SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS Part 49
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GOLDEN GATE YACHT CLUB,

Plaintiff,

- against -

Index No. 602446/07

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant,

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.
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HERMAN CAHN, J.:

Motion sequence numbers 005 and 006 are consolidated for disposition.

In motion number 005, Société Nautique de Genève (SNG) moves for reargument and renewal of this court's decision, dated November 27, 2007 (Prior Decision), which, in a single decision, consolidated four separate motions (collectively, Prior Motion).

In motion number 006, SNG moves for an order declaring the "Notice of Challenge," dated July 11, 2007, and the "Certificate," annexed thereto, by Plaintiff Golden Gate Yacht Club (GGYC), to be in non-compliance with, and invalid under, the Deed of Gift, dated October 24, 1887 (Deed).

As discussed in the Prior Decision, the America's Cup is a trophy awarded to the winner of a world-renowned yacht race that has been held 32 times since the first America's Cup race held in 1851. The Deed governs how challenges are made for the Cup, who may be a qualified "Challenger of Record," and the manner in which matches for the Cup are to proceed. When the

"Defending Club" and the "Challenger of Record" agree upon the match terms pursuant to a mutual consent process, they issue a Protocol setting forth the terms. SNG, through Team Alinghi, is the current Defending Club and trustee, having won the 31st Cup race on March 2, 2003, and having successfully defended its title in the 32nd Cup race on July 3, 2007. GGYC was the Challenger of Record for the 32nd America's Cup.

On July 3, 2007, SNG accepted a challenge, dated June 29, 2007, from intervenor-defendant Club Náutico Español de Vela (CNEV) for the 33rd America's Cup race, and thereby purported to make CNEV the Challenger of Record. On July 11, 2007, GGYC issued its own Notice of Challenge for the 33rd America's Cup race, contending that it, and not CNEV, was the valid Challenger of Record, in that it, but not CNEV, met the requirements set forth in the Deed.

In commencing this action, GGYC contended that CNEV was not qualified to be designated as the Challenger of Record in the forthcoming America's Cup competition and that, therefore, the court should vacate SNG's acceptance of CNEV's challenge. GGYC sought: (1) a declaration that CNEV's purported challenge and the Protocol issued pursuant thereto are void; (2) a declaration that GGYC's challenge is valid; (3) judgment in favor of GGYC and against SNG (i) enjoining SNG from promulgating rules and regulations pursuant to the Protocol, and (ii) directing SNG to reject CNEV's challenge; and (4) judgment in favor of GGYC, and against SNG, directing SNG to (i) accept GGYC's Notice of Challenge and (ii) to implement the terms of the Deed by participating with GGYC in the establishment of a Protocol through a consensual process and, failing that, to proceed with the match under the rules expressly set forth in the Deed.

Motion 005

In the Prior Decision, this court: (1) determined that the challenge by CNEV was invalid; (2) determined that GGYC is Challenger of Record pursuant to the Deed; and (3) dismissed GGYC's breach of fiduciary duty claim against SNG.

SNG seeks reargument of two aspects of the Prior Decision. First, it contends that, in adjudicating the validity of GGYC's challenge, the court failed to consider, or overlooked, certain inconsistencies or flaws in that challenge. SNG contends that GGYC's motion papers did not raise, or attempt to establish, the validity of GGYC's Notice of Challenge and Certificate. Thus, neither SNG nor CNEV had any reason to address that issue on the Prior Motion. SNG argues further that GGYC's challenge is deficient on its face.

Second, SNG argues that one of the facts upon which the court based its decision to declare CNEV's challenge invalid – that CNEV had yet to hold an annual regatta – is no longer true. CNEV held its first annual regatta on November 24 and 25, 2007, after the parties briefed and argued the Prior Motion, but two days prior to the issuance of the Prior Decision.

The motion is denied. Notwithstanding these assertions, SNG has not demonstrated that the court overlooked any relevant fact, misapprehended the law or otherwise mistakenly arrived at its determination (*Spinale v 10 W. 66th St. Corp.*, 193 AD2d 431 [1st Dept 1993]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]).

