To be Argued by:
JAMES J. NAVAGH
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

JAMES HEALY,

Plaintiff-Respondent,

Docket Nos.:
CA 19-01402
CA 19-01403

– against –

EST DOWNTOWN, LLC c/o First Amherst Development Group,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Defendant-appellant EST Downtown, LLC c/o First Amherst Development Group, ("EST") is asking the Court to reverse the lower court's order to the extent that it denied EST's motion for summary judgment dismissing plaintiff-respondent's ("plaintiff's") Labor Law § 240 (1) cause of action, and to the extent that it granted plaintiff's motion and awarded summary judgment to plaintiff on plaintiff's Labor Law § 240 (1) cause of action. This brief is submitted in reply to plaintiff's opposing brief.

ARGUMENT

Plaintiff's counsel argues in her brief (Opposing Brief page 11) that plaintiff need only establish four factors to establish Labor Law § 240 liability: (1) defendant was a statutory owner; (2) plaintiff was engaged in "covered work;" (3) defendant failed to provide adequate protection from an elevation-related hazard; and (4) the violation contributed to the accident and injury (citing *Smith v Hooker Chemicals & Plastics Corp.,* 89 AD2d 361 [4th Dept 1982]). As a matter of law, plaintiff cannot establish the second or third factors.

Plaintiff's counsel makes several invalid assumptions in her opposing brief, which lead to invalid conclusions. Her invalid assumptions include (1) the gutter was malfunctioning; (2) plaintiff's work was ancillary to work previously completed by an outside contractor; (3) all non-routine activities are covered by Labor Law §

240 (1); and (4) plaintiff had a valid reason to believe that his work included patching the hole in the gutter. These invalid assumptions undermine the arguments in the Opposing Brief, as stated in detail below.

Point I

THE GUTTER OPERATED PROPERLY AND DID NOT REQUIRE A REPAIR

A gutter that carries water from a roof is operating properly and does not require a repair. The gutter herein had a hole in the underside of the gutter, but the top side had been lined with a membrane over the hole so that water would not leak out of the gutter through the hole. The gutter was functional. Plaintiff stated at his deposition "the membrane was to make the gutter functional" (R. 126). In spite of her client's testimony to the contrary, counsel for plaintiff claims that the gutter herein was not properly operating and that it had a malfunction. She states "[i]t is clear that the gutter was not operating in the manner for which it was intended, creating unintended consequences and impairing the tenant's use of the subject property." (Opposing Brief page 18).

The purpose of a gutter is to carry water off a roof. It is not the purpose of a gutter to prevent birds' nests. The gutter herein was properly able to carry water away from the roof without leaking. The bird's nest in the underside of the gutter did not interfere with the proper operation of the gutter. The proper understanding

of the purpose of a gutter is demonstrated in the following testimony of plaintiff's supervisor Bruce Marchese:

> Q. If [the nest] was in the gutter and we've already established you don't know where it was, if it was in the gutter and there was a hole in the gutter, would you expect that hole to be repaired?
>
> A. No.
>
> Q. Why not?
>
> A. This was in the bottom of the gutter not where the water flows. (R. 269).

This issue was addressed and resolved by the Second Department in *Azad v 270 5th Realty Corp*., 46 AD3d 728 (2d Dept 2007). In *Azad* the Second Department ruled that patching two six-inch holes in a gutter was not a covered activity under Labor Law § 240. In that case an animal had used a hole in a gutter to enter a building. The Second Department stated "[plaintiff] was not retained to repair the gutter pipe because it was inoperable, but because an animal had used the holes in the pipe, which had developed in the course of normal wear and tear, to enter the building" 46 AD3d at 730. According to the Second Department, the fact that the animal could enter the building did not make the gutter inoperable or cause it to malfunction. The Second Department stated in the above quotation that the gutter was <u>not</u> inoperable. The Second Department properly understood that the purpose of the gutter did not include preventing an animal infestation. Based on the facts in *Azad*, the Second Department could have taken the position that the purpose of a

gutter is to prevent an animal infestation and concluded that a gutter that allows an animal to enter a building is not operating properly. Such an understanding would be consistent with plaintiff's position herein. The Second Department did not accept this unreasonably broad understanding regarding the purpose of a gutter.

