

ATLANTIC ERECTORS, INC., PETITIONER, VS. COURT OF APPEALS AND HERBAL COVE REALTY CORPORATION, RESPONDENTS.

G.R. No. 170732. October 11, 2012

Ponente: PERALTA, J.

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PERALTA, J.:

This is a petition for review on certiorari under Rule 45 of the Rules of Court assailing the Court of Appeals (CA) Decision[1] dated February 28, 2005 and Resolutions dated September 7, 2005[2] and December 5, 2005[3] in CA-G.R. SP No. 52070. The assailed decision affirmed with modification the Decision[4] of the Construction Industry Arbitration Commission (CIAC), dated March 11, 1999, in CIAC Case No. 13-98; while the assailed resolutions denied petitioner Atlantic Erectors, Inc.'s Motion for Partial Reconsideration.

The facts of the case, as culled from the records, are as follows:

Respondent Herbal Cove Realty Corporation (respondent) engaged DP Architects Philippines to prepare architectural designs and RA&A Associates to provide engineering designs for its subdivision project known as "The Herbal Cove" located at Iruhin West, Tagaytay City. It likewise hired Building Energy Systems, Inc. (BESI) to provide management services for the construction and development of the project. On June 20, 1996, respondent and Atlantic Erectors, Inc. (petitioner) entered into a Construction Contract[5] whereby the latter agreed to undertake, accomplish and complete the entire works for the implementation of Construction Package A consisting of four (4) units of Townhouse B and 1 unit of Single Detached A1 of the project[6] for a total contract price of P15,726,745.19[7] which was later adjusted to P16,726,745.19 as a result of additional works.[8] Petitioner further agreed to finish and complete the works and deliver the same to respondent within a period of one hundred eighty (180) consecutive calendar days reckoned from the date indicated in the Notice to Proceed[9] to be issued to petitioner.[10] To secure the completion of the works within the time stipulated, petitioner agreed to pay respondent liquidated damages equivalent to one-tenth of one percent (1/10 of 1%) of the contract price per calendar day of delay until completion, delivery and acceptance of the said works by respondent to a maximum amount not to exceed ten percent (10%).[11]

Petitioner was instructed to commence construction on July 8, 1996.[12] In a letter[13] dated January 6, 1997, petitioner requested for extension of time equivalent to the number of days of delay in the start of the works brought about by the belated turnover of the sites of the building. Additional extension was requested due to bad weather condition that prevailed during the implementation of the projects, again causing excusable delay. In a letter[14] dated January 11, 1997, respondent allowed the requested schedule adjustments with a reminder that liquidated damages shall be applied beyond the extended periods. Petitioner was allowed to complete and deliver the housing units until the following dates:

SDA-15 15 March 1997 or an extension of 67 calendar days

TH 16-A and TH 16-B 7 March 1997 or an extension of 59 calendar days

TH 17-A and TH 17-B 7 April 1997 or an extension of 90 calendar days[15]

Petitioner, however, still failed to complete and deliver the units within the extended period.

On September 22, 1997, respondent required petitioner to submit a formal written commitment to finish and complete the contracted works, otherwise, the contract would be deemed terminated and respondent would take over the project on October 1, 1997 with the corresponding charges for the excess cost occasioned thereby, plus liquidated damages.[16] On October 3, 1997, respondent informed petitioner that the former's management had unanimously agreed to terminate the subject construction contract for the following reasons:

- After a review and evaluation by the management group of the works done in the Project, we found blatant defects in the workmanship of the houses;
- Delayed completion of the project; and
- Lack of interest to make a firm commitment to finish the project.[17]

Respondent, thereafter, entered into a Construction Administration Agreement[18] with Benedict O. Manalo and Associates, Engineers and Construction Managers to finish, complete and deliver the housing units started by petitioner.

On June 3, 1998, respondent filed with the CIAC a Request for Arbitration[19] against petitioner praying for the payment of liquidated damages, cost to remedy defective workmanship, excess costs incurred to complete the work, attorney's fees and litigation expenses. The case was docketed as CIAC Case No. 13-98.

