

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kennedy Justice

PART 54

Golden Gate Yacht Club

INDEX NO.

60214/67

- v -

Societe Maritime de Geneve

MOTION CAL. NO.

MOTION SEQ. NO.

7/21/09
009

The following papers, numbered 1 to 050 were read on this motion ^{for} for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

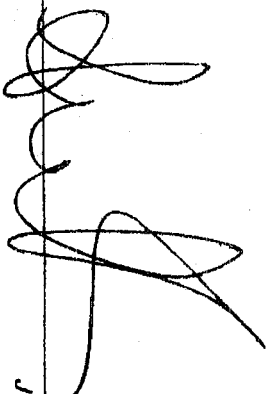
Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

ACTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 7/29/09


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Shirley Werner Kornreich
Justice

PART 54

Golden State Yacht Club
plaintiff

INDEX NO. 602446/07

MOTION DATE 7/21/09

Société Nautique de Genève
defendant
Club Náutico Español de Vela
INTERVENOR - DEFENDANT

MOTION SEQ. NO. 010

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ^{OSC} to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

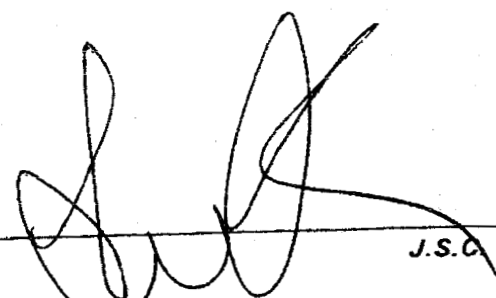
PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 7/29/09


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
GOLDEN GATE YACHT CLUB

Plaintiff,

-against-

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant,

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor/Defendant
-----X

Index No.:602446/2007

**DECISION and
ORDER**

KORNREICH, SHIRLEY WERNER, J.:

In this next permutation of an already lengthy litigation involving The America's Cup race, plaintiff Golden Gate Yacht Club (Golden Gate) seeks, by Order to Show Cause, to hold defendant Société Nautique de Genève (SNG) in contempt, among other relief SNG, also by Order to Show Cause, seeks to compel Golden Gate to provide SNG with a Custom House Registry (CHR) within fourteen days, or face disqualification from the race. Neither party sought interim relief. The court addresses both applications in this single decision.

Background

The America's Cup is a trophy awarded to the winner of a world-renowned yacht race that has been held 32 times since 1851, the first America's Cup race. Initially, Golden Gate commenced an action contending that another challenger, intervenor/defendant Club Náutico Español De Vela (CNEV), was not qualified to challenge SNG, the winner of the 32nd race, to compete in the 33rd. The Supreme Court (Cahn, J., retired) heard and considered the matter, then

agreed with Golden Gate and vacated CNEV's challenge. The decision adjudged that Golden Gate's challenge was valid and that Golden Gate was the Challenger of Record. The Appellate Division reversed that ruling in a decision reported at 55 AD3d 26 (1st Dept 2008). The Court of Appeals reinstated the Supreme Court's decision in an opinion decided April 2, 2009, reported at 12 NY3d 248 (2009), and remitted the case back to the Supreme Court.

SNG, thereafter, submitted an Order to Show Cause seeking to disqualify Golden Gate as the Challenger of Record for failure to provide a Custom House Registry (CHIR) of its challenge vessel, or alternatively compelling Golden Gate to provide SNG with a CHR. Golden Gate also moved to hold SNG in contempt regarding the date of the race. This court heard argument at a hearing on May 14, 2009 and issued an oral ruling on the record:

[I]n regard to Golden Gate Yacht's application for contempt, I'm directing SNG to hold the race as per the order of the Court of Appeals and Justice Cahn in February as the order required. Should SNG not do so, I am then going to give the other party, Golden Gate, the opportunity to move for contempt. ... In regard to SNG's application, I am stating right now that, although the deed does not require a certain date, the deed does require that the vessel conform to the challenge dimensions. If the CHR does not conform to the challenge dimensions, it is this Court's belief, and my direction, that Golden Gate will be disqualified, and I am directing Golden Gate, in good faith, to abide by the deed, to make application for the CHR as soon as possible and provide it as soon as possible.