Recognizing that the Second Department's ruling in the *Azad* case would require dismissal of plaintiff's Labor Law § 240 claim, plaintiff's counsel argues that *Azad* should be disregarded because it is inconsistent with Fourth Department and Court of Appeals precedent. She states "[t]he plaintiff respectfully submits that the Second Department's [decision in *Azad*] does not accurately state the Court of Appeals and Fourth Department holdings with respect to what work constitutes a 'repair,' as those Courts have expressly held that repair work includes all work that 'involves fixing something that is malfunctioning, inoperable, or operating improperly'" (Opposing Brief page 19). This argument lacks merit because, as stated above, a gutter that carries water off a roof without leaking is not "malfunctioning, inoperable, or operating improperly," and the purpose of a gutter is not to prevent birds from building nests. There are no reported cases from the Fourth Department or from the Court of Appeals, or any other Appellate Division department, which hold or suggest otherwise.

The cases cited by plaintiff's counsel are distinguishable. They do not contradict the holding in *Azad*. In *Bissell v Town of Amherst*, 13 Misc3d 1216A

(Sup. Ct. Erie County 2005), *affd Bissell v Town of Amherst*, 32 AD3d 1287 (4th Dept 2006) the alleged malfunction was a roof that leaked ("[t]he plaintiff was part of the repair crew and was climbing a ladder to the roof to determine the cause of the malfunction of the roof drainage system and the work necessary to repair the roof when he was injured. The evidence showed that [plaintiff and his co-workers] intended to begin the repair work after determining the cause of the leak" (*Id.*]). Nothing in the lower or appellate court decisions in this case supports the position that a non-leaking gutter is inoperable if a bird forms a nest in the underside of the gutter, or otherwise contradicts the Second Department's holding *Azad*.

In *Izrailev v Ficarra Furniture of Long Island, Inc.*, 70 NY2d 813, 815 (1987) plaintiff's decedent was injured while "attempting to repair [an electrical] sign which was operating improperly," 70 NY2d at 815. Plaintiff's decedent was an electrician. According to the Appellate Division decision he was injured after receiving an electrical shock (121 AD2d 685, 686). The actual holding of the court, that the electrical sign at issue was part of the building and therefore plaintiff was working on a building or structure as the statute requires, is irrelevant to the issues herein. That holding does not suggest that a gutter that does not leak is malfunctioning or inoperable, as plaintiff's counsel suggests.

In *Beehner v Eckerd Corp*, 307 AD2d 699, 699 (4th Dept 2003) the Court held that, while the repair of a malfunctioning air conditioning unit was covered by

Labor Law § 240, nevertheless, plaintiff was not performing the repair at the time he was injured. He had already completed the repair. Again this case does not broaden the meaning of the word "repair" as used in the statute ("whenever the language of a statute is clear and unambiguous, we are required under ordinary rules of construction to give effect to its plain meaning," *Capone v Weaver*, 6 NY2d 307, 309, [1959]), nor does it contradict the Second Department's holding in *Azad*.

Plaintiff's counsel cites several cases in support of her argument that plaintiff's work was a repair under § 240 (1). These cases are distinguishable. In *Crossett v Shofell*, 256 AD2d 881 (3d Dept 1998) plaintiff was fixing a silo fill pipe that became plugged. A plugged silo fill pipe is inoperable. The purpose of such a pipe is to allow material to flow through the pipe, and a plug in the pipe would interfere with this function. In the present case the gutter was not plugged or otherwise inoperable. In *Ozimek v Holiday Valley, Inc*., 83 AD3d 1414 (4th Dept 2011) plaintiff was injured while troubleshooting a freezer malfunction. In the present case there was no malfunction. A bird's nest is not a "malfunction." Nothing in *Ozimek* suggests that a bird's nest in the underside of a non-leaking, non-plugged gutter makes the gutter inoperable. Plaintiff herein was not required to troubleshoot anything. He, his supervisor, and the tenant all knew that there was a bird's nest above the tenant's door and plaintiff had been instructed to "get rid of bird's nest" (R. 269, 352).