Prior thereto, or on November 21, 1997, petitioner instituted with the Regional Trial Court (RTC) a civil case against respondent where it sought to recover the sum representing unpaid construction service already rendered, unpaid construction materials, equipment and tools, and cost of income by way of rental from equipment of petitioner held by respondent.[20] The case was, however, dismissed on motion of respondent invoking the arbitration clause, which dismissal was affirmed by the Court.[21]

In answer to respondent's request for arbitration, petitioner alleged that the delay was attributable to: (1) delayed turnover of the site; (2) cause of two typhoons; 3) change orders and additional works; (4) late approval of shop drawings; (5) non-arrival of chimney expert; (6) delayed payments; and (7) non-payment of the last two billings.[22] It also argued that respondent suspended the construction works depriving it of the opportunity to complete the works on or before November 15, 1997.[23] It also insisted that there was unlawful termination of the construction contract.

After the reception of the parties' evidence and the submission of their respective memoranda, the CIAC ordered respondent to pay petitioner P1,087,187.80, with 6% interest per annum from the time the award becomes executory.[24] The CIAC summarized the awards as follows:

A. FOR THE CLAIMANT [Respondent herein]

Claim

Award

Liquidated Damages

P 1,572,674.51

P 0.00

Cost to Remedy Defective Workmanship

1,600,000.00

0.00

Excess Cost to Complete

2,592,806.00

506,069.94

Attorney's Fees and Cost of Litigation Excluding Arbitration Fees

2,000,000.00

0.00

Total Claims

P 7,765,480.51

P 506,069.94

B. RESPONDENT'S [PETITIONER'S] CLAIM

Claim

Award

Retention Amount

P 899,718.50

P 1,012,139.89

Work Accomplishment Collectible

4,854,229.94

821,556.09

Deduct Unliquidated Downpayment (P3,145,349.04 - P1,968,044.89)

1,177,304.15

Materials, tools and equipment left at jobsite

1,595,551.00

936,866.00

Rental cost of tools and equipment left at jobsite

800,000.00

0.00

Attorney's Fees and Cost of Litigation excluding Arbitration Fees

1,000,000.00

0.00

Total Counterclaim

P 8,149,499.95

P 1,593,257.74

C. NET AWARD FOR [PETITIONER]

Net Award

P 1,087,187.80[25]

The CIAC found that petitioner incurred delay in the completion of the project. While it did file a request for extension which was granted until April 7, 1997, the project remained incomplete and no further extension was asked.[26] Notwithstanding the delay, the CIAC found the termination of the contract illegal for respondent's failure to comply with the requirements of termination, as the contract specifically provides that petitioner be given 15-day notice prior to such termination.[27] It added that petitioner's delay was overridden by the unlawful termination of the contract.[28] Consequently, respondent was not awarded liquidated damages.[29] For failure to submit sufficient evidence, the CIAC also found respondent not entitled to the additional cost to complete the project.[30] As to the cost of correcting the defects, it concluded that although respondent failed to prove the cost of correcting the defects, reasonable cost should be awarded in view of the admitted and proven defects.[31] Finally, the CIAC found petitioner entitled to the 10% retention which is P1,012,139.89 from which respondent's claims should be deducted.[32] In effect, both petitioner's and respondent's claims and counterclaims were partly granted.

Petitioner elevated the matter to the CA docketed as CA-G.R. SP No. 52200, but the same was denied due course in a Resolution dated July 26, 1999. When the resolution was assailed before the Court in a petition for review on certiorari in G.R. No. 141697, the petition was denied for petitioner's failure to submit a valid affidavit of service of copies of the petition to respondent.[33] Petitioner's motion for reconsideration was likewise denied in a Resolution dated June 26, 2000, which became final and executory on August 31, 2000 and, accordingly, recorded in the Book of Entries of Judgment.

Respondent interposed a separate appeal assailing the same CIAC decision, docketed as CA-G.R. SP No. 52070. Respondent questioned the CIAC's failure to dismiss petitioner's counterclaims on the ground of forum shopping. More importantly, respondent insisted that the CIAC erred in concluding: that the termination of the construction contract was illegal; that it is not entitled to liquidated damages and the excess cost to complete the project; that it is entitled to a reduced amount for the correction of petitioner's defective work; and, that petitioner is entitled to the value of the materials, equipment and tools left at the jobsite.[34]