As stated above, SNG argues that GGYC's motion papers did not raise or attempt to establish the validity of its own Notice of Challenge and Certificate and, therefore, neither SNG nor CNEV had any reason to address the issue. This assertion is unpersuasive. The verified complaint contains a section entitled "GGYC Issued a Valid Notice of Challenge," in which it set

forth the requirements contained in the Deed for a valid challenge, as well as the assertion that it has complied with those requirements (*see* Compl, ¶¶ 39-41).

As set forth in the Prior Decision, GGYC sought, among other things, judgment in favor of GGYC and against SNG enjoining SNG (i) from accepting GGYC's Notice of Challenge and (ii) to implement the terms of the Deed by participating with GGYC in agreeing on a Protocol and, failing that, to proceed with the match under the rules expressly set forth in the Deed.

In addition, SNG's own papers submitted on the Prior Motion contained a copy of the Notice of Challenge and Certificate (Ross Aff, Exh Q). Moreover, SNG asserted "GGYC also has made clear that, should it prevail in this lawsuit, if SNG does not accept GGYC's demands in negotiations for a protocol, GGYC will race a two-hulled catamaran of the maximum size allowed under the Deed-virtually guaranteed to defeat a single-hulled vessel" (Mot Br at 2). In response, GGYC stated that "SNG erroneously asserts that GGYC sought some individual advantage by designating as its representative vessel, in its notice of challenge, a 'catamaran' (a multihull that under most conditions is substantially faster than a monohull)" (Cross-Mot Br at 22).

Thus, the contention that the court should not have addressed the validity of GGYC's challenge, because it was not at issue, is belied by evidence contained in the record on the Prior Motion. Evidently, SNG decided to focus on asserting an unclean hands defense; the court need not speculate as to why the position it adopts now was not adopted then, and does not suggest that it should have been. In short, the court offers no opinion as to the merits of any of the parties' litigation strategies.

In now arguing for renewal, SNG contends that the court should revisit the Prior Decision

because "one of the facts upon which the Court based its decision to declare CNEV's challenge invalid – that CNEV had yet to hold an annual regatta – is no longer true. CNEV held its first annual regatta on November 24 and November 25, 2007, after the motions for summary judgment were fully briefed and argued before this Court and just two days prior to this Court's Decision" (Mot Br at 3). In essence, SNG seeks reargument of this determination, not renewal, because SNG has not submitted any new or additional facts (*Fontanez v St. Barnabas Hosp.*, 24 AD3d 218 [1st Dept 2005]). That CNEV held its first annual regatta on November 24 and 25, 2007 does not actually constitute new facts because the Prior Decision acknowledged the scheduling of the November 2007 regatta.

That CNEV may have held its first annual regatta two days prior to November 27, 2007, the date of the Prior Decision, is inconsequential. As stated in the Prior Decision:

> Although SNG and CNEV contend that CNEV complies with the annual regatta requirement, they do not contend that CNEV had held an actual regatta at the time of its Notice of Challenge, dated June 29, 2007, or by GGYC's subsequent challenge on July 11, 2007. According to Bonet, CNEV is planning to hold its first annual regatta called the 'Club Náutico Español de Vela Primera Regatta, Trofeo Desafío Españo' on open water off Valencia, Spain in November 2007. . . .
>
> Thus, that CNEV may someday comply with the conditions of the Deed has no bearing on GGYC's valid challenge that it issued after the date of CNEV's invalid challenge, but prior to such time as CNEV may fulfill the conditions of the Deed.

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]).

Motion 006

In this motion, SNG seeks an order declaring GGYC's Notice of Challenge and Certificate to be in non-compliance with, and invalid under, the Deed. SNG argues that the Certificate is invalid because it states that GGYC intends to compete with a "keel yacht," which, arguably, is a mono-hull vessel, yet the dimensions set forth in the Certificate describe a multi-hull vessel. Therefore, SNG contends, the ambiguity renders the Certificate facially defective. In making this argument, SNG essentially restates many of the claims raised in motion number 005 for reargument. To the extent that the motion raises issues that were not specifically raised or addressed in detail, however, the court will consider them. In effect, the result remains the same.