The same reasoning applies to *Pieri v B&B Welch Associates*, 74 AD3d 1727 (4th Dept 2010) holding that plaintiff was engaged in covered repair work when he was troubleshooting a lift station malfunction. In *Bruce v Fashion Square Assoc*., 8 AD3d 1053 (4th Dept 2004) plaintiff was injured while repairing a malfunctioning HVAC unit. Nothing in this case suggests that the subject gutter was malfunctioning or needed a repair, therefore this case is not relevant to the issue before the Court. Therefore plaintiff's argument that *Azad* is inconsistent with relevant Court of Appeals and Fourth Department precedent is incorrect and not supported by the cases she cited.

Plaintiff's counsel cites several cases in support of her position that plaintiff's work constituted altering a building or structure under § 240 (1). These cases are easily distinguished. Plaintiff herein was not altering a building by removing a nest or even by patching the hole in the gutter, which he claims he intended to do later, in spite of evidence to the contrary. Putting a sheet metal patch over a hole in a gutter with silicone sealant (he did not even intend to secure the patch with screws [R. 136]) is not an alteration to the building, as is demonstrated by the cases cited by plaintiff's counsel. In *Joblon v Solow*, 91 NY2d 457 (1998) the court found that "the work performed by Joblon was a significant physical change to the configuration or composition of the building" (91 NY2d at 465). The court noted that "[b]ringing an electrical power supply capable of supporting the clock to the mail room, which

required both extending the wiring within the utility room and chiseling a hole through a concrete wall so as to reach the mail room is more than a simple, routine activity and is significant enough to fall within the statute" (*Id*.) Plaintiff's work herein did not perform a "significant physical change to the configuration or composition of the building." Plaintiff's work herein, even including his claim that he intended to put a patch over the hole, is not comparable to chiseling a hole through a concrete wall and extending electrical wiring.

In *DiGiulio v Migliore*, 258 AD2d 903 (4th Dept 1999) plaintiff was "tuning a satellite dish receiver and running cable into the building to connect it to the receiver" (*Id*.) That activity is much more substantial than the work of plaintiff herein. In *Santiago v Rusciano & Son, Inc.*, 92 AD3d 585,586 (1st Dept 2012) plaintiff was boarding up windows to make the subject premises uninhabitable and to protect it from vandalism in anticipation of demolition. This work involved making a significant physical change to the configuration of the building, unlike the work of plaintiff herein.

Plaintiff's activity was not "cleaning", under § 240 (1), as plaintiff's counsel argues. Removing debris from a gutter is not a covered activity (*Leathers v Zaepfel Dev. Co.,* 121 AD3d 1500, 1503 [4th Dept 2014] "[i]n our view, plaintiff's actions in this case are far more akin to clearing gutters of debris, an activity that is not protected under Labor Law § 240[1];" *Hull v Fieldpoint Cmty. Ass'n, Inc.,* 110

AD3d 961, 962 [2d Dept 2013] "Labor Law § 240(1) . . . does not apply to work that is incidental to regular maintenance, such as clearing gutters of debris;" *Berardi v Coney Island Ave. Realty, LLC*, 31 AD3d 590, 591 [2d Dept 2006] "[t]he plaintiff allegedly was injured in a fall while cleaning the leaves from the gutters on the roof of a building. . . . [T]he defendant established its entitlement to summary judgment by showing that the activity in which the plaintiff was engaged in at the time of his injury was routine cleaning in a nonconstruction, nonrenovation context, and thus outside the scope of Labor Law § 240(1);" *Beavers v Hanafin*, 88 AD2d 683 [3d Dept 1982]). *Fox v Brozman-Archer Realty Services, Inc*, 266 AD2d 97 (1st Dept 1999), cited by plaintiff's counsel, is distinguishable. The plaintiff therein was using a power washer to clean a Plexiglas canopy. That case does not contradict the cases cited above for the principle that removing debris from a gutter is not a covered activity under § 240 (1).