On February 28, 2005, the CA rendered the assailed decision affirming with modification the CIAC decision by awarding respondent liquidated damages of P1,572,674.51. The CA agreed with the CIAC that petitioner's counterclaims could not be dismissed on the ground of forum shopping, because the civil case before the RTC was dismissed for lack of jurisdiction. Thus, petitioner aptly set up its counterclaims before the CIAC.[35] The CA also sustained the CIAC's conclusion on the illegality of the termination of the construction contract for failure of respondent to comply with the 15-day notice.[36] It, however, could not agree with the CIAC as to respondent's claim for liquidated damages. Notwithstanding the declaration of the illegality of the termination of the contract, petitioner could still be charged with liquidated damages by reason of the delay in the completion of the project. The CA explained that the right to liquidated damages is available to respondent whether or not it terminated the contract because delay alone is decisive.[37]

Aggrieved, petitioner moved for reconsideration of the decision. On September 7, 2005, the CA issued a

Resolution denying the motion, followed by another Resolution dated December 5, 2005 correcting the earlier resolution, which inadvertently referred to respondent as the party who filed the motion where in fact it was filed by petitioner.

Petitioner now comes before the Court in this petition for review on certiorari with this sole issue:

WHETHER OR NOT THE COURT OF APPEALS HAS DECIDED A QUESTION OF SUBSTANCE OR HAS DECIDED IT IN A WAY NOT IN ACCORD WITH LAW OR WITH APPLICABLE DECISIONS OF THE SUPREME COURT WHEN IT RULED AND MODIFIED THE DECISION OF THE CIAC FINDING PETITIONER LIABLE TO PAY RESPONDENT LIQUIDATED DAMAGES.[38]

The petition is without merit.

At the outset, the Court notes that the case involved various claims and counterclaims separately set up by petitioner and respondent. The CIAC thus awarded petitioner the retention pay; the unpaid value of its work accomplishment; and the value of the materials, tools and equipment left at jobsite. On the other hand, it awarded respondent only with the excess cost to complete the unfinished project. Petitioner elevated the matter to the CA, but the same was dismissed, which dismissal was affirmed by the Court. In the separate appeal filed by respondent, the CA modified the CIAC decision by making petitioner liable for liquidated damages. It is on this issue that petitioner comes before the Court raising in particular the propriety of making it liable for liquidated damages.

The resolution of the issue of respondent's entitlement to liquidated damages hinges on whether petitioner was in default in the performance of its obligation.[39]

The liability for liquidated damages is governed by Articles 2226-2228 of the Civil Code which provide:

Article 2226. Liquidated damages are those agreed upon by the parties to a contract, to be paid in case of breach thereof.

Article 2227. Liquidated damages, whether intended as an indemnity or a penalty, shall be equitably reduced if they are iniquitous or unconscionable.

Article 2228. When the breach of the contract committed by the defendant is not the one contemplated by the parties in agreeing upon the liquidated damages, the law shall determine the measure of damages, and not the stipulation.

Based on the above provisions of law, the parties to a contract are allowed to stipulate on liquidated damages to be paid in case of breach. It is attached to an obligation in order to ensure performance and has a double function: (1) to provide for liquidated damages, and (2) to strengthen the coercive force of the obligation by the threat of greater responsibility in the event of breach.[40] The amount agreed upon answers for damages suffered by the owner due to delays in the completion of the project.[41] As a pre-condition to such award, however, there must be proof of the fact of delay in the performance of the obligation.[42]

To resolve the question of default by the parties, we must re-examine the terms of the Construction Contract and the relevant documents which form part of the parties' agreement. As a general rule, contracts constitute the law between the parties, and they are bound by its stipulations. For as long as they are not contrary to law, morals, good customs, public order, or public policy, the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient.[43]

The pertinent provisions of the Construction Contract which lay down the rules in case of failure to complete the works read:

ARTICLE IX

FAILURE TO COMPLETE WORK

Section 1: The CONTRACTOR acknowledges that the OWNER shall not suffer [loss] by the delay or failure of the CONTRACTOR to finish and complete the works called for under this Contract within the time stipulated in Section 6, Article IV. The CONTRACTOR hereby expresses covenants and agrees to pay to the Owner liquidated damages equivalent to the One-Tenth of One Percent (1/10 of 1%) of the Contract Price per calendar day of delay until completion, delivery and acceptance of the said Works by the OWNER to a maximum amount not to exceed 10%.