Regarding this issue, the Deed provides:

> The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed races . . . . Accompanying the ten months' notice of challenge *there must be sent the name of the owner and a certificate of the name, rig, and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water, which dimensions shall not be exceeded;* and a custom-house registry of the vessel must also be sent as soon as possible. Centre-board or sliding keel vessels shall always be allowed to compete in any race for the Cup, and no restriction nor limitation whatever shall be placed upon the use of such centre-board or sliding keel, nor shall the centre-board or sliding keel be considered a part of the vessel for any purposes of measurement.

(emphasis added).

Thus, the documentation supporting the challenge must include "the name of the owner and a certificate of the name, rig, and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water, which dimensions shall not be exceeded . . . . " GGYC's Certificate (Meyer Aff, Exh C) is valid in that it contains all of this information and, therefore, complies with the requisites set forth in

the Deed.

Notably, SNG does not argue that the Certificate does not fulfill these requirements set forth in the Deed (Mot Br at 6). Instead, it argues that the use of the word "keel" in the introductory section of the Certificate renders it invalid. The introduction reads:

> I, Commodore Marcus Young, certify the details set out below as to the name, rig and specified dimensions of the keel yacht to represent Golden Gate Yacht Club in a match for the America's Cup to be sailed in accordance with the Notice of Challenge herewith:

SNG argues that, by use of the word "keel" in the Certificate, the Certificate contains "an inherent and irreconcilable internal consistency, rendering its Certificate and accompanying Notice of Challenge deficient and invalid." SNG contends that the vessel specifications of a length of 90 feet and a beam of 90 feet are unusual for a keel yacht, and would be more ordinarily consistent with the dimensions of a multi-hulled vessel (Mot Br at 6-7).

Although SNG now claims that there is ambiguity about the racing vessel set forth in GGYC's Certificate, the record on the Prior Motion contained evidence *submitted by SNG* indicating its belief that there was no ambiguity in GGYC's Certificate. According to the affidavit of Hamish Ross, Esq., General Counsel of Alinghi, SNG's representative racing team, the Certificate could only be for a "multi-hulled vessel - presumably, catamaran" (Ross Aff). Moreover, that the designated racing vessel may be "unusual" hardly justifies characterizing the Certificate as containing an "inherent and irreconcilable internal consistency."

As stated above, in its Memorandum of Law in Support on the Prior Motion, SNG asserted that "GGYC also has made clear that, should it prevail in this lawsuit, if SNG does not accept GGYC's demands in negotiations for a protocol, GGYC will race a two-hulled catamaran

of the maximum size allowed under the Deed - virtually guaranteed to defeat a single-hulled vessel." Hence, SNG has not established that the "keel yacht" cannot describe a multi-hull vessel.

More importantly, even if the description of a "keel yacht" were inconsistent with the dimensions set forth in the Certificate, it is the dimensions that control, not the introduction to that portion of the Certificate. The Certificate "certifies the details set forth below," and it is those "details" that matter, because the Certificate has provided them in accordance with the express requirements of the Deed. That this is so is revealed by the introduction to each "detail" category which corresponds exactly to the relevant Deed provision, quoted above, namely: (1) Name; (2) Owner; (3) Rig; and (4) Dimensions. The Deed, which is a clear and complete document, is to be enforced according to its terms (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 [1990]; *Dafnos v Hayes*, 264 AD2d 305 [1st Dept 1999]). Thus, there is no need for a hearing to determine the effect of the use of the word "keel."

SNG also argues that the Certificate violates the Deed, because the Deed "requires the challenger to provide an accurate certificate describing the Challenging Vessel so that the defender will have adequate opportunity to prepare its defense" (Mot Br at 7). SNG does not provide any reference to the Deed that contains this alleged "requirement." In fact, the Deed "*broadly* defines the vessels eligible to compete in the match" and the "deed permits the competitors to both construct and race the fastest vessels possible so long as they fall within the *broad criteria* of the deed" (*Mercury Bay Boating Club v San Diego Yacht Club* (76 NY2d 256, 266, 269 [1990]) (*Mercury Bay*) [emphasis added]). The "donors, who chose to be specific about other aspects of the match, including the load water-line lengths of the competing vessels, could

have easily included an express requirement that the vessels be evenly matched but did not do so" (*id.* at 269).