Plaintiff's counsel argues that plaintiff's activity was "cleaning" under the statute because he was standing on a ladder and therefore working at an elevation. She argues that the elevation makes plaintiff's work "cleaning" under the statute. (Page 23). Gutters tend to be hung at an elevation from the ground to function properly. Therefore the above cases involving removing debris from gutters all involved plaintiffs who worked at an elevation. That fact did not change the result that the plaintiffs' activity in all of these cases was not protected by the statute. The

same is true for the plaintiff in *Vanderwiele v Steiglehner,* 17 AD3d 958 (3d Dept 2005) who was found not to be performing a protected activity when he was applying pesticide to the upper roof of a building (he used "a thirty-two-foot extension ladder to reach the porch roof, and a second twenty-five-foot ladder to reach the dormers and upper roof of the premises," *Vanderwiele v Steiglehner*, 3 Misc. 3d 681, 682). There is no merit to this argument.

Point II

PLAINTIFF'S WORK WAS NOT ANCILLARY TO A PROJECT PREVIOUSLY COMPLETED BY AN OUTSIDE CONTRACTOR

Plaintiff argues that the removal of the bird's nest was ancillary to the previous work of an outside contractor that was hired to line the gutter with a water-tight membrane. Plaintiff testified that sometime before the day of the accident "[t]he entire gutter around the entire building circling this entire building was lined with a membrane" (R. 126), and "[t]he membrane lining of the gutter itself that was done by an outside roofing contractor was what would make the gutter itself watertight" (R. 135). Plaintiff's counsel argues that

> The preexisting gutter system was not operating properly inasmuch as it was leaking. The outside contractor installed roofing membrane in the gutter system, anchored that membrane to the building and installed it around the existing metal gutter structure. That contractor failed to complete the repair inasmuch as they failed to close and cover a six inch hole in the structure of the existing metal gutter." (Opposing Brief page 15).

The outside contractor was hired for a specific job, to line the gutter so that it was water tight. The contractor performed that job to completion. There is no evidence in the record that plaintiff was working in conjunction with the outside contractor on this project. All of the evidence is to the contrary. Plaintiff's work on the day of the accident was triggered by an isolated complaint from a tenant – "Birds keep pooping by [tenant's] door and has become a constant issue" (R. 348) – and plaintiff's work in connection with this complaint was defined by his supervisor in an email that stated "get rid of bird's nest" (R. 269, 352).

Plaintiff's counsel's position is a distortion of the facts. Well before the subject accident the gutter leaked and was therefore inoperable. An outside contractor was hired to repair the leak and to make the gutter operable. The contractor repaired the leak by placing a membrane on the top side of the gutter and making the gutter water tight. The gutter was no longer inoperable, and the work of the contractor was finished. Sometime later a tenant complained about droppings from a bird's nest in front of her door, and plaintiff was instructed to remove the bird's nest in response to this complaint. There was no connection between the work of the contractor and plaintiff's removal of the nest on the day of the accident. His work was not ancillary to this previously completed project.

Point III

NON-ENUMERATED ACTIVITIES ARE NOT COVERED BY LABOR LAW § 240 (1) WHETHER OR NOT THEY ARE ROUTINE

The Court in *Azad v 270 5th Realty Corp*., 46 AD3d 728 (2d Dept 2007) established that patching holes in a gutter where an animal was entering a building is routine maintenance (defendant "established its prima facie entitlement to judgment as a matter of law on this cause of action [violation of Labor Law § 240] by demonstrating that Azad was not engaged in any of the activities protected by Labor Law § 240 (1), but rather, was merely performing 'routine maintenance,' " 46 AD3d at 729 [emphasis added]). Nevertheless plaintiff incorrectly argues that an activity that is non-routine is necessarily covered by Labor Law § 240. There is no basis in authority or logic for this conclusion. The issue in a case alleging liability based on Labor Law § 240 (1) is whether an activity qualifies as one of the specifically enumerated activities in the statute. "The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " (*Nieves v Five Boro Air Conditioning & Refrig. Corp.,* 93 NY2d 914, 915–916 [1999], *quoting Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 501 [1993]; *Aquilino v E.W. Howell Co.,* 7 AD3d 739 740 [2d Dept 2004])

While routine maintenance is not covered by the statute, nevertheless not every non-routine activity will necessarily qualify as one of the enumerated activities. For example, the application of pesticides is not routine but it is not covered by Labor Law § 240 (*Vanderwiele v Steiglehner,* 17 AD3d 958 [3d Dept 2005]). In *Catania v St. Rose of Lima Sch*., 40 Misc 3d 1209(A), 975 NYS2d 708 (Sup. Ct. 2013) the court found that an attempt to remove a squirrel from a ventilation duct was not routine maintenance, but nevertheless was not covered by Labor Law § 240 (1).