Section 2: Any sum which may be payable to the OWNER for such liquidated damages may be deducted from the amounts retained under Article V, or retained by the OWNER from any balance of whatever nature which may be due or become due the CONTRACTOR when any particular works called for under this Contract shall have been finished or completed.

Section 3: The lawful occupation by the OWNER of any completed portion of the PROJECT subject of this Contract shall not be deemed as a waiver of whatsoever rights and/or remedies the OWNER may have or is entitled to under the law and/or under the terms and conditions of this Contract, nor shall it diminish whatever liability the CONTRACTOR may incur for the liquidated damages provided herein with respect to the delays in the installation of the other portions of the Works in the PROJECT.

Section 4: The obligation of the CONTRACTOR to pay damages due to unexcused delays shall not relieve it from the obligation to complete and finish the performance of the Works, and to secure the final certificate of inspection from the proper government authorities.

Section 5: The provision on liquidated damages [notwithstanding], the OWNER, upon certification of the PROJECT MANAGER that sufficient cause exists to justify its action, may without prejudice to any other right or remedy and after giving the CONTRACTOR and its sureties proper notice in writing, terminate this Contract and take over the performance of the Works either by administration or otherwise, and to charge against the CONTRACTOR and its sureties the excess cost occasioned thereby.

Section 6: If the Works are suspended for an unreasonable length of time, without any justifiable cause by the CONTRACTOR, such suspension shall be taken as abandonment of the Works, and the OWNER shall have the right to declare the CONTRACTOR in default; and the former shall be entitled to charge against the CONTRACTOR'S Performance Bond all forms of damages it may suffer and to hire another CONTRACTOR to finish the Works. Suspension of the Works for at least fifteen days shall be deemed unreasonable.[44] (Emphasis supplied)

Notwithstanding its categorical conclusion that petitioner was in default, the CIAC refused to award respondent the stipulated liquidated damages in view of the latter's unlawful termination of the Construction Contract for want of a valid notice to petitioner. Petitioner insists that the award of liquidated damages made by the CA be deleted, because it was not given the chance to finish the works within the period of commitment to do so on or before November 15, 1997.

A perusal of the significant provisions of the Construction Contract as quoted above and the relevant construction documents would show that the CA did not err in concluding that the rights to liquidated damages and to terminate the contract are distinct remedies that are available to respondent. Section 4, Article IX of the Construction Contract states:

Section 4: The obligation of the CONTRACTOR to pay damages due to unexcused delays shall not relieve it from the obligation to complete and finish the performance of the Works, and to secure the final certificate of inspection from the proper government authorities.

Moreover, Article 21.05 of the General Conditions amplifies petitioner's liability for damages, to wit:

21.05. LIQUIDATED DAMAGES: It is understood that time is an essential feature of this Contract, and that upon failure to complete the said Contract within the contract time, the Contractor shall be required to pay the Owner the liquidated damages in the amount stipulated in the Contract Agreement, the said payment to be made as liquidated damages, and not by way of penalty. The Owner may deduct from any sum due or to become due the Contractor any sums accruing for liquidated damages as herein stated. For purposes of calculating, the actual completion date shall be the date certified by the Architect under Article 20.11 hereof.[45]

Also significant is Article 29.04 thereof which explains the owner's right to recover liquidated damages:

29.04. OWNER'S RIGHT TO RECOVER LIQUIDATED DAMAGES: Neither the taking over by the Owner of the work for completion by administration nor the re-letting of the same to another Contractor shall be construed as a waiver of the Owner's rights to recover damages against the original Contractor and/or his sureties for the failure to complete the work as stipulated.

In such case, the full extent of the damages for which the Contractor and/or his sureties liable shall be:

- The total daily liquidated damages up to and including the day immediately before the date the Owner effectively takes over the work.
- The excess cost incurred by the Owner in the completion of the project over the Contract Price. This excess cost includes cost of architectural managerial and administrative services, supervision and inspection from the time the Owner effectively took over the work by administration or by re-letting the same.[46]

Clearly, respondent's entitlement to liquidated damages is distinct from its right to terminate the contract. Petitioner's liability for liquidated damages is not inconsistent with respondent's takeover of the project, or termination of the contract or even the eventual completion of the project. What is decisive of such entitlement is the fact of delay in the completion of the works. Stated in simple terms, as long as the contractor fails to finish the works within the period agreed upon by the parties without justifiable reason and after the owner makes a demand, then liability for damages as a consequence of such default arises.