Exh. Q, Ostrager Affirmation.

Golden Gate now seeks to hold SNG in contempt "for its failure to provide [Golden Gate] its rights as the next America's Cup challenger of record" and asks for the following additional relief: (i) "directing that SNG cannot change any of the rules and sailing regulations for the next America's Cup match without ...[Golden Gate's] mutual consent, (ii) directing SNG to provide Golden Gate ... a copy of the agreements between ISAF, or any of its affiliates, and SNG, or any

of its affiliates and/or its racing team..., (iii) directing SNG to cease and desist from efforts to prevent formation of an ISAF jury or otherwise thwart ISAF's implementation of the rules applicable to the next America's Cup event, [and] (iv) awarding ... [Golden Gate] its attorney's fees."

SNG seeks to compel Golden Gate to provide SNG "with a Custom House registry of its challenge vessel described in its Notice of Challenge (and launched on August 25, 2008, and relaunched on July 6, 2009) within 14 days, or face disqualification." The court heard argument on both motions on July 21, 2009.

The relevant facts, as evidenced by the parties' submissions, are as follows: Golden Gate provided its Notice of Challenge to SNG on July 11, 2007. Pursuant to the Deed, the Notice of Challenge included a certificate as to the name, rig and dimensions of the challenging vessel and stated, "[t]he "Custom House" registry of the challenging vessel will be sent as soon as possible." Exh. B, Ostrager Affirmation. Litigation regarding the competing challenge by CNEV ensued.

SNG has made numerous demands for Golden Gate's CHR, which under the Deed must be provided "as soon as possible" after the Notice of Challenge. Two years after the challenge, Golden Gate has yet to provide the CHR. Golden Gate, however, has completed an approximately 90 foot trimaran (three hulled craft) without movable ballast and power winches used for trimming the sails, which reportedly has already undergone three sessions of sea trials. Golden Gate now represents that it intends to dismantle the boat it has built, that it is building another boat, and that it is not required to provide the CHR until after the Notice of Race (NOR) is issued. The NOR is issued by the defending organization pursuant to the ISAF rules. In

response to Golden Gate's challenge, SNG reportedly has built an approximately 90 foot catamaran (two hulled craft) with movable ballast and power winches for trimming the sails.

According to Golden Gate, unbeknownst to it, there was a change made to the ISAF rules eradicating the rules prohibiting movable ballast and requiring that only manpower be used to trim the sails. Golden Gate asserts that if it had known about the rule change, it would have built a different, more competitive craft. SNG's position is that the rules can be changed up until the time of the race and that the final pronouncement on the applicable rules is made in the NOR, which also states the venue for the race and other specifics. In any event, the rules in question, specifically ISAF 49-54 (including the movable ballast and manpower rules), are explicitly waivable under the rules of the Association des Clubs de Voile de la Région Lémanique (ACVL), a regional association of which SNG is a member. SNG also claims that "it is now standard in the racing of large yachts to allow powered winches for trimming sails and the use of power for movable ballasts." Ostrager Affirmation.

Golden Gate's position is that it is unfair to allow the defender to change the rules up to the last minute, that the phrase "mutual consent" included in the Deed also applies to the separate clause defining the default race requirements, and that it cannot possibly provide a CHR (thereby setting its choice of boat in stone) until it knows the rules of the race. SNG argues that there has been no surprise, but regardless, the Deed gives the defender the advantage in this regard.

By letter dated July 22, 2009, SNG provided the court with its confidential agreement with the ISAF for in *in camera* inspection. Key to this proceeding are the following statements made by SNG's counsel in that letter:

SNG would like to confirm, consistent with our representation made to the Court at the hearing, that the 33rd America's Cup will not impose any restrictions on competitors' boats other than the dimensions and requirements contained in the Deed of Gift and the Certificate of Vessel submitted with GGYC's (Golden Gate's) Notice of Challenge. SNG will not impose, either in its Notice of Race, or in any other applicable document to be issued by SNG, any further restrictions on the design and equipment of the competing vessels. In particular, rules 49 through 54 of the ISAF Racing Rules of Sailing ("RRS") will not apply to the 33rd America's Cup.

