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publication in the New York Reports.

No. 25

Golden Gate Yacht Club,
Appellant,

v.

Societe Nautique De Geneve,
Respondent,
Club Nautico Espanol De Vela,
Intervenor-Respondent.

Maureen E. Mahoney, for appellant.
Barry R. Ostrager, for respondent.
David W. Rivkin, for intervenor-respondent.
New York Yacht Club; The San Diego Yacht Club Sailing
Foundation et al.; William I. Koch; Team French Spirit et al.;
Deutscher Challenger Yacht Club et al.; Reale Yacht Club
Canottieri; Savoia et al.; City of Valencia, Spain, amici curiae.

CIPARICK, J.:

This appeal involves the preeminent international sailing regatta and match race, the America's Cup. We had occasion once before to examine the charitable trust that governs the competition. In Mercury Bay Boating Club v San Diego Yacht Club (76 NY2d 256 [1990]), we strictly construed the provisions

of the trust instrument, the Deed of Gift, to allow multihulled vessels to compete in the America's Cup race. Today, we are called upon to reexamine the Deed of Gift to determine the eligibility criteria for a Challenger of Record -- specifically whether the phrase "having for its annual regatta" requires a yacht club to hold an annual regatta on the sea prior to issuing its challenge (Deed of Gift, October 24, 1887, ¶ 4). We conclude that it does.

The story of the America's Cup begins on August 22, 1851, after the schooner yacht, *America*, entered a race against British sailing vessels around the Isle of Wight, winning a large silver cup. In honor of the winning boat, the trophy was christened the "America's Cup," which became the corpus of a charitable trust created under the laws of New York and donated pursuant to a Deed of Gift to the New York Yacht Club in 1857. The Deed of Gift establishes the rules governing the America's Cup and provides that the holder of the Cup becomes its sole trustee and is succeeded only by a successful challenger in a race at sea. The original Deed of Gift required only that the challenger be an "organized" yacht club.

During the first 30 years after its inception, problems arose with the administration of the competition. As a result, the America's Cup was twice returned to George L. Schuyler, the sole-surviving donor, after two disappointing America's Cup races were sailed by Canadian Great Lake yacht clubs under the command

of Captain Alexander Cuthbert. Neither of the challenging vessels could withstand the rigors of open sea competition. The *Countess of Dufferin*, the first challenging vessel, was described as having "fresh water written all over her. . . [h]er hull lacked finish, being as rough as a nutmeg grater. . . and had little of the shipshape appearance expected of a cup challenger."¹ The *Atalanta*, the second challenging vessel, was also denounced by critics as being "a new yacht, hastily built, totally untried, and miserably equipped. . ."² To deal with this "unseaworthiness" issue, Schuyler amended the Deed of Gift with the intent of precluding Great Lakes yacht clubs from competing and reconveyed the America's Cup to the New York Yacht Club to hold in trust. In addition to requiring that a challenger be an "organized" yacht club, the amended Deed of Gift, dated October 24, 1887, added new eligibility requirements that a challenger must meet, including that it be "incorporated, patented or licensed by the Legislature, admiralty or other executive department, having for its annual regatta an ocean water course. . ." (Deed of Gift, October 24, 1887, ¶ 4). The Deed further provides that the Cup "shall be preserved as a perpetual Challenge Cup for friendly competition between foreign

¹ Winfield M. Thompson and Thomas W. Lawson, *The Lawson History of the America's Cup: Record of Fifty Years*, at 78 [Ashford Press Publishing, Southampton 1986] (internal quotations omitted).

² Id. at 88.

countries."³

The Cup has been defended 32 times and it is the events that occurred after the conclusion of the 32nd America's Cup held on July 3, 2007, in Valencia, Spain, which give rise to this appeal. Soci t  Nautique de Gen ve (SNG),⁴ won the Cup on March 2, 2003, in the 31st America's Cup match and successfully defended its right to continue as trustee of the America's Cup in the July 3, 2007 race. Club N utico Espa ol de Vela (CNEV),⁵ on that very same day, submitted a Notice of Challenge to SNG for the 33rd America's Cup, which was accepted.

The Deed of Gift provides that once a Defender accepts a challenge, the two yacht clubs may negotiate and set the conditions of the next America's Cup competition through their mutual consent. Although not named as such by the Deed of Gift, the sailing community refers to the resulting agreement as the "protocol" and the challenging yacht club with the right to negotiate the protocol is called the Challenger of Record. Since 1970, other yacht clubs that wish to compete in the America's Cup have been allowed to participate in the race when the Defender

³ The Deed has been amended twice by orders of the Supreme Court, New York County, dated December 17, 1956 and April 5, 1985.