Moreover, for the reasons discussed above, I am not persuaded that SNG will be unable to prepare an adequate defense. Furthermore, to the extent that the challenge raises "sporting" issues, the sole province of the court is to resolve the legal issues presented (*Mercury Bay*, 76 NY2d at 266). As stated in the Prior Decision, and equally relevant here, in *Mercury Bay*, the Court of Appeals held that the Deed's unambiguous language, permitting the defender to defend the Cup in "any one yacht or vessel" within the specified range of load water-line length, did not require the defender to race a vessel of the same type or evenly-matched to that of the challenger, and did not preclude the defender's use of a catamaran (*id.* at 269). The Court in *Mercury Bay* expressly declined to consider whether the San Diego club's conduct was "unsportsmanlike" and "unfair," finding that the Deed appropriately left such issues to yachting experts and limited itself to strictly applying the terms of the Deed (*id.* at 271).

SNG next argues that the Notice of Challenge is invalid for the additional reason that it failed to provide 10 months' notice to SNG as required by the Deed. However, the July 11, 2007 Notice of Challenge designated July 4, 2008 as the date of the first race, and July 6, 2008 and July 8, 2008 as the respective dates for the second and third races, if necessary, thereby satisfying the 10-month advance notice requirement. Contrary to SNG's assertion, that the parties wound up entangled in legal proceedings, which "interrupted" the 10-month period, does not invalidate the Notice of Challenge.

As a third ground for the assertion that the Certificate is facially deficient, SNG contends that the proposed race dates violate the Deed, because the Certificate does not designate at least

one "week day" between each race. The absence of a week day separating the first race of July 4, 2008, which is a Friday, and the second proposed race date of July 6, 2008, which is a Sunday, does not invalidate the Certificate. Although the Deed provides that "one week day shall intervene between the conclusion of one race and the starting of the next race," it does not make this a requirement of the validity of Notice of Challenge. Further, dictionaries published contemporaneously with the Deed, define "weekday" or "week day" as any day except Sunday (*see* Petrocelli Aff, Exhs B, C at 275, 631). If the parties wish to have a "business" day separate each race, they could simply adjust of the race dates to, by way of example, July 3, 2008 (Thursday), July 6, 2008 (Sunday), and July 8, 2008 (Tuesday), which would amount to an adjustment of one day.

Apparently SNG has waived this requirement, because it contends that CNEV's challenge is valid, even though CNEV's own certificate designated race dates of July 1, July 3, and July 5, 2009. July 3, 2009 is a Friday and July 5, 2009 is a Sunday. Hence, the record indicates that a "week day" separates each race.

Finally, at oral argument, SNG urged the court to either conduct an evidentiary hearing or refer the issue of the type of yacht that GGYC intends to challenge to the "International Sailing Federation." For the reasons stated above, such hearing or referral is unnecessary to resolve the legal issues presented – the Certificate's description of the racing vessel complies with the Deed requirements. If, however, the parties cannot resolve issues pertaining to the 10-month notice period, in view of any delayed entailed by this litigation or otherwise, and any lingering dispute as to the "week day" issue, the parties may raise the issue with the court at a further hearing, or mutually agree to refer those disputes to a neutral associated with the yachting community (*see*

Mercury Bay, 76 NY2d at 265-66).

Accordingly, it is

ORDERED that the motion (005) by Société Nautique de Genève for reargument and renewal of this court's decision, dated November 27, 2007, is denied; and it is further

ORDERED that the motion (006) by Société Nautique de Genève for an order declaring the Notice of Challenge and Certificate by Golden Gate Yacht Club to be in non-compliance with and invalid under the Deed of Gift, dated October 24, 1887, is denied.

Dated: March 17, 2008

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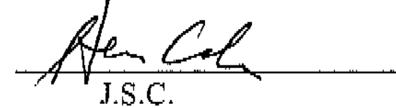

J.S.C.