Second, although we do not believe there is any dispute regarding measurement, SNG will issue precise measurement procedures for the 33rd America's Cup, on or before August 6, 2009, and before the issuance of the Notice of Race for the next Match.

As stated at the hearing, SNG does not have and has never had any intention of using the measurement procedures to disqualify GGYC's Challenging Vessel by applying unfair or deceptive measurement procedures. SNG's sole purpose is to make sure that it will be racing against the vessel described in GGYC's Certificate of Vessel.

Counsel also expressed his client's willingness to continue with the mediation process and stated that SNG would announce the Northern Hemisphere location for the February 2010 America's Cup on August 6.

Discussion

Analysis of the rights and responsibilities of the parties here begins with the primary operative document, the Deed of Gift (Deed), which sets the framework and defines the rights of America's Cup participants. The Deed's origin and content were discussed at length in the leading New York decision involving the America's Cup, *Mercury Bay Boating Club, Inc. v San Diego Yacht Club*, 76 NY2d 256 (1990), as well as in the Court of Appeals' decision reinstating the decision of Justice Cahn in this case:

The America's Cup, a silver cup trophy, is the corpus of a charitable trust created in the 19th century under the laws of New York. So called because it was won by

the yacht *America* in a race around the Isle of Wight in 1851, the America's Cup was donated by its six owners to the New York Yacht Club in 1857. The Cup was twice returned to George Schuyler, the sole surviving donor, when questions arose as to the terms of the trust in which the Cup was to be held. Schuyler executed the present Deed of Gift in 1887, donating the Cup to the New York Yacht Club, to be held in trust "upon the condition that it shall be preserved as a perpetual Challenge Cup for the friendly competition between foreign countries.

Pursuant to the Deed of Gift, the holder of the Cup is its sole trustee and is to be succeeded by a competitor who successfully challenges the trustee in a race for the Cup. Unless otherwise agreed by the parties, the terms of the challenge are specified in the deed. The relevant provisions of the deed provide:

"This Cup is donated upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries.

"Any organized Yacht Club of a foreign country * * * shall always be entitled to the right of sailing a match for this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

"The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line.

"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.

"The Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case the ten months' notice may be waived.

"In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup. All such races shall be on ocean courses * * * [These ocean courses] shall be selected by the Club holding the Cup; and these races shall be sailed subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of Gate, but without any time allowances whatever. The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours."

Mercury Bay, 76 NY2d at 260-262; see *Golden Gate Yacht Club v Societe Nautique De Geneve*, *supra*, 12 NY3d at 252-256.

After futile attempts at mediation, the parties cannot "mutually agree upon the terms of the match," so under the Deed, they will race by default according to the rules and regulations of "the Club holding the Cup," in this case SNG. Golden Gate insists that SNG has not afforded Golden Gate its "rights" as a challenger, that SNG may not change any of its Club's existing rules without Golden Gate's consent, that SNG must follow the ISAF rules without variance, and that the "jury" for the race is to be chosen by the ISAF. SNG argues that Golden Gate should be disqualified because it has failed to provide a CHR of its challenge vessel or it should be ordered to provide one immediately.

Golden Gate's Order to Show Cause Re: Contempt

At the outset, the legal issue the court must determine is whether the donors of the America's Cup, as the settlors of the trust in which it is held, intended to permit the defender to change the applicable rules after the Notice of Challenge has been issued and up to the time the defender issues the Notice of Race. It appears that the challenger's main concern is that it built a boat premised on rules it believed were controlling, but a change in the rules has enabled the defender to build a different and faster boat. Stated simply, Golden Gate, the challenger,

complains that SNG, the defender, would have the benefit of knowing the design of Golden Gate's boat prior to designing its own craft. Unfortunately for Golden Gate, there is nothing in the Deed that would disallow either the rules change or the boat design apparently being used by SNG. To the contrary, the Deed gives the defender this very advantage.