⁴ SNG is a yacht club organized under the laws of Switzerland.

⁵ CNEV is a Spanish yacht club formed by the members of the Real Federaci n Espa ola de Vela (RFEV), a Spanish sailing federation in June, 2007.

and the Challenger of Record agree to such an arrangement and provide in their protocol for such participation. Traditionally, challengers that are allowed to participate based upon the mutual agreement of the Defender and the Challenger of Record pursuant to their resulting protocol, are known as Mutual Consent Challengers. However, should the Defender and the Challenger of Record fail to reach an agreement as to the terms under which they will race, the Deed of Gift contains a default match provision for a one-on-one race between the Defender and the Challenger of Record.

On July 5, 2007, SNG as the Defender and CNEV as Challenger of Record, published a protocol for the 33rd America's Cup setting forth the conditions of the competition that includes an arbitration provision to resolve disputes. On July 11, 2007, plaintiff Golden Gate Yacht Club (GGYC),⁶ disputing the validity of CNEV's challenge, primarily on the basis that CNEV was not a bona fide yacht club -- formed only a few days before submitting its challenge -- and had never held an annual regatta, presented its own Notice of Challenge. SNG rejected GGYC's challenge on the basis that CNEV's challenge was first in time and since CNEV's challenge had already been accepted, no other challenge could be considered until after CNEV's challenge had been decided.

⁶ GGYC is a yacht club incorporated in the State of California.

On July 20, 2007, SNG, seeking to resolve the validity of CNEV's challenge, initiated an arbitration proceeding pursuant to the dispute resolution mechanism provided for in the 33rd protocol. The 33rd America's Cup Arbitration Panel invited GGYC to participate in the arbitration. GGYC rejected the invitation and commenced this present litigation because it could participate in the arbitration, only by agreeing to the protocol, thereby exposing itself to possible disqualification at SNG's sole discretion. The Arbitration Panel ultimately found that the Deed of Gift does not require a challenging club to have held an annual regatta prior to issuing its Notice of Challenge and therefore CNEV's Notice of Challenge was valid. All parties concede that the arbitration decision is not binding upon us.

In the present action, GGYC alleges that SNG breached the Deed of Gift and its fiduciary duty as trustee by accepting CNEV's challenge because CNEV failed to comply with the challenger eligibility criteria set forth in the Deed of Gift since CNEV was not an organized yacht club and had never conducted an annual regatta.⁷ Both sides moved for summary judgment. Although Supreme Court dismissed GGYC's breach of fiduciary duty claim, it declared that the Notice of Challenge issued by CNEV was indeed invalid because CNEV failed to meet the Deed of Gift's eligibility requirements as it had not held an annual regatta on an ocean water course prior to submitting its

⁷ CNEV was allowed to intervene in this action.

Notice of Challenge to SNG. Supreme Court, strictly interpreting the Deed of Gift, declared GGYC to be the Challenger of Record. A divided Appellate Division reversed, holding the language of the Deed to be ambiguous and declaring the Notice of Challenge issued by CNEV valid, and CNEV the rightful Challenger of Record. GGYC appealed pursuant to CPLR 5601(a) dissent grounds and we now reverse.

In Mercury Bay, where we resolved a dispute regarding a type of vessel that arose relating to the 27th America's Cup match, we stated that the

"[l]ong-settled rules of construction preclude an attempt to divine a settlor's intention by looking first to extrinsic evidence. Rather, the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself. It is only where the court determines the words of the trust instrument to be ambiguous that it may properly resort to extrinsic evidence" (id. 76 NY2d at 267).

The relevant provisions of the Deed of Gift, to be construed here at paragraph 4 provide that:

"[a]ny organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match for this Cup."

The Deed, in paragraph 10, further provides that:

"when a challenge from a Club fulfilling

all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided."

Finally, paragraph 11 of the Deed states that the trustee:

"hereby covenants and agrees . . . that it will faithfully and will fully see that the foregoing conditions are fully observed and complied with by any contestant. . ."