> Plaintiff's efforts to remove the squirrel went beyond the scope of his monthly visits, and therefore cannot be viewed as routine maintenance. Nevertheless, plaintiff's work could fall within only the most expansive definition of cleaning, and bears little resemblance to the construction work the hazards of which § 240(1) aims to ameliorate. (*Id*.)

The issue is not decided by whether or not the activity is routine, although that may be a factor considered by the court. According to *Azad*, plaintiff's work herein was routine maintenance. However arguing that it was not routine does not help establish that it was a covered activity.

Point IV

PLAINTIFF WAS NOT ASSIGNED TO PATCH THE HOLE IN THE GUTTER

Plaintiff's counsel states that "on the day of the accident the plaintiff understood that his assignment was to remove a bird's nest from a gutter and to repair a gutter" (Opposing Brief page 29, emphasis added). There was absolutely

no basis for such an understanding of his assignment. The evidence before the Court indicates that plaintiff's assignment originated as a work order from a tenant (R. 348) and was reduced to an email from his supervisor that instructed him to "get rid of bird's nest" (R. 269, 352). Plaintiff's supervisor testified that his maintenance workers have never patched holes in gutters to his knowledge (R. 281) and he does not even stock the sheet metal necessary to patch such a hole (R. 282). His supervisor testified that plaintiff was not supposed to patch the hole in the gutter (R. 269). The property owner, Benjamin Obletz, submitted an affidavit stating that he did not retain or contract with plaintiff or his employer to patch the hole in the gutter (R. 355-57). Plaintiff signed off on the work order, indicating that his work was completed, after the nest was removed, in spite of the fact that the hole was never patched. Also plaintiff failed to state in his hand-written accident report that his job included patching the hole (R. 349-51). The only evidence to the contrary is plaintiff's self-serving deposition testimony. At best this testimony raises a question of fact on the issue of whether plaintiff intended to patch the hole in the gutter after removing the nest. As stated above, even the work of patching the hole would not have been a covered activity.

Plaintiffs counsel argues that plaintiff was not a volunteer. The issue is not whether or not he was a volunteer. The issue is whether his work included patching the hole in the gutter. In this situation a property owner should not be exposed to

absolute liability for work that the property owner did not hire or request. A property owner cannot be expected to provide safety devices for work of which the owner is unaware and which he or she has not requested. No one instructed plaintiff to patch the gutter. He could not have understood that his work included patching the gutter. His work was to "get rid of bird's nest." EST is not liable as a matter of law because plaintiff's work was not a covered activity and also because patching the hole in the gutter is not work requested or contracted for by EST.

Point V

PLAINTIFF'S INJURY WAS NOT CAUSED BY AN ABSENT OR DEFECTIVE SAFETY DEVICE

Plaintiff's counsel argues that the "lower court properly determined that the defendant's failure to properly construct, place and operate a safety device was a cause of the subject incident" (Opposing Brief page 32). This argument is not supported by the evidence. Plaintiff's injury was not caused by an absent or defective safety device. The ladder was not defective and performed as intended (R. 213). The ladder remained in an upright position (R. 149). Plaintiff's deposition testimony established that the ladder did not move until after plaintiff lost his balance when he was startled by the bird. He testified

> Q. What causes you to fall off the ladder?
>
> A. When I began to remove the bird's nest, the bird flew out, my body shifted, the ladder walked from underneath me, and I fell backwards onto the dock. (R. 219).

The sudden appearance of the bird is not an elevation-related hazard requiring a safety device. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no Labor Law § 240 (1) liability exists (*Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999]).