As the Court explained in its decision reinstating Justice Cahn's disqualification of CNEV as a challenger, "[a]s 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." *Golden Gate, supra*, 12 NY3d at 256. The Court in *Mercury Bay*, which also involved a design issue, focused on the provisions in the Deed concerning design of the race crafts. Specifically, the *Mercury Bay* Court was asked to decide whether the Deed's language prohibited catamarans. The Court's response was that the Deed's language is clear and unambiguous and encompasses anything the defender or challenger chooses to create *as long as it does not violate the Deed's provisions*. Specifically, the Court stated,

Accordingly, we conclude that the unambiguous language of the Deed of Gift, permitting the defending club to defend the Cup in "any one yacht or vessel" within the specified range of load water-line length, does not require the defender to race a vessel of the same type or "evenly matched" to that of the challenger and does not preclude the defender's use of a catamaran. Because the deed provisions on these issues are unambiguous, we may not look beyond the four corners of the deed in ascertaining the donors' intent and therefore may not consider any extrinsic evidence on the meaning of these provisions.

Mercury Bay, supra, 76 NY2d at 269-270.

A blatant example of a design feature that would violate the Deed is an engine used to propel the boat; the Deed permits only vessels "propelled by sails." The Deed does not, however,

contain any restrictions on ballast or design features regarding trimming the sails. These features are therefore permitted because they are not prohibited by the language of the Deed.

Golden Gate also attempts to circumvent the lack of restriction in the Deed by claiming that SNG may not change the rules of the race after the Notice of Challenge has been issued.

Golden Gate asserts that allowing rules changes would result in unfair prejudice to the challenger and that it could result in the defender's engineering a disqualification of the challenger. Again, the court must begin with the language of the Deed. The key provision states,

In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup. All such races shall be on ocean courses * * * [These ocean courses] shall be selected by the Club holding the Cup; and these races shall be sailed subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any time allowances whatever. The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours.

Exh. A. The provision is not ambiguous in the least and it applies to this case because the parties have not been able to mutually agree on the terms of the match, instead resorting to litigation.

Nothing in the provision prohibits the defending organization from changing its rules, right up to the start of the race, so long as they do not conflict with the Deed.

The court will not read this provision to require that the defending organization is precluded from changing its rules after the Notice of Challenge has been issued. There is no such limiting language in the Deed. To the contrary, the Deed contemplates that the parties will negotiate after the Notice of Challenge is provided, for the purpose of mutual agreement as to the race and rules. Any rules freeze, as advocated by Golden Gate, would be inconsistent with the

flexibility the parties would need to negotiate toward a mutually consensual agreement. It is only after the parties have failed to agree that the Deed defaults to the defender's rules.¹

Nor does the court find that the change in the rules to permit movable ballast and power winches to trim sails in any way violates the controlling rules. The court refers the parties to the Affidavit of Fred Meyer, the Vice-Commodore of SNG, which sets forth the controlling rules and regulations. Golden Gate has not submitted any evidence directly disputing the rules descriptions and interpretation provided by Mr. Meyer. In short, SNG recognizes that the ISAF Racing Rules of Sailing (RRS) control. Under those rules, specifically RRS 86.1(b), the defending organization may modify the rules, regulations and other specifics of the race through the issuance of the Notice of Race. Under the rules of the ACVL, the regional association of which SNG is a member, RRS rules 49-54 (including the movable ballast and manpower rules) are waived as to multi-hull classes of boats like the boat SNG will sail.

