute Defendants were employed by Plaintiff. The alleged actions, if true, could constitute less than reasonable care in the provision of legal services. Lastly, Plaintiff alleges the damages sustained, including attorneys fees and loss of trust assets– the required element of loss.

[41] *Mell,* 835 A.2d at 145 (internal quotations omitted).

[42] *Weaver*, 1986 WL 17121 at *1.

suit is barred by collateral estoppel. Generally speaking, "[w]here a question of fact is determined by the final judgment of a court of competent jurisdiction, the doctrine of collateral estoppel bars reconsideration of that *same issue* in a subsequent suit concerning a *different* cause of action."[43] Additionally, application of collateral estoppel requires that "the party against whom the doctrine is invoked was a party...to the prior adjudication" and "the party...had a full and fair opportunity to litigate the issue in the prior action."[44]

Defendants, again, refer to the Chancery Court's remark in *Hardy* that "[Plaintiff] had the benefit of impartial advice from a competent and disinterested party."[45] According to Defendants, this is the factual issue decided by the judgment of the *Hardy* Court, which forecloses Plaintiff's current suit. In essence, there can be no further assertion of negligent legal counsel, as the Chancery Court stated Defendants were " competent." In support of their position, the Defendants cite to *Ross Sys. Corp. v. Ross,* a case in which a legal malpractice claim, arising out of a previously adjudicated dispute, was determined to be barred by collateral estoppel.[46]

It is true that legal malpractice claims originated from prior suits in both *Ross* and the instant matter. This is about as far as the similarity extends, however. *Ross* is inapposite in that the prior litigation and the legal malpractice claim involved the

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[43] *Delaware Transit Corp v. Taylor-Aakala,* 2012 WL 1413998, at *4 (Del. Super. Ct. Feb. 7, 2012) (emphasis added).

[44] *Betts v. Townsend*s, *Inc.*, 765 A.2d 531, 535 (Del. 2000).

[45] 2014 WL 3736331 at *8.

[46] 1994 WL 89015, at *1 (Del. Ch. Feb. 15, 1994).

same two adversaries.[47] Here, the adversarial relationship is between Plaintiff, a party to the first suit, and Defendants, who had no involvement in that litigation. The significance of this is that this Court, cannot, as the *Ross* Court did, determine that "facts that are essential to that claim were determined..."[48] The factual circumstances underlying the relationship between the two adversaries in *Ross* formed the basis of both the claim in the prior litigation and the legal malpractice claim.[49] In the case at bar, there is certainly factual overlap, but not identity, such that the same, precise facts could sustain either action. As has been stated before, the focus in *Hardy* was upon the misdeeds of Plaintiff's Trustees, while the focus here is upon Plaintiff's attorneys. Any mention by the *Hardy* Court of Defendants was in passing. The statement that Defendants were "competent" was not central to the disposition of that suit. It is further unclear that the Chancery Court had the benefit of the same facts that may arise from the discovery process in the instant matter. Given these considerations, the Court cannot, based upon a mere remark by the Chancery Court, hold that Plaintiff's suit is now barred by collateral estoppel.

CONCLUSION

For the foregoing reasons, Defendants' motions are **DENIED**, without

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[47] In *Ross,* lawsuit was between client and attorney who became business partners. 1994 WL 89015 at *1.

[48] 1994 WL 89015 at *9 (emphasis added).

[49] In *Ross,* the attorney had entered into a business venture with his client, executing certain transactions without informing the client that he should seek independent advice of counsel. 1994 WL 89015 at *6.

prejudice to later appropriate motions.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc
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