Thus, to comply with the eligibility requirements as outlined by the Deed, a challenger must be (1) an organized yacht club, (2) foreign, in that it is not of the same country as the trustee yacht club, (3) incorporated in its local jurisdiction or officially recognized either through a license or patent from its government, (4) and "having for its annual regatta an ocean water course on the sea or an arm of the sea or one which combines both." It is the last requirement that divided the court below⁸ in light of the fact that CNEV had not held an annual regatta on the sea prior to submitting its Notice of Challenge. It is undisputed that the defender has the obligation to address a challenge only when the challenger is a "club fulfilling all the conditions required" (Deed of Gift, October 24, 1887, ¶ 10). When such a challenge occurs, all other challenges are foreclosed.

As we stated in W.W.W. Assoc. v Giancontieri (77 NY2d

⁸ Supreme Court did not decide the question of whether CNEV was "organized" under the Deed and it is not necessary for us to reach this issue to resolve this appeal.

157, 162 [1990]), "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." The Appellate Division majority deemed the phrase, "having for its annual regatta," ambiguous and therefore found it appropriate to glean the settlor's intention as to the meaning and purpose of this phrase by looking to extrinsic evidence. We disagree and find the phrase to be unambiguous. As we did in Mercury Bay, we must first examine the plain language of the Deed of Gift and determine, as a matter of law, whether the language can be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself.

In looking at the plain language of the Deed of Gift itself, as we must, we first note that the annual regatta requirement is only one of a list of eligibility requirements set forth in the Deed of Gift. The settlor clearly placed the requirements of "organized" and "incorporated, patented, or licensed" in the past and intended that a challenger would continue to meet these eligibility requirements in the present and future. For example, the term "incorporated" refers both to a past event of incorporation and to a continuing status. We believe that the settlor intended the same to be true for the "annual" regatta requirement. By using the word "annual," the settlor suggested an event that has already occurred at least once and will occur regularly in the future. Taken as a whole,

we conclude that the settlor intended to link the annual regatta requirement to the other eligibility requirements in that the challenging yacht club has in the past and will continue in the future "having" an annual regatta on the sea. Any other interpretation would render the annual regatta requirement a nullity.⁹

The settlor clearly intended that for a challenging yacht club to be within the eligibility requirements, it must have held at least one qualifying annual regatta before it submits its Notice of Challenge to a Defender and demonstrate that it will continue to have qualifying annual regattas on an ongoing basis. Thus, SNG is wrong in its claim that the regatta requirement can be satisfied by race time rather than at the time of challenge. We conclude there is no ambiguity as to the annual regatta clause at issue. When read in the context of the entire Deed of Gift, the challenger must demonstrate that its Notice of Challenge "fulfill[s] all the conditions required" (Deed of Gift, October 24, 1887, ¶ 10) at the time it submits its challenge.

SNG and CNEV assert that the existing practice among Defenders and Challengers of Record to allow Mutual Consent Challengers to participate in the America's Cup, even without having held an open sea course regatta is evidence that the

⁹ The fact that CNEV has since held two ocean course regattas, one in November, 2007 and a second in November, 2008 is of no moment since none had been held in July, 2007 prior to CNEV submitting its Notice of Challenge to SNG.

settlor intended that a challenging yacht club is not required to have held a regatta on the open sea prior to issuing its Notice of Challenge. This assertion has no merit because the plain language of the Deed of Gift itself forecloses such an illogical conclusion. Even if the language of the Deed of Gift were ambiguous, evidence of these practices would not qualify as extrinsic evidence of the settlor's intent in 1887 as these practices emerged much later. Thus, the decision of the Defender and the Challenger of Record to waive the eligibility requirements for yacht clubs seeking to participate as Mutual Consent Challengers has no bearing on whether a yacht club seeking to establish itself as the Challenger of Record must meet the requirements imposed by the Deed of Gift itself.

Since CNEV has failed to show that at the time it submitted its Notice of Challenge it was a "[c]lub fulfilling all the conditions required by" the Deed of Gift, it does not qualify as the Challenger of Record for the 33rd America's Cup competition and Supreme Court was correct in declaring GGYC to be the valid Challenger of Record.

It has been posited that the right to act as trustee of the America's Cup should be decided on the water and not in a courtroom. We wholeheartedly agree. It falls now to SNG and GGYC to work together to maintain this noble sailing tradition as "a perpetual Challenge Cup for friendly competition between foreign countries" (Deed of Gift, October 24, 1887, ¶ 3).

Accordingly, the order of the Appellate Division should be reversed, with costs, and the orders of Supreme Court reinstated.

* * * * *

Order reversed, with costs, and orders of Supreme Court, New York County, reinstated. Opinion by Judge Ciparick. Judges Graffeo, Read, Smith, Pigott and Jones concur. Chief Judge Lippman took no part.

Decided April 2, 2009