Golden Gate's arguments based on sportsmanship and fairness are equally unavailing, as well as ironic in light of both parties' displayed lack of adherence to the Deed's condition that the America's Cup race be a "perpetual Challenge Cup for *friendly* competition" [emphasis added]. As the Court in *Mercury Bay* found,

The question of whether particular conduct is "sporting" or "fair" in the context of a particular sporting event, however, is wholly distinct from the question of whether it is legal. Questions of sportsmanship and fairness with respect to sporting contests depend largely upon the rules of the particular sport and the

¹Golden Gate argued at the hearing on July 21st that the mutual consent language should also be read to control the clause requiring that the default races be sailed subject to the defender's rules. The court finds that the clauses are separate and that a consent requirement would be entirely inconsistent with the default provision's intent to create a situation where the race can still be held regardless that the parties have failed to agree.

expertise of those knowledgeable in that sport; they are not questions suitable for judicial resolution.

Id. at 265. As noted above, the applicable rules permit rules changes by the defending organization and do not prohibit the design specifications that SNG has chosen. The court's inquiry must necessarily end there.

As for the appointment of a jury, the court finds that the method for appointing a jury contained in the confidential agreement between ISAF and SNG is not inconsistent with anything in the Deed or the applicable rules. There is also nothing untoward about the agreement itself. SNG has provided evidence that such agreements are "common practice," which Golden Gate has not disputed with contrary evidence. The court will, however, direct SNG to provide Golden Gate with a copy of the agreement pursuant to a standard confidentiality agreement that the parties can access from the court's website.

SNG's Order to Show Cause

SNG argues that Golden Gate should be disqualified because it has failed to provide a CHR of its challenge vessel, or it should be ordered to provide one immediately. In its last order, the court directed Golden Gate to provide SNG with a CHR "as soon as possible" in accordance with the Deed's requirements. The court now clarifies its ruling.

Examining the plain language of the Deed, the court finds that the phrase "as soon as possible" is not ambiguous. It means as soon as is practicable or reasonable after the notice of challenge is provided. *See Merriam-Webster's Collegiate Dictionary* (10th ed 2002) (defining "as soon as possible" as "after the time that" and defining "possible" as "practicable"); *Travelers Prop. Cas. Corp. v Fusilli*, 266 AD2d 48, 50 (1st Dept 1999) (construing "as soon as possible" in

policy's notice provision as requiring notice with reasonable promptness). The court finds further that a hearing is necessary to determine exactly what would be practicable or reasonable dependent on the facts and circumstances of this case, a determination that concerns primarily the mechanics of obtaining what the court understands to be a perfunctory document. It will be Golden Gate's burden at the hearing to show when it would be practicable for it to provide a CHR because: (1) it is the challenger's obligation to obtain the document in the first instance; and (2) the Deed establishes a distinct advantage to the defender as the latter does not have to disclose the specifics of its craft until the time of the start, whereas the challenger must reveal the specifics of its craft in the Notice of Challenge at least ten months in advance. Accordingly, it is

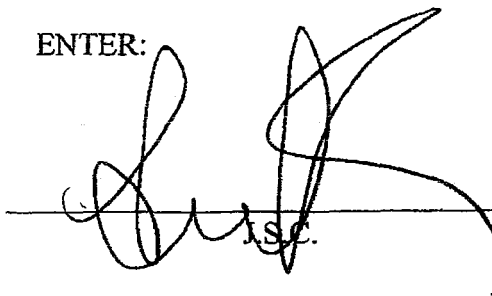
ORDERED that Golden Gate's Order to Show Cause is denied; and it is further

ORDERED that SNG's Order to Show Cause is referred for an evidentiary hearing to be held on Monday, August 10, 2009, at 10:00 a.m. in Part 54 of the Supreme Court, 60 Centre Street, Room 418, New York, New York. Each party will have six hours, inclusive of argument and cross-examination, in which to present evidence regarding the phrase "as soon as possible" as used in the Deed of Gift as applied to the circumstances of this case; and it is further

ORDERED that defendant SNG shall provide Golden Gate with a copy of its agreement with ISAF on condition that Golden Gate sign a standard confidentiality agreement, as described in the practices of this court set forth on the Supreme Court website.

Date: July 29, 2009
New York, N. Y.

ENTER:



J.S.C.