Uncontradicted affirmative evidence establishes that plaintiff's fall was not caused by an absent or defective protective device. It was caused by the sudden appearance of a bird which is a hazard unrelated to the need for the ladder. For this reason plaintiff cannot establish liability under Labor Law § 240 (1) as a matter of law.

Point VI

PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT

Plaintiff is not entitled to judgment as a matter of law as to his Labor Law § 240 (1) claim because plaintiff was not engaged in an activity covered by the statute, and for other reasons discussed above. The holding of the *Azad* case is that patching a hole in an operational gutter is not a covered activity. In the present case, as discussed above, the majority of the credible evidence indicates that plaintiff was removing a nest and had no intention of patching the hole. Nevertheless, whether or not he intended to patch the hole is irrelevant because either way plaintiff was not engaged in a covered activity. If patching the hole were a covered activity, which it

is not as discussed above, then there would be at best a question of fact as to whether or not plaintiff intended to patch the hole and whether or not removal of the nest was ancillary to patching the hole.

Furthermore, assuming for the purpose of argument that patching the hole were a covered activity, plaintiff would not be entitled to summary judgment because his fall was unwitnessed and therefore his credibility would have to be assessed by a jury (*Carlos v Rochester Gen. Hosp*., 163 AD2d 894 [4th Dept 1990]) "Because the manner in which the accident occurred is within the exclusive knowledge of the plaintiff, partial summary judgment [for plaintiff in regard to Labor Law § 240 (1)] is not appropriate. Plaintiff's testimonial version should be subjected to cross-examination and his credibility assessed by the fact-finder after a trial," [citations omitted]).

Plaintiff's counsel argues to the contrary, "[s]ince there is no proof in this Record that even remotely supports an inference that the incident happened in a manner other than the manner in which the plaintiff testified, the fact that the incident was unwitnessed cannot be a basis for denying summary judgment" (Opposing Brief page 37, emphasis added). The evidence is to the contrary. Plaintiff did not have tools with him to patch the hole when he fell (R. 146). Plaintiff's supervisor testified that his maintenance workers have never patched holes in gutters to his knowledge (R. 281) and he does not even stock the sheet metal necessary to patch such a hole

(R. 282). Plaintiff's supervisor sent plaintiff an email defining his assignment as "get rid of bird's nest" with no mention of patching the hole (R. 269, 352). Plaintiff's supervisor testified that plaintiff was not assigned to patch the hole and it would not have been proper for him to patch the hole in the absence of such an assignment (R. 269). Plaintiff signed off on the work order after removing the nest, thereby indicating that his work was finished, even though he never patched the hole (R. 348). Plaintiff's hand-written accident report failed to mention that his job included patching the hole (R. 349-51). To say that there is "no proof in the Record that even remotely supports an inference that the incident happened in a manner other than the manner in which the plaintiff testified" is to ignore all of the above evidence, and to suggest that the Court do the same.

The cases cited by plaintiff's counsel do not require a different result. The relevant holding in *Kirbis v LPCiminelli, Inc.,* 90 AD3d 1581, 1583 (4th Dept 2011) was that "mere speculation that the accident may have occurred in a different manner is not sufficient to raise an issue of fact (90 AD2d at 1582-83, citations, brackets and ellipsis omitted)." In the present case the majority of the evidence indicates that the accident may have occurred in a different manner. In *Ewing v ADF Const. Corp.,* 16 AD3d 1085, 1086 (4th Dept 2005) the Court's holding was that "the fact that the accident was unwitnessed does not provide a basis to defeat plaintiffs' motion where, as here, there are no bona fide issues of fact with respect to how it occurred (16

AD3d at 1086, citations and quotation marks omitted)." In the present case there are bona fide issues of fact, as discussed above. Therefore the lower Court's order must be reversed to the extent that it granted plaintiff summary judgment.

CONCLUSION

EST has established entitlement to summary judgment dismissing plaintiff's Labor Law § 240 cause of action, and plaintiff has failed to raise a question of fact. Plaintiff's work was not a covered activity and plaintiff did not fall as the result of an absent or defective safety device. Accordingly we respectfully request an order reversing the lower court and granting EST's motion and denying plaintiff's motion as stated above and granting such other and further relief as may seem proper.

Dated: Buffalo, New York
March 20, 2020

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