It is undisputed that petitioner failed to perform the contracted works within the period as originally agreed upon. It is likewise settled that an extension was requested by petitioner and granted by respondent. With the modification of the contract period, petitioner was obliged to perform the works and deliver the units only until April 7, 1997. Yet it still reneged on its obligation. However, as aptly found by the CIAC, petitioner did not seek additional time within which to complete the project. We quote with approval the CA observations in this wise:

It is the Tribunal's finding that the Respondent-Contractor is delayed in the completion of the project. Except for the delay in the turnover of the sites extensions which were granted, Respondent did not file for and did not obtain formal extension of its time of completion beyond April 7, 1997. The Tribunal notes the Respondent-Contractor did not document at the time the reasons now being claimed as causing the delay. The Tribunal finds it unusual that for a project with a Project Construction Manager, there were also no proper reports showing and reporting the changes, additions and deviations to approved schedules. x x x[47]

In other words, petitioner never sent notice to respondent regarding a request for extension of time to finish the work despite its claim of the existence of circumstances fairly entitling it to an extension of the contract period. Assuming that the reasons for valid extension indeed exist, still, petitioner should bear the consequences for the delay as it deprived respondent of its right to determine the length of extension to be given to it and, consequently, to adjust the period to finish the extra work.[48]

Besides, the General Conditions specifically lay down the requirements for a valid extension of the contract

period, to wit:

Article 21.04. EXTENSION OF TIME: The Contractor will be allowed an extension of time based on the following conditions:

- Should the contractor be obstructed or delayed in the prosecution or completion of the work x x x then the contractor shall within fifteen (15) days from the occurrence of such delay file the necessary request for extension. The Architect may grant the request for extension for such period of time as he considers reasonable.

x x x x

- x x x However, if in the opinion of the Architect, the nature of the increased work is such that the new Contract Time as computed above is unreasonably short, the time allowance for any extension and increases shall be as agreed upon in writing.[49] (Emphasis supplied)

Also, Section 3, Article V of the Construction Contract emphasizes that any extension in the contract period must be in writing, to wit:

Section 3: The OWNER may, at any time during the progress of the performance of the Works in the PROJECT, order a change or changes in the plans and specifications; provided, that in such cases, any increase or decrease in the Contract Price above stipulated shall be subject to proportionate adjustment mutually agreed upon. Nevertheless, in the event that the alterations and the changes mentioned herein shall affect the Contract period, an extension thereof shall also be subject to proportionate adjustment in writing. x x x[50] (Emphasis supplied.)

Without doubt, no further extension was sought after the expiration of the first extension given by respondent. Any and all claims of its entitlement to period adjustment should not be granted to petitioner as would excuse it from liability for delay.

While in its letter dated September 22, 1997 respondent indeed required petitioner to submit a formal written commitment to finish and complete the project by a certain date, the same should not be deemed a waiver of its right to collect liquidated damages. The request made by respondent was only necessary in the determination of whether petitioner could still complete the works or there is already a need for respondent to take over the project or engage the services of another contractor. Such is only relevant in the exercise of respondent's right to terminate the contract but not in the entitlement to liquidated damages.

In answer to petitioner's request for schedule adjustments, respondent, in its letter dated January 11, 1997, allowed such extension and fixed the new date of completion, the latest of which was April 7, 1997. It is noteworthy that at the time such adjustment was given, respondent specified that liquidated damages shall be applied beyond the extended period given as provided for in their Construction Contract.[51] Clearly, respondent had also made a demand for the payment of said damages should delay be incurred by petitioner beyond the new agreed dates.

As no extension was validly agreed upon and in view of the established fact that petitioner failed to complete the works and deliver the housing units within the stipulated period, petitioner's liability for liquidated damages arose, which is 1/10 of 1% of the contract price per calendar day of delay to a maximum amount of 10% of the contract price. Petitioner failed to meet its new deadline which was April 7, 1997. It even proposed that it be allowed to complete the works until November 15, 1997, way beyond the original as well as the extended contract period. Undoubtedly, petitioner may be held to answer for liquidated damages in its maximum amount which is 10% of the contract price. While we have reduced the amount of liquidated damages in some cases because of partial fulfillment of the contract and/or the amount is unconscionable, we do not find the same to be applicable in

this case.[52] Per the CIAC findings, as of the last certified billing, petitioner's percentage accomplishment was only 62.57%. Hence, we apply the general rule not to ignore the freedom of the parties to agree on such terms and conditions as they see fit as long as they are not contrary to law, morals, good customs, public order or public policy.[53] Thus, we find no reason to disturb the CA conclusion.

WHEREFORE, premises considered, the petition is DENIED for lack of merit.

SO ORDERED.

Velasco, Jr., (Chairperson), Abad, Perez,[*] and Mendoza, JJ., concur.

[*] Designated Acting Member, per Special Order No. 1299 dated August 28, 2012.

[1] Penned by Associate Justice Godardo A. Jacinto, with Associate Justices Bienvenido L. Reyes (now a member of this Court) and Rosalinda Asuncion-Vicente, concurring; rollo, pp. 28-42.

[2] Rollo, pp. 43-44.

[3] Id. at 45-46.

[4] CA rollo, pp. 56-76.

[5] Id. at 136-145.

[6] Id. at 136.

[7] Id. at 138.

[8] *Atlantic Erectors, Inc. v. Herbal Cove Realty Corporation*, G.R. No. 148568, March 20, 2003, 399 SCRA 409, 411; 447 Phil. 531, 536 (2003).

[9] Exhibit "H"; Expanding Envelope No. 1.

[10] CA rollo, p. 139.

[11] Id. at 142.

[12] Rollo, p. 31.

[13] Exhibit "J"; Expanding Envelope No. 1.

[14] Exhibit "K"; Expanding Envelope No. 1.

[15] CA rollo, p. 59.

[16] Exhibit "T"; Expanding Envelope No. 1.

[17] Exhibit "U"; Expanding Envelope No. 1.

[18] Exhibit "V"; Expanding Envelope No. 1.

[19] Expanding Envelope No. 1.

[20] Rollo, p. 33.

[21] Id. at 34.

[22] CA rollo, p. 66.

[23] Id. at 71.

[24] Id. at 75.

[25] Id.

[26] Id. at 67.

[27] Id. at 71.

[28] Id. at 73.

[29] Id.

[30] Id.

[31] Id. at 74.

[32] Id.

[33] The decision was embodied in a Minute Resolution dated March 6, 2000.

[34] Id. at 23-24.

[35] Rollo, pp. 36-37.

[36] Id. at 38-39.

[37] Id. at 40-41.

[38] Id. at 17.

[39] Empire East Land Holdings, Inc. v. Capitol Industrial Construction Groups, Inc., G.R. No. 168074, September 26, 2008, 566 SCRA 473. 489.

[40] Philippine Charter Insurance Corporation v. Petroleum Distributors & Service Corporation, G.R. No. 180898, April 18, 2012; Filinvest Land, Inc. v. Court of Appeals, G.R. No. 138980, September 20, 2005, 470 SCRA 260, 269.

[41] H.L. Carlos Construction, Inc. v. Marina Properties Corporation, G.R. No. 147614, January 29, 2004, 421 SCRA 428, 445; 466 Phil. 182, 205 (2004).

[42] Empire East Land Holdings, Inc. v. Capitol Industrial Construction Groups, Inc., supra note 39, at 489.

[43] Philippine Charter Insurance Corporation v. Petroleum Distributors & Service Corporation, supra note 40.

[44] CA rollo, p. 142.

[45] Exhibit "A"; Expanding Envelope No. 1.

[46] Exhibit "A"; Expanding Envelope No. 1.

[47] CA rollo, p. 67.

[48] Advanced Foundation Construction Systems Corporation v. New World Properties and Ventures, Inc., G.R. No. 143154, June 21, 2006, 491 SCRA 557, 579-580.

[49] Exhibit “A”; Expanding Envelope No. 1.

[50] CA rollo, p. 140.

[51] Exhibit “K”; Expanding Envelope No. 1.

[52] R.S. Tomas, Inc. v. Rizal Cement Company, Inc., G.R. No. 173155, March 21, 2012.

[53] Id.

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